
Co-Chairs

Jodi H. Linker
Federal Public Defender
Northern District of California

Patricia L. Richman
Assistant Federal Public Defender
District of Maryland

February 18, 2025

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 1178, RIN 1120-AB78, “Inmate Financial Responsibility Program: Procedures”

On behalf of the Federal Public and Community Defenders, we submit this comment on the Bureau of Prisons’ (BOP) latest proposed rule regarding the Inmate Financial Responsibility Program (IFRP).¹ 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.

We previously identified substantial concerns regarding the burdens that would be borne by indigent people in federal custody and their families as a result of BOP’s January 10, 2023 initial proposed rule (the “prior proposal”).² We thus were pleased that on December 17, 2024—in response to almost 1400 comments, many of which addressed similar concerns—BOP issued a Supplemental Notice of Proposed Rulemaking (Supplemental Notice) acknowledging that people with drastically different financial circumstances should not be treated similarly. We commend BOP for listening to the broad consensus against the prior proposal. BOP’s recognition

¹ 89 FR 102022 (December 17, 2024).

² Federal Public and Community Defenders, [Comment Letter on Proposed Rule re: Inmate Financial Responsibility Program: Procedures](#) (March 13, 2023), Comment ID BOP-2023-0001-1135.

that IFRP cannot treat all people in prison alike goes far in redressing the multitude of harms that the prior proposal would have caused.

While we support some of the proposed changes to IFRP, however, the revised proposed rule would impose unnecessary hardships on the poorest individuals in custody. It would leave them without sufficient funds to afford basic necessities, maintain connections with their families, and prepare for successful reentry. It would also hurt the families of poor people in custody, the majority of whom rely on their families to cover the substantial costs of incarceration.

With these financial realities in mind, we take the following positions on BOP's latest proposed changes to IFRP:

- We support the renewed proposal to codify BOP's policy that court-ordered payment plans shall constitute a person's IFRP payment plan, and to eliminate changes to housing status and disqualification from community-based programming as penalties for declining to participate in IFRP.
- We support BOP's proposal to allot 10 percent of wages from both UNICOR and non-UNICOR work assignments to IFRP.
- While we support BOP's attempt to ensure that people with fewer financial resources pay a smaller percentage of community deposits to IFRP, we think the threshold for exemption from this requirement should be higher than proposed, and we caution against using past deposit history to set future payment percentages. And while we firmly support BOP's decision to retain the monthly set-aside for phone calls, and to make it available for other expenses as well, we ask BOP to raise that monthly set-aside amount, which was last raised in 1996.
- We oppose BOP's proposal to require a one-time initial payment at an individual's initial classification/program review. We also ask that, when determining a person's available resources for a one-time payment (whether it is mandatory or encouraged), BOP raise the threshold for exemption by incorporating a monthly set-aside, similar to the proposal for community deposits.
- We encourage BOP to exempt individuals from IFRP participation, without penalties, for at least six to 12 months prior to their release to the community, depending on the length of their sentence.

- For legal and policy reasons, we continue to oppose BOP's attempt to condition First Step Act earned time credits on IFRP participation.

I. Background

When Congress passed the First Step Act, it acknowledged that “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[.]”³ Thus, BOP's core focus, aside from keeping individuals safe, secure, and healthy, should be on risk reduction and successful reentry. IFRP's stated mission—encouraging people to pay their financial obligations and supporting the development of financial planning skills—is consistent with that goal, as financial competence and responsible repayment of debts undoubtedly facilitate reentry. But that can occur only if IFRP accounts for the financial realities of the prison population.

The majority of people in federal prisons lack sufficient, let alone significant, financial resources. Indeed, “[i]ncarceration is both a predictor and a consequence of poverty.”⁴ 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 \$6,250.⁵ Poverty and incarceration are inextricably linked, as 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.”⁶

The families of people in prison are also disproportionately poor. In other words, there is an undeniable correlation between a person's incarceration and the indigency of their family members. “[A] family's probability of being poor is 40

³ H.R. Rep. No. 115-699 at 22 (2018).

⁴ Saneta deVunono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, [Who Pays? The True Cost of Incarceration on Families](#), Ella Baker Center, Forward Together, Research Action Design at 11 (September 2015) (“Ella Baker Center, *Who Pays?*”).

⁵ Tara O'Neill Hayes & Margaret Barnhorst, [Incarceration and Poverty in the United States](#) at 3 (June 30, 2020).

⁶ *Id.*

percent greater if the father is incarcerated.”⁷ Two-thirds of families that have a member in jail or prison struggle to meet their basic needs for housing and food.⁸

The challenges of poverty are exacerbated when a person enters BOP custody. Upon admission, a person receives only the barest essentials: clothing, shoes, minimal hygiene items, and bedding.⁹ Everything else costs money. People in custody must pay a copay for health care services for each requested sick call;¹⁰ purchase vitamins and over-the-counter medications like antacids, antihistamines, pain-relievers, and cough drops;¹¹ purchase their own hygiene products, including soap, shampoo, toothpaste, toothbrushes, deodorant, floss, and shaving supplies;¹² and purchase all clothing items beyond what is standard-issue, including shower shoes, socks, sneakers, underwear, pajamas, thermals, sweatpants, and sweatshirts.¹³ People in prison have no choice but to use whatever funds they have to purchase commissary items needed to maintain minimum levels of health, sanitation, and comfort.

Beyond commissary purchases, people in custody ordinarily must also pay for all outside communications by phone, video, and email. These communications are critical, as numerous studies link strong family contact during incarceration to success on reentry.¹⁴ BOP's telephone system is set up with that very principle in mind: to “encourage . . . family ties.”¹⁵ BOP now charges \$.06 per minute of phone time, and \$0.16 per minute for video communications for people who do not meet

⁷ Michael D. Tanner, [Cato's Project on Poverty and Inequality in California: Poverty and Criminal Justice Reform](#) at 1 (October 1, 2021).

⁸ Timothy Williams, [Report Details Economic Hardships for Inmate Families](#), New York Times (Sept. 15, 2015).

⁹ Fed. Bureau of Prisons, [Entering Prison: What to expect upon admission to an institution](#) (accessed Feb. 14, 2025).

¹⁰ 28 C.F.R. § 549.70; Fed. Bureau of Prisons, *Inmate Copay Program*, Program Statement 6031.02 at 1-2 (Aug. 15, 2005). 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. *Id.*

¹¹ Fed. Bureau of Prisons, Health Services, [National Formulary](#) (June 20, 2023).

¹² See, e.g., [USP Atwater Commissary List](#) (June 29, 2023).

¹³ *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.

¹⁴ Joshua B. Folk, et al., [Behind Bars but Connected to Family: Evidence for the Benefits of Family Contact During Incarceration](#), J. Fam. Psychol. (Jun. 2019) (“[T]hose who maintain contact with their families during incarceration tend to function more adaptively post-release.”); see also Off. of the Asst. Secretary for Planning & Evaluation, U.S. Dep’t of Health & Human Services, [Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families](#) (Aug. 31, 2008).

¹⁵ Fed. Bureau of Prisons Program Statement 4500.12 § 6.4.

the criteria for free phone calls.¹⁶ Emailing is also 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.

The result is inevitable: the financial strain of BOP incarceration is borne not only by people in custody, but also by their families, who already have little, if any, 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.¹⁷ In many cases, the financial burden is heavy enough to push families into debt.¹⁸ One survey of families of incarcerated people showed that more than 34% of the respondents reported going into debt just to pay for phone calls or visitation.¹⁹

The financial burdens on most of BOP's population and their families are reflected in BOP's own statistics, which show that the "overwhelming majority of inmates maintain balances of \$1000 or less," while approximately 77% of balances are below \$250.²⁰ Any changes to IFRP must be narrowly tailored to avoid imposing unnecessary burdens on these individuals and destabilizing the families who are essential to social and economic support upon reentry.

II. The proposed changes regarding court-ordered payment plans and the elimination of superfluous penalties for declining to participate in IFRP continue to reflect sound policy and should be implemented immediately.

The Supplemental Notice retains the prior proposal to amend 28 C.F.R. § 545.11 to explicitly state that any payment plan contained in a judgment and commitment order, or any other court order, should be adopted as their IFRP financial plan.²¹ As we noted in our January 2023 comment, this amendment is required as a matter of

¹⁶ Fed. Bureau of Prisons, [FBOP Updates to Phone Call Policies and Time Credit System](#) (Oct. 4, 2024). Since the COVID-19 pandemic, BOP has provided 500 minutes of free phone calls to people in its prisons; however, as of January 1, 2025, only those individuals who participate in FSA evidence-based recidivism reduction programs will be eligible for free phone minutes. People who do not qualify for FSA programming must pay for all of their phone and video calls. *Id.*

¹⁷ Ella Baker Center, *Who Pays?*, *supra*, n. 4 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).

¹⁸ Williams, *Economic Hardships*, *supra*, n. 8 at 24.

¹⁹ Ella Baker Center, *Who Pays?*, *supra*, n. 4 at 34.

²⁰ *Id.*

²¹ 89 Fed. Reg. at 102029; 88 FR at 1336.

law; the authority to determine payment plans for restitution and other court-ordered obligations lies with the courts and cannot be delegated.²² 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.²³

We also support BOP's proposal to eliminate existing penalties for non-participation in IFRP, including changes to housing status and disqualification from community-based programming in home confinement or reentry centers.²⁴ IFRP is a voluntary program precisely because non-participation often reflects a lack of means, rather than an intent to evade responsibility. As BOP explained in the 2023 notice, "[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[.]"²⁵

But the proposed rule errs by continuing to condition eligibility for the early release benefit for completion of the residential drug abuse program (RDAP) on IFRP participation.²⁶ RDAP is an intensive 9-to-12-month inpatient substance abuse program conducted in a separate treatment dorm where participants reside for the duration of their treatment.²⁷ The program also provides outpatient treatment in the community after the participant is transferred to prerelease custody, a critical step to ensuring lasting sobriety.²⁸ Graduating from RDAP is a significant achievement that warrants the early release incentive, while the prospect of early release is a powerful incentive for individuals who struggle with substance abuse to participate in RDAP, and to ensure the efficacy of treatment. Critically, RDAP is proven to successfully reduce recidivism.²⁹ BOP therefore should be doing everything possible to encourage RDAP participation, rather than removing the

²² 88 Fed. Reg. at 1333; *see also Ward v. Chavez*, 678 F.3d 1042, 1046-51 (9th Cir. 2012).

²³ *See* Fed. R. Crim. Proc. 32(d) (setting out information required to be included in the presentence report).

²⁴ 88 Fed. Reg. at 1335.

²⁵ *Id.*

²⁶ 18 U.S.C. § 3621(e).

²⁷ Fed. Bureau of Prisons, *Psychology Treatment Programs*, Program Statement 5330.11 at 2-8 (Mar. 16, 2009).

²⁸ *Id.*

²⁹ U.S. Sent'g Comm'n, [Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010](#) at 5 (May 17, 2022) ("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.").

incentive of early release for people who decline to participate in IFRP—a program that serves an entirely different purpose.

III. The proposed amendment to the percentage of wages allotted to IFRP is a marked improvement from the current rule and from the prior proposal.

The Supplemental Notice would require individuals in BOP custody to allot 10% of monthly pay from UNICOR and non-UNICOR work assignments to IFRP.³⁰ This proposal appears to respond to comments to the prior proposal, which would have required individuals to allot 50% of wages from UNICOR jobs (which is the same requirement currently in effect), and 25% of wages from non-UNICOR jobs to IFRP. In contrast, IFRP currently requires people with non-UNICOR work assignments to allot \$25 of their wages per quarter to IFRP.³¹

We support the new proposal. An allotment of greater than 10% of wages per month would create an undue hardship on BOP's working population. Wages in prison are extraordinarily low. UNICOR jobs—the highest paying jobs, held by only 8 percent of the BOP population—pay between 23 cents and \$1.15 per hour.³² Non-UNICOR, institutional work assignments pay only 12-40 cents per hour.³³ By regulation, most of those institutional workers (55 percent) are paid at the low end of that range.³⁴ That baseline institutional pay amounts to less than \$5 per week. Unsurprisingly, BOP wages have not increased in at least *25 years*.³⁵ It is unreasonable to require workers to allot more than 10% of such miniscule wages to IFRP, regardless of whether they work a UNICOR or non-UNICOR job. We commend BOP for this commonsense proposal.

³⁰ *Id.* at 102031.

³¹ 88 Fed. Reg. at 1333, 1336.

³² 28 CFR 345.51; *see also* Fed. Bureau of Prisons, [UNICOR Program Details](#) (accessed February 11, 2025).

³³ 89 Fed. Reg. at 1333; *see also* Fed. Bureau of Prisons, [Work Programs](#) (accessed February 11, 2025).

³⁴ 28 C.F.R. § 545.26.

³⁵ Off. of Inspector Gen., U.S. Dep't of Justice, [The Federal Bureau of Prisons' Inmate Financial Responsibility Program](#) (Sept. 2000) (reporting the exact same pay rates in IFRP audit from 2000).

IV. BOP's proposal for progressive allotment of community deposits to IFRP improves on the prior proposal but should be adjusted to accommodate the poorest people in BOP custody.

For many commenters, including us, the most troublesome aspect of BOP's 2023 proposed changes to IFRP was the proposal to allot 75% of all deposits from the community, including friends and family, to all IFRP participants, regardless of their financial status. This would have financially devastated the families of poor people in custody and unjustly burdened most people held by BOP. This proposal led to widespread public outcry. In response, BOP now proposes a progressive/tiered approach to community deposits, with the percentage of community deposits to be paid toward IFRP determined by the value of deposits received during the previous six-month period.³⁶ BOP explains that "[t]he Bureau's intent in making this revision is to try to require inmates with greater financial resources to pay more toward their financial obligations."³⁷

We share BOP's goal of reducing the burden on those with lesser means, and while we appreciate BOP's more tailored approach to community deposits, we do not think it is sufficient to achieve its stated objective. First, under the new proposal, the only individuals exempt from allotments of community deposits towards IFRP are those who receive less than \$250 of such deposits over a six-month period *and* who also have account balances of less than \$250. This means that under the new proposal, individuals who receive \$42 or less per month from their families will be required to devote 25% of those deposits to IFRP for the following six months if their account balance is \$250 or more. This six-month total is far too low; \$42 per month is simply not enough for poor individuals to pay for hygiene items, calls/emails/video visits with family members, warm clothing, and other necessities. We encourage BOP to raise this threshold.

Next, we firmly support BOP's decision to retain the monthly set-aside for telephone calls—currently set at \$75 per month—that Bureau staff must exclude in its evaluation of a person's financial resources. This shift shows that BOP has listened to the flood of comments submitted in response to its prior proposal to eliminate the set aside completely, recognizing the importance of regular, meaningful contact with loved ones to mental health, and that these connections decrease the chances of recidivism by ensuring that people in custody have the

³⁶ 89 Fed. Reg. at 102027-28, 102031.

³⁷ *Id.* at 102027.

community support they will need when they are released. We are thankful to BOP for reversing course by proposing instead to not only maintain the set-aside, but to expand to its applicability to expenses beyond phone calls.³⁸

BOP's acknowledgment of the importance of the set-aside leads us to note, however, that BOP has not raised the monthly set-aside amount in nearly *30 years*, when it increased the amount from \$50 per month to \$75 in 1996.³⁹ Another substantial increase, to keep pace with the rising cost of inmate calls, other forms of communication, and commissary items—as well as the rising cost of living for the family members who supply the funds for those expenses—is long overdue.

Finally, we are concerned with BOP's proposal to use past deposit history to determine the percentage of future community deposits to be paid towards IFRP. Under this methodology, a person who receives a one-time \$1000 tax refund on the first day of the six-month period following a program review, and who uses all of those funds over the next six months, will nonetheless have to pay 35% of community deposits received in the six months after their next program review—up to one year after receiving that one-time payment—even if they receive *no* additional community funds. And as the BOP itself acknowledges, an individual who receives no community funds at all during the six months before their program review will have to pay 25% of any community funds received during the following six months if they have an account balance of \$300 at the time of their review.⁴⁰ This is a fundamentally unfair method of determining the percentage of community funds to be allotted to IFRP, and it will hurt the very people BOP claims it is trying to shield from unfair IFRP requirements—people who lack financial resources. For poor individuals in particular, past deposit history is not a predictor of future deposits, as family members contribute what they can afford, when they can afford it. Poor people in prison can rarely count on receiving sustained, continued financial support at the same level from month to month.

BOP itself recognizes that the use of past deposit history to set the percentage of future deposits allotted to IFRP is imperfect, and it explains that it chose this method, rather than simply looking at an individual's account balance, because using the account balance would incentivize individuals to “spend down” their account balances in advance of the time at which their financial plan is established

³⁸ Compare 89 Fed. Reg. at 1333 with 88 Fed. Reg. at 102028.

³⁹ 61 Fed. Reg. 90 (January 2, 1996).

⁴⁰ 89 Fed. Reg. at 102027.

or reviewed, in order to evade financial responsibility obligations.”⁴¹ But BOP has no evidence that IFRP participants will spend the money in their accounts needlessly simply to avoid their obligations. Perhaps more importantly, it is only individuals with significant financial resources who have the luxury of gaming the system in this manner. Poor people who receive modest amounts of community deposits spend their funds on the items they need; they simply cannot afford to make frivolous purchases to avoid IFRP payments. The use of past deposit history might make sense for that small percentage of people in BOP custody with more than \$1000 in their accounts, but it will be potentially devastating for the vast majority of BOP’s population.

V. The one-time initial payment should remain as an encouraged option, not a mandatory requirement.

In its current form, BOP’s program statement states that during an individual’s initial program review, 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.⁴² As we noted in our comment to BOP’s prior proposal, the existing policy statement should be retained.⁴³

The proposal to codify this policy as mandatory for individuals with \$250 or more in their accounts would create undue hardship for the poorest of those confined in BOP custody. The beginning of a sentence is a time of significant uncertainty, when an incarcerated person simply does not know what to expect. It is the most expensive time, too, as the person must cover all necessary expenses up front—shower shoes, toothpaste, soap, shampoo, underwear, over-the-counter medication, sweatshirts, etc.—and they will not receive an institutional work assignment until sometime later.⁴⁴ Often, family members save money specifically to prepare for these initial expenses. Requiring a one-time payment at this time is not necessary, particularly since most who have financial obligations will be participating in IFRP and making payments throughout their time in custody.

⁴¹ *Id.*

⁴² Program Statement 5380.08 at 9.

⁴³ Federal Public and Community Defenders, [Comment Letter on Proposed Rule re: Inmate Financial Responsibility Program: Procedures](#) (March 13, 2023), Comment ID BOP-2023-0001-1135.

⁴⁴ As noted above, institutional/non-UNICOR jobs pay only \$0.12--\$0.40 per hour, and there is a 25,000 person waitlist for the relatively higher-paying UNICOR jobs. *See* Fed. Bureau of Prisons, [UNICOR Program Details](#) (accessed on February 17, 2025).

BOP's stated reason for this change would apply to only a small percentage of BOP's population. The Supplemental Notice explains that "[w]hile for some inmates this [initial classification and program review] will occur relatively quickly, other inmates may have spent substantial time in Bureau custody pre-trial and accumulated significant funds in their commissary account. Similarly, inmates may enter Bureau custody following sentencing with a significant deposit or deposits made before their initial classification and review meeting occurs."⁴⁵ We understand those concerns, but they appear to apply only to a small percentage of BOP's population, given that 77% of people in BOP custody have balances of less than \$250 in their accounts.⁴⁶ That percentage is likely to grow significantly, given the current Administration's intent to ramp up enforcement of immigration-based crimes.⁴⁷ Moreover, many (if not most) inmates spend their pretrial custody in local jails (pursuant to contracts with the U.S. Marshals Service), rather than in BOP facilities, and it can take time for any funds accrued in those facilities to transfer to a person's BOP account once they arrive at a BOP facility.

For these reasons, if BOP implements a mandatory one-time payment requirement, the threshold for exemption should be at least \$450. This threshold would be consistent with BOP's proposal for IFRP's treatment of community deposits, pursuant to which \$450 (\$75 per month) would be subtracted from consideration of an inmate's available financial resources, for telephone calls, email, or other expenses.⁴⁸ Under the one-time payment proposal, however, there is no such set-aside for the initial payment—meaning that individuals who have between \$250–\$450 in their accounts at the time of their initial classification/review would not retain the funds that BOP itself has deemed necessary to maintain contact with their families or cover other necessary expenses for at least six months, until their next program review. This proposal would treat poor individuals more harshly during the early months of their incarceration than it does for the rest of their time in custody. This is counterintuitive and counterproductive. If BOP is going to implement a mandatory one-time payment requirement, it should apply the same monthly set-aside for expenses that it applies to program reviews going forward. And as asserted above, the monthly set-aside amount should be higher than the \$75 figure selected in 1996.

⁴⁵ 89 Fed. Reg. at 102025.

⁴⁶ *Id.*

⁴⁷ U.S. Dep't of Justice, [Memorandum re: General Policy Regarding Charging, Plea Negotiations, and Sentencing](#) (February 5, 2025).

⁴⁸ *Id.* at 102028.

VI. BOP should exempt individuals from IFRP participation for at least 6 to 12 months prior to their release to the community.

We appreciate BOP's request for comment on the question of whether individuals should be exempt from participation in IFRP for a period of time prior to reentry to the community. The answer is a clear **yes**: BOP should do everything possible to prepare people in custody for the challenges of reentry. One way to do that is by exempting them from participation in IFRP, with no adverse consequences, as their release to the community approaches.

People who are released from prison face substantial economic barriers to reentry, including limited employment opportunities, depressed wages, loss of housing and other benefits, and disqualification from student grants and loans.⁴⁹ Indeed, more than 60% of formerly incarcerated individuals are unemployed one year after their release.⁵⁰ The challenges of reentry are so steep that some groups aimed at improving reentry outcomes offer releasees cash during their first few months after release, recognizing that financial instability during those critical first months contributes to reincarceration.⁵¹ 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.⁵²

Helping individuals overcome reentry obstacles and achieve economic stability, rather than requiring IFRP payments through the duration of their incarceration, would better ensure that they are able to pay off their financial obligations in the long run. Increasing the financial burdens on families and communities outside of BOP, as they help their loved ones prepare for reentry, is also likely to better serve the long-term goal of reducing recidivism, while allowing individuals to pay off their remaining financial obligations after release. The families of the formerly incarcerated are “the primary resource for housing, employment, and health needs”

⁴⁹ Ex. Off. of the President, Council of Economic Advisers, [Economic Perspectives on Incarceration and the Criminal Justice System](#) at 45 (Apr. 2016); Tanner, *supra* n.7 at 1 (“Someone who has been incarcerated can expect to earn roughly 40 percent less than someone who has avoided detention.”); Williams, *supra*, n.8.

⁵⁰ Bruce Western and Becky Pettit, [Collateral Costs: Incarceration's Effect on Economic Mobility](#), The Pew Charitable Trusts (2010).

⁵¹ Patricia Leigh Brown, [For People Just Leaving Prison, a Novel Kind of Support: Cash](#), New York Times (Jul. 7, 2022).

⁵² See Pub. L. No. 115-391 § 605, 132 Stat. 5194 (2018). Notably, the First Step Act did not include any similar set-aside for lower-paying prison jobs.

for people released from prison.⁵³ In fact, two-thirds of people turn to their family members for support in housing when released, and more than one-third seek assistance from family members in finding employment.⁵⁴ Research has consistently shown that this type of material family support decreases recidivism.⁵⁵

BOP therefore can and should do more to help those in its custody prepare for reentry. One of the easiest and most effective steps it could take would be to allow individuals to save money for the basic necessities—shelter, food, transportation, clothing, medication, etc.—by exempting them from IFRP participation for 6-12 months before release, depending on the length of their sentence. BOP should consider even longer periods of exemption for individuals who have been in custody for more than a decade, as those individuals are less likely to have family or community support, or homes to return to, and their long sentences will make it that much harder for them to find employment.

Finally, the exemption period should be calculated in relation to an individual's release to home confinement, a residential reentry center, or the expiration of the term of imprisonment (if the person is not participating in some form of community confinement).

VII. Conditioning First Step Act earned time credits on IFRP participation would be unlawful and counterproductive, even with the proposed reforms to IFRP.

We continue to oppose BOP's proposal to make individuals who decline to participate in IFRP ineligible to accrue or apply earned time credits under the First Step Act (FSA). While we appreciate BOP's efforts to minimize the burdens of IFRP participation, those burdens were not the basis for our opposition to conditioning FSA credits on IFRP participation. Our objection was and continues to be that the proposed linkage between IFRP participation and FSA earned time credits is not only counterproductive to the goal of rehabilitation, but it is also contrary to the text of the FSA itself, and therefore likely unlawful.

⁵³ Ella Baker Center, *Who Pays?*, *supra* n. 4 at 13.

⁵⁴ *Id.* at 26, 31.

⁵⁵ Thomas J. Mowen, et al., *Family Matters: Moving Beyond "If" Family Support Matters to "Why" Family Support Matters During Reentry from Prison*, 56 J. Research, Crime & Delinquency 483 (Jul. 2019) (concluding that "instrumental" support, as distinct from emotional and instructional support, has the highest correlation with reduced recidivism).

Earned time credits were among the central reforms created by the First Step Act for the express goals of *reducing* recidivism and *enhancing* public safety. Congress incentivized participation in targeted recidivism reduction programming by offering individuals time off their sentences, with the amount of time credits earned based on the successful participation in programming.⁵⁶ 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 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.⁵⁷ 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.”⁵⁸ And as for *when* those credits will be applied, Congress directed that BOP “*shall transfer* eligible prisoners . . . into prelease custody or supervised release.”⁵⁹

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 such as completing a drug treatment program, a parenting class, or a vocational training program. And just as non-participation in IFRP “should not be the sole determining factor in an inmate's eligibility for placement in a community-based program,”⁶⁰ it also should not automatically disqualify individuals from receiving the full benefit of their beneficial program participation.

BOP claimed in its prior proposal 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 the FSA 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

⁵⁶ 18 U.S.C. § 3632(d).

⁵⁷ 18 U.S.C. § 3632(d)(4)(D).

⁵⁸ *Id.* at (d)(4)(A)(i) (emphasis added).

⁵⁹ *Id.* at (d)(4)(C) (emphasis added); *see also* 18 U.S.C. § 3624(g) (setting out the criteria to qualify as an “eligible prisoner”).

⁶⁰ 88 Fed. Reg. at 1335.

maintain a minimum or low risk of recidivating. . . .”⁶¹ IFRP does not match any part of that definition: it is not an “activity,” but rather a passive, automated program through which BOP takes money out of a person’s account, with no action by the person required; it is not solely for “minimum or low risk” individuals; and it doesn’t allow anyone to “remain productive.” It solely requires agreement to a financial payment plan that is set by BOP, rather than the individual. Moreover, the term “unstructured activity” is a creation of BOP—not the First Step Act, which does not use that term.

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.⁶² 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.⁶³

Non-participation in IFRP already carries serious consequences, and those consequences are sufficient to incentivize participation. Conversely, making individuals ineligible to benefit from their recidivism-reduction programming because they are too poor to participate in IFRP undermines the First Step Act’s risk and needs assessment system. That is why members of Congress from both chambers, all of whom were cosponsors of the First Step Act, submitted comments to the prior proposal, stating their strong opposition to conditioning FSA earned time credits on IFRP participation.⁶⁴

While BOP claims that it “has taken very seriously the comments it received in response to the January NPRM that expressed concerns that conditioning FSA Time Credits on IFRP participation may take away from the FSA’s spirit and intent to prepare individuals in custody for reentry,”⁶⁵ it is not just the spirit and intent of the FSA that this requirement would contravene; it is also its text. For both policy

⁶¹ 18 U.S.C. § 3635(5).

⁶² 18 U.S.C. § 3624(g)(1).

⁶³ Following the Supreme Court’s decision in *Loper-Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), BOP’s interpretation of the FSA to the contrary will not receive deference in the likely event that it is subjected to legal challenge.

⁶⁴ See U.S. Senators Richard J. Durbin, Cory A. Booker, Sheldon Whitehouse, and Christopher A. Coons, [Comment Letter on Proposed Rule re: Inmate Financial Responsibility Program: Procedures](#) (March 13, 2023), Comment ID BOP-2023-0001-1141; see also Jerrold Nadler, Ranking Member, House Committee on the Judiciary, [Comment Letter on Proposed Rule re: Inmate Financial Responsibility Program: Procedures](#) (March 13, 2023), Comment ID BOP-2023-0001-1112;

⁶⁵ 89 Fed. Reg. at 102029.

and legal reasons, the IFRP and the FSA earned time credits system should remain separate.

VIII. Conclusion

We commend BOP for taking to heart the comments that stressed the importance of recognizing the financial realities that most people in custody face, and the financial toll that incarceration takes on them, as well as on the families who will support them during and after their time in prison. Some of the proposed amendments to IFRP in the Supplemental Notice do just that, while others must be adjusted (or discarded) in order to allow IFRP to achieve its goals without risking the health, safety, and future economic stability of the poorest individuals in BOP custody, and without risking increased recidivism.

Thank you for your attention to these comments.

Very truly yours,

/s/

Jodi Linker

Federal Public Defender for the

Northern District of California

Co-Chair, Federal Defender Legislative Committee

/s/

Patricia L. Richman

Assistant Federal Public Defender

District of Maryland

Co-Chair, Federal Defender Legislative Committee

/s/

Melody Brannon

Federal Public Defender for the District of Kansas

Co-Chair, Defender Services Advisory Group

/s/

Jill Ginstling

National Sentencing Resource Counsel

Federal and Community Public Defenders