

Colette S. Peters, Director, Federal Bureau of Prisons  
Attention: Comments, Amendments to 28 CFR Part 545  
320 First Street, NW  
Washington, DC 20534

March 12, 2023

**Re: Comment on the Inmate Financial Responsibility Program: Procedures, Proposed Rule**

The Brennan Center for Justice at New York University School of Law welcomes the opportunity to submit comments on the Bureau of Prisons' (Bureau) proposed amendment to 28 CFR 545 regarding the Inmate Financial Responsibility Program (IFRP), proposed rule to update, streamline, and clarify IFRP regulations in paragraphs (b), (c), and (d) in section 545.11.

The Brennan Center is a nonpartisan public policy and law institute that focuses on improving America's systems of democracy and justice.<sup>1</sup> The Brennan Center's Justice Program seeks to ensure a rational, efficient, effective, and fair criminal justice system. As part of that mission, we seek to reduce mass incarceration by reducing the system's racial and economic disparities while also advocating for fundamental reforms that will reduce its size and severity. We commend the Bureau of Prisons for continuing to evaluate and refine its policies that encourage people incarcerated in its prisons to develop financial planning skills. But we strongly oppose the proposed rule "to allot 75% of deposits placed in the incarcerated person's commissary account by non-institution (community) sources to the IFRP payment process" and the addition of language regarding incarcerated people's "ineligibility to earn or apply First Step Act Time Credits as an effect of non-participation in IFRP." However, we are supportive of the Bureau's proposal to delete language requiring "quartering in lowest housing status as an effect of nonparticipation in IFRP and deletion of language prohibiting placement in community-based programs as an effect of non-participation in IFRP."

Currently, more than 5.4 million adults in the United States are under the supervision of correctional systems.<sup>2</sup> The U.S. prison population is largely drawn from the most disadvantaged part of the nation's population, consisting mostly of young men of color, often without a strong

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<sup>1</sup> This letter does not purport to represent the views, if any, that the New York University School of Law may have.

<sup>2</sup> E. Ann Carson and Rich Kluckow, *Correctional Populations in the United States, 2021 — Statistical Tables*, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2023, 4, table 1, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus21stB.pdf>.

educational background. As another consequence of mass incarceration, more than 80 million people in the United States have a criminal record of some kind.<sup>3</sup>

This level of incarceration has extracted wealth from communities that most often encounter our justice system. In fact, a recent Brennan Center study found that felony convictions and time spent in prison reduce people's earnings potential long after they have completed their sentences. The cumulative losses are steep and disparate: white people who have spent time behind bars miss out on an average of \$267,000 in expected earnings over their lifetime; Black people, \$358,900; and Latinos, \$511,500.<sup>4</sup>

It is because of this context of the devastating financial impact of incarceration on our communities that we submit this comment letter.

### **I. Allotment of non-institution (community) resources.**

The proposed amendment would allot 75 percent of deposits placed in an incarcerated person's commissary account by non-institution (community) sources to the IFRP payment process. While we recognize the importance of satisfying financial obligations, including restitution owed to victims of criminal conduct, this policy will have significantly negative financial impacts on people incarcerated in federal prisons and their family and friends who contribute to their commissary accounts.

Incarcerated workers in federal prison who participate in institutional work assignments earn only 12¢ to 40¢ per hour.<sup>5</sup> Those who participate in the Federal Prison Industries UNICOR program — only 8 percent of the work-eligible population in the Bureau of Prisons — typically earn 23¢ to \$1.15 an hour.<sup>6</sup> These low wages — far below the federal minimum wage of \$7.25 an hour — often necessitate the loved ones of those in federal prison to contribute to their commissary account so that they can pay for toiletries, additional food, and telephone calls.

According to a 2015 report by the Ella Baker Center for Human Rights, on average, families incurred more than \$13,000 “for court-related fines and fees alone,” amounting to nearly one year's

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<sup>3</sup> “February 2023 Next Generation Identification (NGI) System Fact Sheet,” FED. BUREAU OF INVESTIGATION, <https://le.fbi.gov/file-repository/ngi-fact-sheet.pdf/view> (showing more than 82.2 million criminal fingerprint records as of February 2023); *see also* Matthew Friedman, “Just Facts: As Many Americans Have Criminal Records as College Diplomas,” BRENNAN CTR. FOR JUSTICE, Nov. 17, 2015, <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

<sup>4</sup> Terry-Ann Craigie, Ames Grawert, Cameron Kimble, and Joseph E. Stiglitz, *Conviction, Imprisonment, and Lost Earnings*, BRENNAN CTR. FOR JUSTICE, 2020, 7, <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

<sup>5</sup> “Work Programs,” FED. BUREAU OF PRISONS, accessed March 9, 2023, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp)

<sup>6</sup> “UNICOR Program Details,” FED. BUREAU OF PRISONS, accessed February 28, 2023, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp).

income for low-income families.<sup>7</sup> And the Center for American Progress found that on average, households with a currently or previously incarcerated family member have about 50 percent less wealth than households not affected by incarceration and that 22.6 percent of households with a currently or previously incarcerated family member could not afford to pay all of their bills in 2019.<sup>8</sup> Research also indicates that women represent 83 percent of the people bearing the burden of court-related costs for family members.<sup>9</sup> And women of color are disproportionately impacted. One study found that Black women are “more likely to have an acquaintance” (35 percent vs. 15 percent), family member (44 percent vs. 12 percent), neighbor (22 percent vs. 4 percent), or someone they trust (17 percent vs. 5 percent) “in prison than are white women.”<sup>10</sup>

While many families scrape together savings to contribute to commissary accounts of their loved ones behind bars to provide critical funds to improve their conditions of confinement, this proposed rule would serve as a deterrent to those families attempting to reduce the burdens of incarceration on their relatives and friends. Just to contribute \$50 in commissary funds would require a community member to come up with \$200 to ensure that the incarcerated loved one receives the full \$50. This burden is heavy for families of incarcerated individuals; in fact, some estimates indicate that family members spend 9 percent to 26 percent of their income paying for phone calls and visits to and care packages for those behind bars.<sup>11</sup>

To summarize, this rule, if adopted, will deter community members from funding commissary accounts, reducing the amount of money incarcerated people will have to buy the essential products they need behind bars. This policy is unlikely to improve the ability of incarcerated people to pay victim restitution or other legal financial obligations.

## **II. Addition of language regarding incarcerated people’s ineligibility to earn or apply First Step Act Time Credits as an effect of non-participation in IFRP.**

The Bureau proposes “to clarify that inmates who refuse to participate in (opt out of) the IFRP will not be eligible to earn or apply” [First Step Act] Time Credits. In 2018, Congress passed

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<sup>7</sup> Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CENTER FOR HUMAN RIGHTS, FORWARD TOGETHER, AND RESEARCH ACTION DESIGN, 2015, 9, <https://www.whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

<sup>8</sup> Christian E. Weller, Akua Amaning, and Rebecca Vallas, *America’s Broken Criminal Legal System Contributes to Wealth Inequality*, CENTER FOR AMERICAN PROGRESS, 2022, <https://www.americanprogress.org/article/americas-broken-criminal-legal-system-contributes-to-wealth-inequality/>.

<sup>9</sup> Saneta deVuono-powell et al., *Who Pays?* 2015, 9.

<sup>10</sup> Hedwig Lee, et al., “Racial Inequalities in Connectedness to Imprisoned Individuals in the United States,” *Du Bois Review: Social Science Research on Race* 12, no. 2, 271 (2015).

<sup>11</sup> Olga Grinstead et al., “The Financial Cost of Maintaining Relationships with Incarcerated African American Men: A Survey of Women Prison Visitors,” *Journal of African American Men* 6, no. 1 (2001): 66, <https://www.jstor.org/stable/41819418>.

and President Trump signed into law The First Step Act, a bipartisan effort to reduce the size of the federal prison population by providing relief to those in federal prison serving excessively punitive sentences. The legislation also allows people to reduce their time spent in prison by participating in programming and activities. Currently, an eligible person can accrue 10 to 15 days of earned time credits for every 30-day period in which they successfully participate in programs or productive activities.

The Bureau considers “the IFRP to be an unstructured Productive Activity” that allows people who participate in the program to receive First Step Act good time credits. However, the Bureau now seeks to “clarify that inmates who refuse to participate in (opt out of) the IFRP will not be eligible to earn or apply FSA Time Credits.” Taking part in the IFRP is supposed to be voluntary, but this new policy would punish those in federal prison who do not participate. Given the proposed change to deduct 75 percent of funds added by community members to an IFRP account, it’s likely that more people will determine that they don’t want to participate in this program, thus circumventing the goal and spirit of the First Step Act, which is to provide more ways for people in federal prison to earn time off their sentence. This punitive measure will certainly reverse some of the gains already made by the Justice Department in implementing the First Step Act’s earned time provisions.

### **III. The proposed seizure of funds and inability to receive earned time credits via the First Step Act contradict the Biden administration’s efforts to improve racial and economic equality and focus on rehabilitation of people who are incarcerated.**

In January 2021, the Biden administration issued an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.<sup>12</sup> In the order, President Biden calls on the federal government to “allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities.”<sup>13</sup> The two BOP proposed policies above would deepen social and economic inequities in the communities the Biden administration describes wanting to invest in. Despite Black people making up only 13 percent of the U.S. adult population, they make up more than 38 percent of the federal prison population.<sup>14</sup> Research indicates that nationwide, “62 percent of African Americans reside in highly segregated, inner city neighborhoods that experience a high degree of violent crime,

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<sup>12</sup> THE WHITE HOUSE, “Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>13</sup> THE WHITE HOUSE, “Executive Order On Advancing Racial Equity,” 2021.

<sup>14</sup> “Inmate Statistics: Inmate Race,” FED. BUREAU OF PRISONS, March 4, 2023, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp).

while the majority of whites live in more advantaged neighborhoods that experience little violent crime.”<sup>15</sup>

Despite advocating for an investment in historically underserved communities, the Justice Department is doing the exact opposite by making it more difficult for those in federal prison to fund their commissary accounts, extracting resources directly from community members in the process.

**IV. Deletion of language requiring quartering in lowest housing status as an effect of non-participation in IFRP and deletion of language prohibiting placement in community-based programs as an effect of non-participation in IFRP.**

The current rule requires someone housed within a BOP facility to “be quartered in the lowest housing status available” such as a double bunk. It also states that if someone “refuses to participate in or comply with the provisions of the IFRP, the inmate will not be placed in a community-based program.” The Bureau now proposes deleting this language, and we wholly support that. Although the Bureau’s reasoning for eliminating the requirement that incarcerated people who don’t participate in or comply with the provisions of the IFRP are based on the logistical impracticality of basing housing decisions on non-participation or compliance, we still commend the Bureau for removing the punitive practice of making housing decisions based on compliance with this program. Additionally, we applaud the Bureau for providing additional flexibility in its decision-making so that some people who don’t participate in the IFRP will still be able to gain placement in the IFRP. However, we would recommend that it never be a determining factor in lieu of the proposed language that it “not be the sole determining factor.”

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In summary, we strongly oppose the proposed rule to allot 75 percent of deposits placed in the incarcerated person’s commissary account from non-institution (community) sources “to the IFRP payment process” and the addition of language regarding incarcerated people’s “ineligibility to earn or apply First Step Act Time Credits as an effect of non-participation in IFRP.” Given the Biden administration’s promise to improve racial and economic equality and focus on rehabilitation of people who are incarcerated, these two rule changes would do just the opposite. But we are supportive of the Bureau’s proposal to delete “language requiring quartering in lowest housing status as an effect of non-participation in IFRP.” Still, while supporting the proposed “deletion of language prohibiting placement in community-based programs as an effect of non-participation in IFRP,” we recommend

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<sup>15</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, 2021, 15, <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>. For original research, see Lauren J. Krivo, Ruth D. Peterson, and Danielle C. Kuhl, (2009). “Segregation, Racial Structure, and Neighborhood Violent Crime,” *American Journal of Sociology* 114, no. 6 (2009): 1765–1802.

that it never be a determining factor in lieu of the proposed language that it “not be the sole determining factor.”

Respectfully submitted,

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