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Via regulations.gov

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

Re: Proposed Rule, Inmate Financial Responsibility Program: Procedures, BOP-1178

The National Consumer Law Center (on behalf of its low-income clients) (“NCLC”), the Prison Policy Initiative, and Stephen Raheer respectfully submit these comments in response to the Bureau of Prisons’ (the “Bureau”) Proposed Rule regarding the Inmate Financial Responsibility Program (“IFRP”), RIN 1120-AB-78, BOP-1178 (“Proposed Rule”).¹ We strongly oppose several of the proposed changes to the regulations on policy and legal grounds. Specifically, we oppose the Bureau’s proposals to:

- (1) eliminate the \$75 set-aside for phone calls,
- (2) require notification of the United States Attorney’s Office if a person has funds sufficient to satisfy a fine or restitution in a single payment but declines to do so,
- (3) allow garnishment of 25% to 50% of prison wages for IFRP payments, and
- (4) allow seizure of 75% of non-institution (community) deposits for IFRP payments.

From a policy standpoint, the Proposed Rule would directly undermine numerous critical objectives of the Biden Administration and existing Bureau policies. First, the Biden Administration has promised a “whole-of-government effort to . . . bolster reentry,”² and the Bureau acknowledges the importance of reentry in the Supplementary Information accompanying the Proposed Rule. Yet the Proposed Rule would severely hinder these efforts by eroding incarcerated people’s support systems and connections with the outside world and by depleting the financial resources people will have available upon their release.

¹ Bureau of Prisons, Proposed Rule, 88 Fed. Reg. 1331 (Jan. 10, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-10/pdf/2023-00244.pdf>.

² White House, “Fact Sheet: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons” (Apr. 26, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-harris-administration-expands-second-chance-opportunities-for-formerly-incarcerated-persons/> [hereinafter “White House, Second Chances Fact Sheet”]; *see also* White House, “Fact Sheet: The Biden-Harris Administration’s Work to Make Our Communities Safer and Advance Effective, Accountable Policing” (Feb. 7, 2023), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/07/fact-sheet-the-biden-harris-administrations-work-to-make-our-communities-safer-and-advance-effective-accountable-policing/> [hereinafter “White House, Safer Communities Fact Sheet”] (describing President Biden’s call on Congress to invest billions on services that help prevent crime, including “reentry services so people leaving prison can stabilize their lives and avoid recidivism”); Statement of Mignon Clyburn of the Fed. Comm’ns Comm’n (2015), available at https://static.prisonpolicy.org/scans/Clyburn_FCC_Statement.pdf (in a statement on the high cost of phone calls, stating “[m]eaningful communication beyond prison walls helps to promote rehabilitation and reduce recidivism”).

Second, President Biden has made advancing racial equity and supporting underprivileged communities a pillar of his administration. But although only a very small portion of the federal prison population likely has any significant resources to contribute to legal financial obligations, the Proposed Rule would sweep broadly. It would take 75% of community funds and 25% to 50% of wages not only from the small minority of wealthy incarcerated people but from the entire federal prison population, which is disproportionately comprised of “Black, Latino, . . . and persons otherwise adversely affected by persistent poverty or inequality.”³ In other words, the Proposed Rule would disproportionately harm precisely those populations the Biden Administration has ordered the Bureau to support through its policies and programs.

Third, the Proposed Rule would unnecessarily harm children—particularly poor children of color. Among other things, it would cause more of their incarcerated parents’ meager wages to be diverted away from supporting and maintaining ties with children. Worse still, the Proposed Rule would take 75% of contributions from incarcerated people’s family members. Accordingly, if the child’s non-incarcerated caregiver wants to fund \$25 worth of communications between the child and their incarcerated parent, the caregiver would have to pay \$100 under the Proposed Rule—the equivalent of 300% inflation. The result would be that children who are already experiencing financial and emotional hardship due to their parent’s incarceration would either have even fewer financial resources available for their support, or else have even less parental contact.

In addition to its many normative and policy-based failings, the Proposed Rule is legally defective for several reasons. First, the Bureau lacks authority to seize so-called “non-institution (community) resources,” which include money from incarcerated people’s family members. Second, the Administrative Procedure Act (“APA”) requires federal agencies to give a “hard look” at data and alternative approaches when making policy decisions as part of a rulemaking. The Bureau has not fulfilled its hard-look obligation here. Third, the Proposed Rule is untethered from applicable law governing the enforcement and collection of legal financial obligations. Fourth, the Proposed Rule contravenes peoples’ Fifth Amendment due process rights. Finally, the Proposed Rule is a “significant regulatory action” under Executive Order 12866, and the Bureau must therefore conduct a regulatory analysis, which it has thus far failed to do.

Without derogating from our position that many aspects of the Proposed Rule are procedurally and substantively defective, we propose an alternative approach that would have a number of advantages over the Proposed Rule. Our central proposal is that the Bureau use a threshold-based approach to the IFRP. Specifically, we propose the Bureau adopt an interim rule that uses a threshold based on the federal poverty level. If deposits (from wages or other sources) are below this threshold, the Bureau should not garnish any wages or confiscate any community funds for the IFRP. If they exceed this threshold, the Bureau should adopt a progressive approach under which the percentage of the funds seized increases as the amount by which the funds exceed the

³ Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>. *See also* Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace 3 (2022), available at https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf (“The financial burdens [of interacting with the criminal legal system] fall disproportionately on people of color, women, and people with lower incomes.”).

threshold increases. A final rule should be informed by real-world data, which the Bureau should collect and publish.

We explain our policy and legal objections to the Proposed Rule, our recommended alternative approaches, and the numerous benefits of our alternative over the Proposed Rule in considerable detail in the comments that follow.

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I. CONTRARY TO RECENT NEWS COVERAGE, MOST PEOPLE IN THE BUREAU’S CUSTODY LACK FINANCIAL RESOURCES AND HAVE MANY EXPENSES WHILE INCARCERATED

Recent news stories have suggested that people incarcerated in Bureau facilities commonly live lavishly off of enormous balances in their trust accounts.⁴ For example, one *Washington Post* article references “more than 20 inmate accounts in 2021 holding more than \$100,000, for a total

⁴ The Bureau varyingly refers to the master fund holding individual incarcerated people’s money as the “inmate deposit account,” “prisoners’ trust fund,” and “inmate trust account.” For simplicity’s sake we will use the phrase “trust account” to refer to the master fund and “trust accounts” to refer to individuals’ beneficial interests in the trust account.

exceeding \$3 million.”⁵ The *Post* also reported that as a result of pandemic relief payments from the federal government, the combined value of accounts “swelled above \$140 million.”⁶ But contrary to the lavish picture than the *Post* paints, these numbers demonstrate that the vast majority of prisoners actually have very meager balances with which to pay their expenses.

In 2021, the year-end population total of “federal inmates” was 155,826.⁷ If you subtract the \$3 million in the 20 high-balance accounts that the *Post* discusses—which comprise only about .013% percent of “federal inmates”—you arrive at an *average* account balance for the remaining 99.9% of federal inmates of \$879.30 (\$137,000,000 divided by 155,806 people). That number is quite modest. It is significantly less than the median transaction account balance⁸ of \$5,300 for people on the outside.⁹ It is also well below the bank account balance most states protect from garnishment.¹⁰

Moreover, incarcerated people require a substantial amount of money to cover necessary expenses, both while they are in custody and following their release. First, as the Bureau acknowledges, people need to pay for basic goods and services while in prison.¹¹ These expenses include medical co-pays¹² and commissary orders for items like over-the-counter medications, personal care products (e.g., hair, shaving, hygiene, and dental supplies), clothing, and food to supplement meals served in the cafeteria.¹³ Items sold at the commissary are also unusually expensive because the customers are captive and commissaries often include a “substantial

⁵ Devlin Barrett, *Federal inmates would pay more to victims under new Justice Dept. rule*, Wash. Post (Jan. 9, 2023), <https://www.washingtonpost.com/national-security/2023/01/09/prisoner-accounts-new-rules-victims/>.

⁶ *Id.* See also 167 Cong. Rec. 1257 (Mar. 5, 2021) (statement of Sen. Durbin prior to vote rejecting amendment that would have made incarcerated people ineligible for CARES Act relief payments).

⁷ Statistics, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 8, 2023).

⁸ Transaction accounts include savings, checking, money market and call accounts, as well as prepaid debit cards. René Bennett, *The average amount in U.S. savings accounts – how does your cash stack up?*, Bankrate (Dec. 21, 2022), <https://www.bankrate.com/banking/savings/savings-account-average-balance/>.

⁹ *Id.*

¹⁰ Michael Best & Carolyn Carter, Nat’l Consumer L. Ctr., *No Fresh Start 2022: Will States Let Debt Collectors Push Families into Poverty as the Cost of Necessities Soars?* (2022), https://www.nclc.org/wp-content/uploads/2022/12/NoFreshStart-22_Rpt.pdf.

¹¹ Proposed Rule, 88 Fed. Reg. at 1333 (noting that incarcerated people must “[r]etain[] sufficient funds to cover basic inmate needs during incarceration”).

¹² Tiana Herring, “COVID looks like it may stay. That means prison medical copays must go,” Prison Pol’y Initiative Blog (Feb. 1, 2022), https://www.prisonpolicy.org/blog/2022/02/01/pandemic_copays/ (Bureau of Prisons charges a \$2 co-pay for medical visits, though there is a limited exception for indigency and for evaluations and monitoring for COVID-19); U.S. Dept. of Just., Fed. Bureau of Prisons, Program Statement 6031.02, Inmate Copayment Program (2005), [bop.gov/policy/progstat/6031_002.pdf](https://www.bop.gov/policy/progstat/6031_002.pdf). Edward Williams, a person incarcerated in federal prison, stated that he “pay[s] a \$2 copay for medical care even if all the staff does is tell me to buy medication at the commissary.” More Than Our Crimes, Wash. Lawyers’ Comm. for Civil Rights & Urban Affairs, *Voices from Within the Federal Bureau of Prisons: A System Designed to Silence and Dehumanize* 34–35 (2022), <https://morethanourcrimes.org/wp-content/uploads/2022/09/Voices-from-Within-More-Than-Our-Crimes-Sept-2022.pdf> [hereinafter “Voices from Within”].

¹³ See Ariel Nelson & Stephen Rahe, *Captive Consumers*, Inquest (March 19, 2022), <https://inquest.org/captive-consumers/>; see also Jeremy Fontanez, *How Much Money Can You Squeeze from a Prisoner*, More Than Our Crimes (Jan. 25, 2023), <https://morethanourcrimes.org/voices/how-much-money-can-you-squeeze-from-a-prisoner/>; Stephen Rahe, Prison Pol’y Initiative, *The Company Store: A Deeper Look at Prison Commissaries* (2018), <https://www.prisonpolicy.org/reports/commissary.html>.

markup” of 30 to 40%.¹⁴ Commissary prices also increase regularly—for example, Akin Sean El Preci Bey explained that staff at the facility where he is incarcerated “consistently increase[] prices on canteen items up to \$1 at a time.”¹⁵ People also spend money on phone calls,¹⁶ postage stamps, and emails to communicate with loved ones, clergy, and attorneys. As discussed below, these communications are not only essential to people’s health and wellbeing while they are incarcerated, but contact enhances the wellbeing of incarcerated peoples’ families and contributes to better results upon reentry.¹⁷

Second, incarcerated people need money to help take care of loved ones and other obligations outside of prison, including previously incurred or ongoing obligations for mortgages, credit card accounts, auto loans, and student loans.¹⁸

Finally, people need money to pay for basic living expenses when they are released from prison. Life during reentry often requires fast access to funds to establish new housing and utilities, transportation, and to buy clothes, a cell phone, and other modern life necessities, alongside continuing obligations to pay fines, fees, restitution, child support, and other pre-existing debts. Justice-involved individuals face significant barriers to securing employment,¹⁹ which only enhances the importance of saving to cover post-release expenses until a steady job can be secured and new financial resources developed.

The Proposed Rule fails to adequately account for these expenses. To the contrary, it would drain incarcerated people’s accounts, undermining their ability to be successful and meet basic human needs during their term of imprisonment and upon release.

¹⁴ Letter from Sen. Chuck Grassley to Director Colette Peters, at 2 (Aug. 1, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_to_bureau_of_prisons_-_commissary_trust_fund.pdf.

¹⁵ Voices from Within, *supra* note 12 at 33.

¹⁶ We have been unable to locate current phone rates for calls from Bureau facilities, but telecom provider Global Tel*Link reported charging interstate rates of 12¢ per minute and intrastate rates of 25¢ per minute at Bureau facilities in 2021. *See* Global Tel*Link, Annual Reporting Form, FCC Form 2301(a), Calendar Year 2021, available at <https://www.fcc.gov/ecfs/document/1040189005146/3>.

¹⁷ *See, e.g.*, Ryan Shanahan & Sandra Villalobos Agudelo, *The Family and Recidivism*, American Jails (Sept./Oct. 2012), <https://www.prisonpolicy.org/scans/vera/the-family-and-recidivism.pdf>.

¹⁸ *See* Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace, *supra* note 1, at 21 (noting there is no national data on the debt burden of incarcerated individuals, but citing studies from two states discussing percentage of incarcerated people with credit card accounts, auto loans, and mortgages and emphasizing the difficulty of managing, servicing, or paying existing consumer debt while incarcerated). Taking care of loved ones while incarcerated is often not possible given low prison wages. Instead, money typically flows in the opposite direction—i.e., from loved ones on the outside to the incarcerated person.

¹⁹ *E.g.*, Kira Nikolaidis, *Collateral Consequences of Conviction: Barriers to Employment*, Berkeley J. Crim. L. Blog (Aug. 31, 2022), <https://www.bjcl.org/blog/collateral-consequences-of-conviction-barriers-to-employment/>; Leah Wang & Wanda Bertram, Prison Pol’y Initiative, New data on formerly incarcerated people’s employment reveal labor market injustices (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/>; Cohn, et al., Nat’l Consumer L. Ctr. & Collateral Consequences Resource Ctr., *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing* 2–3 (2022), <https://www.nclc.org/wp-content/uploads/2022/08/Report-High-Cost-of-Fresh-Start.pdf>.

II. THE PROPOSED RULE WOULD UNDERMINE THE BIDEN ADMINISTRATION’S AND THE BUREAU’S GOALS CONCERNING JUSTICE-INVOLVED INDIVIDUALS AND EQUITY

A. The Proposed Rule Would Undermine Successful Reentry and Risk Increasing Recidivism

The Biden Administration has promised a “whole-of-government effort to . . . bolster reentry,” both for the sake of those leaving incarceration as well as the communities to which they will return.²⁰ As the Administration has explained:

America must offer meaningful opportunities for redemption and rehabilitation to empower those who have been incarcerated to become productive, law-abiding, members of society, and reduce crime and make our communities safer.

...
Advancing successful reentry outcomes makes our communities safer, disrupts cycles of economic hardship, and strengthens our economy. Improving reentry is also [a] key part of the comprehensive strategy President Biden announced last June to tackle gun crime and violence.²¹

President Biden has even turned his exhortations on reentry into law, issuing an executive order mandating that people who are incarcerated be provided with “meaningful opportunities for rehabilitation and the tools and support they need to transition successfully back to society” because “[l]owering barriers to reentry is essential to reducing recidivism and reducing crime.”²²

In the Supplementary Information, the Bureau acknowledges the “importance of planning for reentry” upon release from Bureau custody.²³ Yet the Proposed Rule would severely undermine these efforts in at least two ways: (1) by eroding incarcerated people’s support systems and connections with the outside world, and (2) by depleting the financial resources people will have available upon their release. Research has shown that both community support systems and financial resources promote successful reentry and reduce recidivism.

1. *Erosion of Community Support Systems*

Research shows that those who maintain contact with their families during incarceration are more likely to reenter successfully.²⁴ As one researcher summarized, “Every known study that

²⁰ White House, Second Chances Fact Sheet, *supra* note 2; *see also* White House, Safer Communities Fact Sheet, *supra* note 2 (describing President Biden’s call on Congress to invest billions on services that help prevent crime, including “reentry services so people leaving prison can stabilize their lives and avoid recidivism”); Statement of Mignon Clyburn of the Fed. Comm’n’s Comm’n (2015), available at https://static.prisonpolicy.org/scans/Clyburn_FCC_Statement.pdf (in a statement on the high cost of phone calls, stating “[m]eaningful communication beyond prison walls helps to promote rehabilitation and reduce recidivism”).

²¹ White House, Second Chances Fact Sheet, *supra* note 2.

²² White House, Safer Communities Fact Sheet, *supra* note 2.

²³ Proposed Rule, 88 Fed. Reg. at 1331.

²⁴ *See, e.g.*, Leah Wang, “Research roundup: The positive impacts of family contact for incarcerated people and their families,” Prison Pol’y Initiative Blog, (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ (“As with visitation, family phone calls are shown to

has been able to directly examine the relationship between a prisoner’s legitimate community ties and recidivism has found that feelings of being welcome at home and the strength of interpersonal ties outside prison help predict postprison adjustment.”²⁵ Indeed, the Bureau itself notes on its website that “[s]tudies show that when inmates maintain relationships with friends and family, it greatly reduces the risk they will recidivate.”²⁶ In recognition of the importance of communication with loved ones outside prison, jurisdictions around the country have started to make phone calls free,²⁷ and Congress passed legislation to clarify the Federal Communications Commission’s ability to regulate rates charged for phone and video calls from correctional facilities.²⁸

In contrast to state and Congressional efforts in this area, the Bureau’s proposal to garnish 25% (or more) of prison wages, take 75% of funds that incarcerated people receive from family and friends, and eliminate the \$75 set-aside for telephone calls would undoubtedly hinder incarcerated people’s ability to communicate with their loved ones. Often, incarcerated callers pay for calls with money from their trust accounts, hence the importance of protecting funds for phone calls and other communications.²⁹ The proposed changes would be all the more disruptive to incarcerated people’s relationships with loved ones on the outside because they would come

reduce the likelihood of recidivism; more consistent and/or frequent phone calls were linked to the lowest odds of returning to prison.”); Barrick, et al., *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, The Prison Journal (2014), available at <https://web.archive.org/web/20211228235145/http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.925.34&rep=rep1&type=pdf> (study of incarcerated women finding that those who had any phone contact with a family member were less likely to be reincarcerated within the five years after their release); Shanahan & Villalobos Agudelo, *supra* note 17.

²⁵ Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 246 (2006) (emphasis in original).

²⁶ Bureau of Prisons, “Stay in Touch” (last visited Mar. 12, 2023), available at <https://www.bop.gov/inmates/communications.jsp>; *see also id.* (stating that “[t]hrough phone contact, inmates are able to maintain or develop their relationships with their children, family, and friends,” and noting that [t]hese relationships are important to an individual’s reentry success”).

²⁷ New York City, Los Angeles, San Francisco, San Diego, and Miami have made jail phone calls free, and Connecticut and California took this step for their prison populations. *See* Daniel A. Rosen, *Connecticut Makes All Prison Communications Free, Makes History*, Prison Legal News (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/connecticut-makes-all-prison-communications-free-makes-history/> (discussing New York City, Los Angeles, San Francisco, San Diego, and Connecticut legislation); Senate Bill 1008, available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1008 (California law); <https://worthriser.org/pressreleases/in-a-9-2-vote-miami-dade-commissioners-approve-plan-to-make-jail-communications-free> (discussing Miami ordinance). Many other states have introduced legislation that would do the same. *See, e.g.,* S.D. 1441, *An Act to Keep Families Connected*, available at <https://malegislature.gov/Bills/193/SD1441> (would provide telephone calls at no cost to people in Massachusetts prisons and jails).

²⁸ Signed on January 5, 2023, the Martha Wright-Reed Just and Reasonable Communications Act of 2022 clarifies that the FCC has authority to regulate in-state calls placed from correctional facilities (a federal court had ruled that the FCC had authority to regulate only interstate calls), as well as confirms that the FCC has authority to regulate video calls. Martha Wright-Reed Just and Reasonable Communications Act of 2022, S. 1541, Public Law No: 117-338, available at <https://www.congress.gov/bill/117th-congress/senate-bill/1541/text>.

²⁹ Bureau of Prisons, “Stay in Touch” (last visited Mar. 12, 2023), available at <https://www.bop.gov/inmates/communications.jsp> (explaining that “[o]rdinarily, the inmate pays for the calls; but in some cases the receiving party pays”).

into effect soon after the end of policy of allowing free phone calls due to the Covid-19 pandemic.³⁰

The Proposed Rule would thus put the Bureau out-of-step with the Biden Administration on pursuing its reentry and anti-recidivism goals.

2. *Depletion of Financial Resources Available Upon Release*

The Proposed Rule would also undermine successful reentry by reducing the financial resources people will have available upon their release from Bureau custody—including by taking most of the money that their friends and family send and garnishing a significant portion of already-meager prison wages. As the Bureau recognizes, “the availability of financial resources” is a key component of planning for reentry.³¹ Research bears this out. People need money upon release to pay for essentials like getting something to eat and transportation home³² from prison. They also need money for necessities like paying for rent (and often start-up fees for new housing upon release, like security deposits, application fees, and first and last month’s rent), a cell phone, clothing, and transportation to job interviews.

Even with some funds, justice-involved individuals will face significant barriers to securing employment, including their criminal records³³ and time out of the workforce. People who have spent time in prison have lower earning potential for the rest of their lives.³⁴ Accordingly, ensuring that people have funds available when they leave incarceration is part of the bare minimum for supporting successful reentry.

³⁰ 28 C.F.R. § 540.106(a), Video visiting and telephone calls under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, available at <https://www.ecfr.gov/current/title-28/chapter-V/subchapter-C/part-540/subpart-I/section-540.106> (providing that “During the ‘covered emergency period’ as defined by the CARES Act with respect to the coronavirus disease (COVID-19), when the Attorney General determines that emergency conditions will materially affect the functioning of the Bureau of Prisons (Bureau), the Bureau may, on a case-by-case basis, authorize inmates to conduct visitation through video teleconferencing and telephonically, *free of charge to inmates*, notwithstanding provisions in part 540 to the contrary”) (emphasis added); *see also* Fontanez, *supra* note 13 (noting that phone calls are currently free).

³¹ Proposed Rule, 88 Fed. Reg. at 1331.

³² The Bureau’s website notes that “[s]ome inmates will be eligible for . . . money for transportation to their release destination.” Bureau of Prisons, “Reentry Programs” (last visited Mar. 12, 2023), available at https://www.bop.gov/inmates/custody_and_care/reentry.jsp. It is thus clear that some people must pay for their own transportation, though it is not clear how many.

³³ *See, e.g.*, sources cited in note 19, *supra*. *See also* Bruce Western, Nat’l Crim. Just. Reference Serv., *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228584.pdf> (showing that a person who has a criminal record is only half as likely to get a call back or job offer as a result); Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, *Annals of the Am. Acad. of Pol. & Soc. Sci.* 195, 199 (2009) (noting that the negative effect of having a record is roughly twice as large for Black job-seekers as it is for their white counterparts).

³⁴ People who have spent time in prison see their subsequent annual earnings reduced by an average of 52 percent, earning nearly half a million dollars less over the course of their careers. Terry-Ann Craigie, et. al., Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality* (Sept. 15, 2020), available at <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>. *See also* Leah Wang, “Both sides of the bars: How mass incarceration punishes families,” *Prison Pol’y Initiative Blog* (Aug. 11, 2022), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/.

The Proposed Rule does not, however, do anything to ensure that people will have financial resources at their disposal upon their release from Bureau custody. Instead, the Proposed Rule would significantly diminish financial resources available to people upon release. While the Bureau says it is “separately exploring methods to encourage inmates to set aside and/or maintain a limited amount of funds specifically for reentry assistance, which would be encumbered until reentry and treated differently for purposes of the IFRP,”³⁵ deferring such potential protections to some future, unspecified proceeding—instead of incorporating them into the rule presently under consideration—fails to prioritize reentry or ensure that such protections will be incorporated.

Kicking this can down the road is particularly concerning considering that Congress passed legislation over four years ago *requiring* the Bureau to implement reforms to better protect inmate resources for reentry. Specifically, as the Bureau notes in the Supplementary Information, the First Step Act of 2018 requires that people incarcerated in federal prisons have 15 percent of their compensation from UNICOR jobs “reserved and made available” to assist them with reentry, yet the Bureau still has not acted.³⁶

In sum, the Proposed Rule would severely undercut, rather than advance, the Biden Administration’s, Congress’s, and its own critical reentry goals.

B. The Proposed Rule Would Undermine the Administration’s Equity Goals

President Biden has also made advancing racial equity and supporting underprivileged communities a pillar of his Administration.³⁷ On the first day of his presidency, he ordered all executive agencies—including the Bureau—to work to redress inequities in their own policies and programs, including ensuring fair and just treatment of “Black, Latino, . . . and persons otherwise adversely affected by persistent poverty or inequality.”³⁸ As recently as last month, he issued an executive order “Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government.”³⁹ Yet the Proposed Rule would disproportionately harm poor people and people of color—and women of color in particular—and the BOP fails to demonstrate that it has considered the equity impact of the rule and alternatives to reduce inequitable impact.

If the Proposed Rule were adopted, family members of incarcerated people would lose at least 75% of the funds that they send to their incarcerated loved ones. Family members send their

³⁵ Proposed Rule, 88 Fed. Reg. at 1331.

³⁶ Proposed Rule, 88 Fed. Reg. at 1331 (noting that “section 605(c) of the First Step Act of 2018 (Pub. L. 115–391) . . . amended 18 U.S.C. 4126(c)(4) to indicate that inmates who work for Federal Prison Industries (FPI, operating under the trade name UNICOR) will have 15 percent of their compensation reserved and made available to assist them with costs associated with release from prison”) (footnote omitted).

³⁷ Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>.

³⁸ *Id.*

³⁹ White House, “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” (Feb. 16, 2023), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

incarcerated loved ones money to help pay for a variety of expenses discussed above.⁴⁰ Research has shown that one in three families with an incarcerated loved one goes into debt trying to pay for calls and visits alone⁴¹—and this figure does not even factor in additional costs such as commissary purchases. Women—and as a result of the racial disparities throughout the criminal legal system,⁴² disproportionately women of color—overwhelmingly bear these costs.⁴³ These are generally mothers and wives who are simply trying to stay connected to their family and ensure their family can meet basic needs, yet this garnishment of their funds would effectively force them to pay for the costs of the criminal justice system and for restitution that they bear no responsibility for. Thus, running counter to the administration’s equity goals, women of color stand to be one of the populations that the Proposed Rule most adversely impacts.

Although only a very small portion of the federal prison population likely has any significant resources to contribute toward payment of court debts,⁴⁴ the Proposed Rule would sweep broadly. It would take 75% of community funds, and 25% to 50% of wages not only from the small minority of wealthy incarcerated people but from the entire federal prison population, who are disproportionately “Black, Latino, . . . and persons otherwise adversely affected by persistent poverty or inequality.”⁴⁵ People incarcerated in federal prison are disproportionately people of color. Black people make up only 13.6% of the U.S. population⁴⁶ but are 38.4% of the federal prison population.⁴⁷ Similarly, Hispanic people make up only 18.9% of the U.S. population⁴⁸ while comprising 30.3% of the federal prison population.⁴⁹ The Proposed Rule is thus likely to

⁴⁰ See Part I, *supra*.

⁴¹ Saneta deVuono-powell, et al., Ella Baker Center for Human Rights, Who Pays? The True Cost of Incarceration on Families 30 (2015), available at <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf> at 30 (“One in three families (34%) [who participated in the study] reported going into debt to pay for phone calls or visitation.”).

⁴² “People of color are more likely to be arrested, convicted, and sentenced more harshly than are white people, which amplifies the impact of collateral consequences on this population.” U.S. Comm’n on Civil Rights, Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities 19 (June 2019) <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf>.

⁴³ DeVuono-powell, et al., *supra* note 41 at 30 (“Eighty-two percent of survey participants reported that family members were primarily responsible for phone and visitation costs. Of the family members who were responsible for the costs, 87% were women.”). See also Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace, *supra* note 1, at 3 (“The financial burdens [of interacting with the criminal legal system] fall disproportionately on people of color, women, and people with lower incomes.”).

⁴⁴ See Part I, *supra*.

⁴⁵ Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>. See also Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace 3 (2022), available at https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf (“The financial burdens [of interacting with the criminal legal system] fall disproportionately on people of color, women, and people with lower incomes.”).

⁴⁶ U.S. Census Bureau, Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US#> (data from July 1, 2022).

⁴⁷ Bureau of Prisons, Inmate Statistics (Jan. 21, 2023), available at https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

⁴⁸ U.S. Census Bureau, Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US#> (data from July 1, 2022).

⁴⁹ Bureau of Prisons, Inmate Statistics (Jan. 21, 2023), available at https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

disproportionately harm precisely those populations the Biden Administration has ordered the Bureau to devise policies and programs to better support.

In addition, the Bureau requires unit managers, associate wardens, and wardens to make highly discretionary determinations throughout the process.⁵⁰ Yet numerous studies have found that increased discretion in the criminal legal system can contribute to harmful racial disparities in treatment.⁵¹

It is possible that those who are owed restitution are also members of disadvantaged communities, which could be considered in an equity analysis. Demographic information about victims of federal crimes who are owed restitution is not publicly available, however, nor does the Bureau appear to have considered such information. In contrast, the Bureau has significant information available demonstrating that the incarcerated population in its care are disproportionately economically disadvantaged and from disadvantaged racial and ethnic groups. It is also worth noting that although restitution is often assumed to consist of money actually transmitted to individual victims of crime, in many instances it is in fact paid to government agencies or insurance companies. Aside from restitution, most of the legal financial obligations targeted by the IFRP are also paid to government entities.⁵²

⁵⁰ Proposed Rule, 88 Fed. Reg. at 1332 (justifying the proposed elimination of the provision reserving \$75 for phone calls on the ground that “the concern that inmates without funds will be blocked from telephone use is remedied” by the fact that the warden “has the discretion” to provide such incarcerated people with more than one call per month, and “the government may bear the expense of inmate telephone use under compelling circumstances”), 1333 (stating that Bureau staff would “work with inmates to structure a reasonable payment plan that is attainable for the inmate, in light of any funds coming into the account (whether from inmate work assignment pay or through outside sources) and any reasonable expenditures required by the inmate”), 1334 (providing that although incarcerated people would be expected to give 75% of community funds to the IFRP process, “these percentage allotments may be altered on a case-by-case basis, as approved by the unit manager in consultation with the associate warden of the inmate’s institution”), and 1335 (stating that staff would have “flexibility to adjust an inmate’s financial plan during the interim period between program review meetings in the event the inmate’s circumstances change (for example, a change in institution work assignment)”).

⁵¹ See, e.g., Elizabeth Tsai Bishop, et al., Harvard Law School Criminal Justice Policy Program, *Racial Disparities in the Massachusetts Criminal System*, 63–64 (Sept. 2020), available at <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (conducting regression analysis on data of people incarcerated in Massachusetts state prisons and finding “the evidence is most consistent with Black and Latinx defendants receiving more severe initial charges than White defendants for similar conduct,” which then translates into longer incarceration sentences for similar offenses); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. of Pol. Econ. 1320, 1323 (2014) (studying the federal system and finding that racial disparities in how prosecutors charge people with offenses carrying mandatory minimum sentences were a major driver of sentencing length disparities); Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 4 J. of Res. in Crime and Delinquency 427, 442 (2007) (studying the exercise of prosecutorial discretion to bring charges carrying mandatory minimum sentences in Pennsylvania and finding Latinx people were nearly twice as likely to receive a mandatory sentence as white people); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & Soc’y Rev. no. 4, 733–64 (2001), available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/judging-judicial-discretion-legal-factors-and-racial-discrimination> (using modeling to isolate the part of the sentencing variation that is due to the discretion of the judge (or other criminal justice agent such as a prosecutor) in a data set comprised of sentenced offenders in Maryland during an eight-year period, and finding that Black people had 20% longer sentencing than white people on average, holding constant age, gender, and recommended sentence length from the sentencing guidelines).

⁵² 28 C.F.R. § 545 provides: “The financial plan developed shall be documented and will include the following obligations, ordinarily to be paid in the priority order as listed:

C. The Proposed Rule Would Harm Children—Disproportionately Poor Children of Color

The majority of people incarcerated in federal prisons have minor children. According to a 2021 Bureau of Justice Statistics report, 57% of people incarcerated in federal prisons have one or more dependent children.⁵³ In total, 221,600 minor children have one or more parent in federal prison.⁵⁴ By authorizing increased seizure of funds from low-income incarcerated parents of dependent children and the loved ones who support them, the Proposed Rule risks causing unnecessary additional harm to these nearly quarter-million children.

Even without the effects of the Proposed Rule, “[c]hildren of incarcerated parents experience more economic instability and are more likely to become poor.”⁵⁵ More than half of all incarcerated people were the primary income providers for their families before being imprisoned.⁵⁶ But because incarcerated people make little or no money, “incarceration usually means a sharp decline in (or the complete loss of) family income.”⁵⁷ Unsurprisingly, “[t]he overwhelming majority of children with incarcerated parents have restricted economic resources available for their support.”⁵⁸

The Proposed Rule would further deplete these limited financial resources. First, more of their incarcerated parents’ meager wages would be diverted away from maintaining contact with, or otherwise supporting, their children. Worse still, the Proposed Rule would take 75% of community funds. Accordingly, if the child’s non-incarcerated caregiver wants to allow a child to communicate with their incarcerated parent for the equivalent of \$25 in phone time or TRULINCS usage,⁵⁹ they would have to send \$100 to the incarcerated parent under the Proposed Rule—the equivalent of 300 percent inflation. The result of this unfortunate policy would be that children who are already experiencing financial and emotional hardship due to their parent’s

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- (1) Special Assessments imposed under 18 U.S.C. 3013;
 - (2) Court-ordered restitution;
 - (3) Fines and court costs;
 - (4) State or local court obligations; and
 - (5) Other federal government obligations.

⁵³ Laura M. Maruschak, et al., Bureau of Justice Statistics, *Parents in Prison and Their Minor Children: Survey of Prison Inmates*, 2016, at 1 (Mar. 2021), available at <https://bjs.ojp.gov/content/pub/pdf/pptmcspl16st.pdf>.

⁵⁴ *Id.* at 2.

⁵⁵ Leila Morsy & Richard Rothstein, *Econ. Pol’y Institute, Mass incarceration and children’s outcomes: Criminal justice policy is education policy* (Dec. 15, 2016), available at <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/> (footnote omitted).

⁵⁶ *Id.* (citation omitted).

⁵⁷ Wang, “Both sides of the bars,” *supra* note 34.

⁵⁸ Eric Martin, *Nat’l Institute of Just., Hidden Consequences: The Impact of Incarceration on Dependent Children* (Mar. 1, 2017), available at <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>.

⁵⁹ As we understand the “trust fund limited inmate computer system,” or “TRULINCS,” incarcerated users are the only ones who can pay the required user fees. *See* Bureau of Prisons, “TRULINCS Topics: Funding,” <https://www.bop.gov/inmates/trulincs.jsp> (last visited Mar. 9, 2023).

incarceration would either have even fewer financial resources, or else have even less ability to connect with their parent.

In other contexts, the federal government has recognized that family members who are not liable for a debt should not have their funds seized to pay it.⁶⁰ Such policies generally recognize the need to protect children, who are not responsible for their parents and have no control over their parents' incarceration. In contrast to these generally accepted principles, the Proposed Rule would punish children through government seizure of 75% of the funds their caregiver provides to help maintain family connections.

Finally, it is worth noting the impact of parental incarceration is disproportionately borne by children of color. As one study notes, “[b]y the age of 14, approximately 25 percent of African American children have experienced a parent—in most cases a father—being imprisoned for some period of time. The comparable share for white children is 4 percent.”⁶¹ Accordingly, the Proposed Rule would likely disproportionately harm children of color.

III. THE BUREAU SHOULD RECONSIDER MOST OF ITS PROPOSED CHANGES TO THE IFRP

Most aspects of the proposed changes to the IFRP regulations would unfairly harm all people in the Bureau's custody for the sake of reining in a very small number of comparatively wealthy outliers. Below, we discuss our concerns with the following proposed changes to paragraph (b) of 28 C.F.R. § 545.11:

- (1) the introductory paragraph (elimination of the \$75 set-aside for phone calls),
- (2) the proposed addition of language regarding one-time payments,
- (3) the proposed revision of language regarding development of payment plans (garnishing of at least 50% of pay from UNICOR work in grades 1 through 4 and at least 25% of pay from UNICOR grade 5 or non-UNICOR work), and
- (4) the proposed revision of language regarding development of payment plans (garnishment of at least 75% of funds from community resources).

We raise additional concerns with aspects of the current IFRP regulations, which the Bureau has left intact, concerning the effects of non-participation in the program.

We note that we do not object to the Bureau's proposal to delete paragraph (d)(7) of 28 C.F.R. § 545.11 (“language requiring quartering in lowest housing status as an effect of non-participation

⁶⁰ The Internal Revenue Service (“IRS”), for example, protects tax refunds from being seized from “injured spouses” who are not liable for a debt. Internal Revenue Manual, I.R.M., 25.18.5 Injured Spouse, *Community Property, Injured Spouse*, available at https://www.irs.gov/irm/part25/irm_25-018-005 (IRS on “injured spouses”); 31 C.F.R. § 285.2, available at <https://www.govinfo.gov/content/pkg/CFR-2021-title31-vol2/pdf/CFR-2021-title31-vol2-sec285-2.pdf> (advising a “nondebtor spouse who may have filed a joint tax return with the debtor of the steps which a non-debtor spouse may take in order to secure his or her proper share of the tax refund”).

⁶¹ Morsy & Rothstein, *supra* note 55; *see also* Maruschak, et al., *supra* note 52 at 2 (“Among federal prisoners, about 3 in 5 black (64%) and Hispanic (64%) males and 3 in 10 white (34%) males were fathers with minor children. Nearly 7 in 10 Hispanic (67%) females in federal prison were mothers with minor children, compared to about 1 in 2 white (49%) and black (54%) females.”).

in IFRP”) or to delete paragraph (d)(8) of 28 C.F.R. § 545.11 (“deletion of language prohibiting placement in community-based programs as an effect of non-participation in IFRP”).

A. Elimination of the \$75 Set-Aside for Phone Calls

Under the current rule, Bureau staff subtract \$75 per month when computing the amount of funds an incarcerated person has available to pay for legal financial obligations. The Bureau explains that a \$50 set-aside provision was enacted in 1994 “to ensure that inmates could maintain telephonic communication with their families,” and the reserved amount was increased to \$75 in 1999.⁶² The Bureau now proposes to eliminate this provision.

The undersigned strongly oppose this proposed change for numerous reasons. First, as discussed in Part III.A.1 immediately below, the reasons the Bureau offers for why the \$75 reserved for phone calls are unsound. Second, as discussed above in Part II, this change would be counterproductive: it would hinder successful reentry, run counter to the Biden administration’s equity goals, and disproportionately harm poor children of color.

1. The Bureau’s Reasoning for Eliminating this Provision Is Flawed

The Bureau advances two main reasons in support of its proposal to eliminate the \$75 reservation provision. We discuss each reason below and explain its flaws.

a. The Bureau Puzzlingly Asserts the \$75 Set-Aside Is No Longer Necessary Because of Regulations that Have Been in Place Since the Set-Aside Provision Was First Promulgated

The Bureau asserts that “several developments since the initial creation” of the set-aside provision for phone calls “have rendered it unnecessary and obsolete.”⁶³ It points specifically to two “safeguards that currently exist in 28 CFR part 540”⁶⁴ as remedying “[t]he concern that inmates without funds will be blocked from telephone use.”⁶⁵

The problem with the Bureau’s reasoning is that these safeguards in 28 C.F.R. § 540.105(b) and (d) are not “developments.” They did not come into existence after the \$50 reservation provision was promulgated in 1994 or after the reserved amount was increased to \$75 in 1999. Rather, as the Supplementary Information acknowledges, these safeguards existed in 1994 when the Bureau created the reservation provision in the first instance. Not only did they exist, but the Bureau pointed commenters to them when promulgating the 1994 rule. As the Bureau explains in the Supplementary Information:

⁶² Proposed Rule, 88 Fed. Reg. at 1332.

⁶³ Proposed Rule, 88 Fed. Reg. at 1332.

⁶⁴ Proposed Rule, 88 Fed. Reg. at 1333 (“Therefore, because of the safeguards that currently exist in 28 CFR part 540 to allow inmates without funds access to telephone calls to maintain family contact, the proposed amendments would delete provisions in 28 CFR part 545 requiring that inmate funds be specifically reserved for this purpose.”).

⁶⁵ Proposed Rule, 88 Fed. Reg. at 1332. These safeguards are: (1) under 28 C.F.R. § 540.105(b), the warden must permit one collect call per month for inmates without funds and has the discretion to increase that number; and (2) under 28 C.F.R. § 540.105(d), the government may bear the expense of inmate telephone use under compelling circumstances.

In the 1994 final rule, the Bureau also assured commenters that inmates without funds would have access to the telephone system, referring to amendments to 28 CFR 540.105, Expenses of inmate telephone use[,], Paragraph (b) . . . [and] Paragraph (d)[.]⁶⁶

Given that these safeguards existed when the Bureau created the set-aside provision, how can they be an excuse for eliminating it now? Put another way, the Bureau errs in reasoning that “developments since the initial creation of this [set-aside] provision” for phone calls “have rendered it unnecessary and obsolete,”⁶⁷ because the “developments” to which it refers are not developments at all.

The fact that the Bureau decided to increase the reserved amount from \$50 to \$75 shortly after it created the original \$50 reservation further undermines the Bureau’s reasoning. Clearly the Bureau deemed the safeguards in 28 C.F.R. § 540.105(b) and (d) insufficient to ensure that incarcerated people were able to communicate with their families, because the Bureau decided it should increase the reserved amount by 50% just two years later.⁶⁸

It is certainly true that there have been significant developments since the reservation provision was first created in 1994. But these developments militate in favor of *increasing* the reservation amount, not eliminating the provision entirely. Considerable research since 1994 has demonstrated that maintaining contact with family members during incarceration is important to successful reentry.⁶⁹ This research suggests efforts should be made to foster more contact with loved ones; eliminating the reservation provision would do the opposite.

Finally, contrary to the Bureau’s assertion, the two safeguard provisions in 28 C.F.R. § 540.105 do not alleviate “[t]he concern that inmates without funds will be blocked from telephone use.”⁷⁰ One provision gives the warden discretion to provide indigent people with more than the requisite minimum *one call per month*, and the other allows the warden to “direct the government to bear the expense of inmate telephone use or allow a call to be made collect under compelling circumstances such as when an inmate has lost contact with his family or has a *family emergency*.”⁷¹ These very minimal provisions are wholly inadequate measures for ensuring that low-income people can maintain reasonable communication with their families, particularly in the absence of any data about how frequently wardens have exercised their discretion under these amendments in the nearly 30 years since their enactment.

⁶⁶ Proposed Rule, 88 Fed. Reg. at 1332.

⁶⁷ *Id.*

⁶⁸ The Bureau increased the reserved amount from \$50 to \$75 via an interim rule in 1996. The 1996 interim rule was finalized in 1999. Proposed Rule, 88 Fed. Reg. at 1332.

⁶⁹ See Part II.A.1, *supra*.

⁷⁰ Proposed Rule, 88 Fed. Reg. at 1332.

⁷¹ 28 C.F.R. § 540.105(b) and (d); Proposed Rule, 88 Fed. Reg. at 1332.

b. The Bureau Also Claims the \$75 Set-Aside Is No Longer Necessary Because of a Settlement Agreement that Expired in 2002

The Bureau provides a second line of reasoning in support of its proposed elimination of the \$75 reservation provision. The Supplementary Information states:

On January 2, 1996, the Bureau increased the reserved amount from \$50 to \$75 in an interim rule with a request for comments. (*See* 61 FR 90). This amendment was the direct result of the terms of a settlement approved by the district court in a nationwide federal prisoner class action, *Washington v. Reno*, Nos. 93-217, 93-290 (E.D. Ky. Nov. 3, 1995). The 1996 interim rule was finalized on December 28, 1999 (64 FR 72798). However, the settlement agreement, according to its terms, expired in 2002, four years after the installation of the Bureau's second nationwide inmate telephone system.⁷²

This line of reasoning is puzzling. The expiration of the settlement agreement of course has no legal effect on the 1999 rule that finalized the \$75 reservation provision. And we assume the Bureau does not suggest otherwise. Nor should the expiration of the settlement agreement itself indicate that the \$75 reservation provision is no longer necessary. The Bureau knew that the settlement agreement was going to expire when it created the interim rule in 1996 and when it finalized the rule in 1999.⁷³ Accordingly, the Bureau would have already taken into account the fact that the settlement agreement was going to expire when promulgating the rule.

The Bureau also asserts that “[w]ithin the first few years of the implementation of [its] telephone system, inmates were able to acclimate to the need to adjust IFRP payments and funds in their account in a way that allowed them to retain sufficient funds to use for telephone calls and other needs while incarcerated.”⁷⁴ To the extent the Bureau is claiming that the \$75 reservation provision is no longer necessary because incarcerated people have been “able to acclimate” to the prison phone system, this reasoning also makes little sense. The \$75 reservation provision has been in place for over twenty years, so if people incarcerated in federal prisons have gotten acclimated to anything, it is having \$75 reserved per month for phone calls.

Finally, at the end of the section explaining the Bureau's reasoning for proposing to eliminate the \$75 reservation provision, the Bureau states that “[r]etaining sufficient funds to cover basic inmate needs during incarceration remains a priority when developing and updating an inmate's IFRP payment plan.”⁷⁵ But this assertion is not reflected in the Bureau's proposed change: the Bureau proposes to eliminate the reservation provision without replacing it with another mechanism for protecting people's ability to cover even their communications needs, much less their other basic subsistence costs.⁷⁶

⁷² Proposed Rule, 88 Fed. Reg. at 1332.

⁷³ The BOP acknowledges this when it states that the 1996 interim rule “was the direct result of the terms of the settlement,” and “the settlement agreement, according to its terms, expired in 2002.” Proposed Rule, 88 Fed. Reg. at 1332.

⁷⁴ Proposed Rule, 88 Fed. Reg. at 1332–33.

⁷⁵ Proposed Rule, 88 Fed. Reg. at 1333.

⁷⁶ It is also troubling that the Bureau does not provide details as to what it believes “basic inmate needs” comprise. Proposed Rule, 88 Fed. Reg. at 1333. Thus, commenters cannot meaningfully evaluate and comment upon whether

2. *Eliminating the Reservation Provision Would Undermine the Biden Administration and Bureau’s Goals and Cause Unnecessary Harm*

Not only is there a lack of sound reasoning in favor of eliminating the \$75 reservation provision, but there are also good reasons against doing so. First, as discussed in more detail in Part II.A.1, *supra*, eliminating this provision would hinder successful reentry by further limiting incarcerated people’s support systems and connections with the outside world.

Second, as discussed in Part II.B, *supra*, eliminating the reservation provision would run counter to the Biden Administration’s directives to advance racial equity and better support underprivileged communities. It would do so by (1) disproportionately harming the populations the Biden Administration has ordered the Bureau to devise policies and programs to better support—specifically, Black, Latinx, and poor people; and (2) relying heavily on wardens’ discretion to ensure that people are able to access enough phone calls, which can contribute to racially disparate treatment. This reliance on discretionary determinations would also add to the inefficiency of the Proposed Rule, as discussed in Part V.E.2, *supra*.

Finally, eliminating this provision would harm children—disproportionately poor children of color. It would do so by reducing the amount of time children have to connect with their incarcerated parent over the phone, or at a minimum by injecting unnecessary uncertainty about how frequently or how long they will be able to speak with their parent. *See* Part II.C, *supra*.

B. Addition of Language Regarding One-Time Payments

The Bureau proposes to add language to the rule clarifying that “all [incarcerated people],” “regardless of the size of the financial obligation” should be “encouraged to make a one-time payment from available funds in [their] commissary account to satisfy any identified financial obligations.”⁷⁷ According to the Proposed Rule, if the person has the funds sufficient to satisfy a fine or restitution but refuses to make a one-time payment to do so during the initial classification and review of their financial obligations, the United States Attorney’s Office should be notified.⁷⁸

This proposed change seemingly could result in the complete draining of a person’s commissary account, leaving a person without any money for necessities like communications or subsistence items from the commissary. The Bureau does not appear to have contemplated or intended that

we agree that this is an appropriate definition of basic needs, much less whether the Proposed Rule would result in sufficient funds being left over to cover these needs. *See also id.* (noting that “staff work with inmates to structure a reasonable payment plan that is attainable for the inmate, in light of any funds coming into the account (whether from inmate work assignment pay or through outside sources) and any reasonable expenditures required by the inmate,” but without detailing what “reasonable expenditures” consists of).

⁷⁷ Proposed Rule, 88 Fed. Reg. at 1331, 1333.

⁷⁸ Proposed Rule, 88 Fed. Reg. at 1331, 1333.

their Proposed Rule could leave people with nothing in their account.⁷⁹ We recommend eliminating this provision in its entirety.

C. Garnishing at Least 50% of Pay from UNICOR Work in Grades 1 through 4 and at Least 25% of Pay from UNICOR Grade 5 or Non-UNICOR Work

The Bureau notes that under existing rules, many people employed in non-UNICOR assignments or a UNICOR grade 5 assignment make payments of \$25 per quarter and community resources are not taken into account.⁸⁰ In the Proposed Rule, the Bureau proposes removing the specified dollar amount altogether, and replacing it with a percentage system that dictates seizure of at least 50% of pay (for people holding UNICOR jobs in grades 1 through 4) or at least 25% of pay (for people holding UNICOR jobs in grade 5 or non-UNICOR assignments).⁸¹

As the Supplementary Information recognizes, incarcerated workers—even the highest paid workers—receive meager wages. The lowest paid UNICOR workers (grade 5) make \$0.23/hour and the highest paid UNICOR workers (grade 1) make \$1.15/hour. Workers in non-UNICOR jobs can make even less—from \$0.12/hour to \$0.40, depending on grade.⁸² The vast majority of eligible people do not have the (relatively) more desirable UNICOR assignments. Only 8% of work-eligible people participate in the UNICOR program; approximately 25,000 people are waiting to work those jobs.⁸³

Garnishing 25% or 50% of these low wages would not address the primary concerns that prompted the Proposed Rule. To the contrary, it would only hurt people’s ability to access necessities while incarcerated. Say, for example, that a person is a grade 3 UNICOR worker making \$0.69/hour. If none of their wages were garnished, it would take them almost 4 hours to purchase Ibuprofen from the commissary at USP Lewisburg.⁸⁴ Under the Proposed Rule, this person would have 50% of his wages garnished, effectively making his wages \$0.35/hour. He would have to work for over 7.5 hours—a full day’s work—to purchase the Ibuprofen from the commissary.

The federal government recently acknowledged in the student loan context that borrowers who make \$15/hour—or about 225% of the Federal poverty guidelines—should not have to make monthly payments on their student loans. As the government recognized, this would allow more borrowers to cover the cost of necessities.⁸⁵ The Bureau’s rule should similarly take into account the expenses and needs that incarcerated people have on the inside and outside of prison walls.

⁷⁹ For example, the Bureau justifies its proposal by asserting it “will more equitably account for each inmate’s specific obligations and resources while *leaving the inmate with some funds* to spend within the institution and/or save for re-entry purposes.” Proposed Rule, 88 Fed. Reg. at 1331, 1334 (emphasis added).

⁸⁰ Proposed Rule, 88 Fed. Reg. at 1331, 1333.

⁸¹ Proposed Rule, 88 Fed. Reg. at 1334–35.

⁸² Proposed Rule, 88 Fed. Reg. at 1333.

⁸³ Bureau of Prisons, “UNICOR,” available at https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited Feb. 14, 2023).

⁸⁴ USP/LEC Lewisburg, “Commissary List” (updated July 2022), available at https://www.bop.gov/locations/institutions/lew/lew_commlist.pdf?v=1.0.0 (one “BT Ibuprofen” costs \$2.65; the Commissary List does not specify how many pills are in one “BT”).

⁸⁵ Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894, 1902 (proposed Jan. 11, 2023).

Finally, it bears emphasizing that the nature of prison work—including the egregiously low wages paid for it—is already exploitative.⁸⁶ Seizing even more of the money generated by prison labor is both inequitable and draconian.

D. Confiscation of at Least 75% of Funds from Community Resources

The Proposed Rule would take 75% of the money that incarcerated people receive from family members and friends—referred to as “community resources”—and put these funds toward IFRP payments. This proposal is of dubious legality, as we explain in Part IV.A, *infra*. It is also bad policy.

First, the proposed confiscation of 75% of community funds would severely undermine the Biden Administration’s equity goals. People with large amounts of money in their trust accounts—whether from community contributions or otherwise—are the rare exception.⁸⁷ Many people in federal prison are struggling to make ends meet on the inside, and to support their families (financially, emotionally, or both) on the outside. Meanwhile, under the Proposed Rule, families that send funds to incarcerated loved ones would have to send four times as much money to provide the recipient with the same purchasing power. In this way the Proposed Rule would work a hardship on millions of disadvantaged people who are not incarcerated, but who are committed to supporting loved ones in the federal prison system.

The Bureau’s one-size-fits-all approach would act as a regressive penalty, disproportionately affecting poorer people in federal custody and making their imprisonment more difficult than their wealthier counterparts.⁸⁸ In addition to perpetuating wealth disparities and disproportionately harming poorer people, this proposed change would exacerbate racial inequities given that federal prisoners are disproportionately people of color, as are their support systems on the outside.⁸⁹ In these ways, the Bureau’s proposed change would go against the Biden Administration’s charge to his executive agencies to advance racial equity and support underprivileged communities.

Second, the proposed change would undermine reentry—and in turn, risk increasing recidivism—both by eroding incarcerated people’s community support systems and depleting the financial resources they would have available upon release.⁹⁰ Third, it would harm children—disproportionately poor children of color.⁹¹ Finally, seizure of community resources is administratively inefficient and would lead to inconsistent results across individuals and institutions.⁹²

⁸⁶ See, e.g., ACLU & Univ. of Chi. Glob. Hum. Rts. Clinic, *Captive Labor: Exploitation of Incarcerated Workers* (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

⁸⁷ See Part I, *supra*.

⁸⁸ See Part II.B, *supra*.

⁸⁹ See *id.*

⁹⁰ See Part II.A, *supra*.

⁹¹ See Part II.C, *supra*.

⁹² See Part V.B.2, *infra*.

For these reasons, we urge the Bureau to remove all provisions for seizure of community resources from the rule.

IV. THE PROPOSED RULE SUFFERS FROM NUMEROUS FATAL LEGAL DEFICIENCIES

In addition to the normative failings discussed above, the Proposed Rule is legally defective under the APA and other applicable law, for the reasons addressed in this section.

A. The Bureau Lacks Authority to Seize Community Resources

It is an axiomatic principle of federal administrative law that an agency can only issue rules pursuant to a clear authorization by Congress. Courts can and will set aside agency actions that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”⁹³ The Proposed Rule speaks broadly of two sources of funds that would be confiscated under the IFRP: wages and “non-institution (community) resources.”⁹⁴ Community resources include “deposits received into . . . commissary accounts from sources outside the institution,”⁹⁵ such as assistance from relatives. The Bureau has failed to demonstrate that it has any statutory authorization to seize community resources and divert them to the IFRP.

The Bureau’s Supplementary Information accompanying the Proposed Rule conspicuously lacks any reference to a statutory authority. The actual text of the Proposed Rule retains existing language, from 28 C.F.R. § 545, that cites seventeen statutes (plus a series of repealed statutes) as general authority for the IFRP;⁹⁶ but none of these statutes allow the Bureau to seize community resources. The statutes cited as authority in the existing rule are summarized in the following table:

Statute(s)	Contents
5 U.S.C. § 301	General delegation of authority to make rules relating to <i>government</i> property, employees, and operations. No grant of power to interfere with private property rights.
18 U.S.C. §§ 3013, 3571, and 3663	Grants courts the ability to impose certain assessments and fines; outlines related procedures. No delegation of any power to the executive branch.
18 U.S.C. § 3572	General statute regarding criminal fines; does not include any delegation of power to the executive branch. ⁹⁷

⁹³ 5 U.S.C. § 706(2)(C).

⁹⁴ Proposed Rule, 88 Fed. Reg. at 1333–34.

⁹⁵ Proposed Rule, 88 Fed. Reg. at 1334.

⁹⁶ Proposed Rule, 88 Fed. Reg. at 1336 (listing the authority for the IFRP as “5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3572, 3621, 3622, 3624, 3632, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.”)

⁹⁷ Notably, 18 U.S.C. § 3572(d)(3) requires a defendant to “notify the court of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay the fine.” The court is then directed to “adjust the payment schedule . . . as the interests of justice require.” If the Proposed Rule were actually implementing this statute, then it seems that it would include a system to facilitate the reporting of changed circumstances to the sentencing court.

18 U.S.C. § 3621	General statute regarding placement of sentenced individuals with the Bureau. Authorizes the Bureau to determine the place of confinement, but contains no <i>general</i> grant of authority to the Bureau. ⁹⁸
18 U.S.C. § 3622	Authorizes temporary release of incarcerated persons. ⁹⁹
18 U.S.C. § 3624	Specifies procedures related to releasing people from custody, but does not mention financial affairs except to require the Bureau to provide financial assistance under certain conditions.
18 U.S.C. § 3632	First Step Act’s “risk and needs assessment system” requirement. No authority is delegated to seize private property; and, for the reasons discussed <i>supra</i> , at Part II.A.2, the Proposed Rule conflicts with the Bureau’s obligations under the First Step Act.
18 U.S.C. §§ 4001 and 4042; 28 U.S.C. §§ 509 and 510	General enabling statutes for the Department of Justice and the Bureau. Some of the provisions in title 18 direct the Bureau to house and care for incarcerated people, and authorize the Bureau to “discipline” incarcerated people. While discipline may entail seizure of property as a consequence of misconduct in prison, nothing in these statutes allows the Bureau to indiscriminately seize property in the absence of a disciplinary proceeding.
18 U.S.C. § 4081	Authorizes the Bureau to “provid[e] an <i>individualized</i> system of discipline, care, and treatment of the persons committed” to the federal prison system (emphasis added). The Proposed Rule’s unyielding uniformity is antithetical to the statutory requirement of individualized treatment.
18 U.S.C. § 4082	Concerns escape and intergovernmental relations; no authorization to seize property.
18 U.S.C. § 4126	Financial management of the Prison Industries Fund; no reference to individual persons’ funds.
18 U.S.C. §§ 5006-5024	Repealed by Pub. L. 98-473, § 218, 98 Stat. 1837, 2027 (1984). Unclear why the Bureau still includes this as a statutory authorization.
18 U.S.C. § 5039	Prohibits incarceration of juveniles in adult facilities. No apparent relation to the Proposed Rule.

A careful reading of these statutes reveals *no* grant of authority by which the Bureau can seize property other than wages. Indeed, the IFRP was originally developed as a rule related to “inmate work and performance pay.”¹⁰⁰ Consistent with this framing, courts that have upheld the legality of the IFRP have relied on the Bureau’s statutory authority to operate *employment* programs for incarcerated people.¹⁰¹ Courts have recognized that this authority extends to

⁹⁸ In fact, 18 U.S.C. § 3621 is notable for its specificity in granting the Bureau programmatic authority. This statute directs the Bureau to provide substance abuse treatment, sex offender treatment, reentry programs, and medical care. Under the principle of *expressio unius est exclusio alterius*, Congress’s mention of several types of programs while conspicuously omitting financial management of incarcerated peoples’ funds strongly indicates that § 3621 does not authorize the IFRP. See *Beverly Enterprises v. Herman*, 119 F.Supp. 2d 1, 5, n.5 (D.D.C. 2000) (application of the *expressio unius* maxim in administrative law cases).

⁹⁹ 18 U.S.C. § 3622(c) may authorize some aspects of the IFRP with respect to incarcerated people who have paid employment outside of prison, but has no applicability to any other people held by the Bureau.

¹⁰⁰ 49 Fed. Reg. 38914 (Oct. 1, 1984) (publication of final rule establishing the IFRP).

¹⁰¹ See e.g., *Weinberger v. U.S.*, 268 F.3d 346, 360 (6th Cir. 2001) (“The IFRP is a work program instituted by the Bureau of Prisons”); *U.S. v. Williams*, 996 F.2d 231, 234-235 (10th Cir. 1993) (describing IFRP as a method of diverting “up to one-half of [plaintiff’s] meager earnings” toward restitution); *Dorman v. Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992) (per curiam) (upholding constitutionality of IFRP due to the Bureau’s authority “to set the terms and conditions of prison employment”); *James v. Quinlan*, 866 F.2d 627, 629-630 (3d Cir. 1989) (upholding constitutionality of IFRP because plaintiffs had neither liberty nor property interests “in their Federal Prison Industries job assignments”); *Phillips v. Booker*, 76 F. Supp.2d 1183, 1193 (D. Kan. 1999) (denying challenge to IFRP because incarcerated plaintiff “has no right to a UNICOR job without meeting the prerequisite of participation in the IFRP”); *Prows v. U.S. Dept. of Justice*, 704 F.Supp. 272, 275 (D.D.C. 1988) (“The primary purpose of the IFRP is neither fine collection nor management of the employees of Federal Prison Industries. . . . Therefore, pursuant to 18 U.S.C. §§ 4001, 4042 and 28 C.F.R. § 0.96(g), the Bureau of Prisons has the statutory authority to

controlling the disposition of earned wages; however, Congress has provided no similar authority with respect to seizing funds from non-institutional sources. The relative handful of courts that have used broader language to uphold the legality of the IFRP have typically done so in the context of ruling on a habeas corpus petition, which renders such rulings non-binding in the qualitatively different context of a challenge under the APA.¹⁰² Indeed, the only appellate decision we located that addresses the IFRP's compliance with the APA is a Third Circuit opinion dismissing an APA claim that was limited to an allegation of inadequate notice of the Bureau's 1986 IFRP rulemaking.¹⁰³

Nor do the Bureau's general enabling statutes give it the authority to deprive incarcerated people of their interest in property for reasons unrelated to operation of the prison system itself. Perhaps the best example of this comes in the form of the Bureau's cost of incarceration fee. The Bureau unquestionably has the statutory power (and obligation) to house, clothe, feed, and care for people entrusted to its custody. But the Bureau did not rely on these general powers when devising a system to charge incarcerated people for the costs of their own incarceration. Instead, Congress specifically provided the Bureau with the power to impose such a fee,¹⁰⁴ and the Bureau relied on that grant of power when creating the fee.¹⁰⁵ The same logic applies here: the Bureau may have the power to compel the disposition of prison-based wages, and it may have the power to regulate how much money an incarcerated person can receive from outside the prison; but no statute grants the Bureau sweeping authority to intercept incoming funds and direct such money to non-prison related purposes.¹⁰⁶

Finally, the nominal "voluntary" nature of the IFRP is not a defense to lack of statutory authority. The patina of voluntariness may be successful in warding off legal challenges from individual IFRP participants, but it does not act as a bypass to the APA's requirement that agencies must act pursuant to legislative authorization when issuing rules.

We understand the Proposed Rule is likely a response to public pressure concerning a handful of atypical cases where a few individuals have amassed substantial trust account balances.¹⁰⁷ However, no amount of public outrage can create authority for an agency to act, unless and until Congress says so.¹⁰⁸ As the Supreme Court has noted, "[w]here Congress has in the statute given the [agency] a question to answer, the courts will give respect to that answer; but they must be

condition UNICOR employment on an inmate's demonstration of financial responsibility as set forth in the Inmate Financial Responsibility Program.").

¹⁰² See *Fontanez v. O'Brien*, 807 F.3d 84 (4th Cir. 2015); *Williams v. Pearson*, 197 Fed. Appx. 872 (11th Cir. 2006) (per curiam); *Montano-Figueroa v. Crabtree*, 162 F.3d 548 (9th Cir. 1998) (per curiam). See also, *U.S. v. Gomez*, 24 F.3d 924 (7th Cir. 1994) (request for resentencing under 21 U.S.C. § 841(b)(1)(B)).

¹⁰³ *James v. Quinlan*, 866 F.2d 627, 629-630 (3d Cir. 1989).

¹⁰⁴ Department of Justice and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, § 111(a), 106 Stat. 1828, 1842 (Oct. 6, 1992).

¹⁰⁵ 59 Fed. Reg. 60557 (Nov. 26, 1994) (final rule on cost of incarceration fee, citing Pub. L. 102-395 as authority).

¹⁰⁶ See *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-915 (3d Cir. 1981) ("If the issue [of a federal rulemaking] falls outside the area generally entrusted to the agency, and is one in which the courts have a special competence, i.e., the common law or the constitutional law, there is little reason for the judiciary to defer to an administrative interpretation.").

¹⁰⁷ See *supra*, note 5 and accompanying text.

¹⁰⁸ See *Midwater Trawlers Cooperative v. Dept. of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (vacating agency rule that "was a product of pure political compromise, not reasoned scientific endeavor").

sure the question has been asked.”¹⁰⁹ Here, Congress has not asked the Bureau to act as a disbursing agent with the power to confiscate funds for purposes unrelated to operating prisons. Accordingly, to the extent the Proposed Rule seeks to impose a 75% deduction on all non-institution resources, it exceeds the Bureau’s authority and would thus be invalid under the APA.

B. The Bureau has Failed to Take the Required “Hard Look” at Alternative Solutions

When making policy decisions as part of a rulemaking, federal agencies must give a “hard look” at alternatives and projections.¹¹⁰ This requirement is grounded in the APA’s requirement that rules cannot be arbitrary and capricious.¹¹¹ The Bureau has not fulfilled its hard-look obligation because it summarily dismisses alternative policies that it admits would be “more equitable,” based on ill-defined “technological and administrative challenges.”¹¹²

When issuing a rule, a federal agency must exercise independent judgment¹¹³ and provide a non-conclusory explanation of why it has selected a particular course of action.¹¹⁴ Here, the Bureau admits that a “progressive” or threshold-based system would better target the small number of incarcerated individuals with significant resources, but the Proposed Rule rejects such alternatives simply because there is not an automated process for making IFRP withdrawals from an individual’s trust account. The Bureau’s explanation is legally deficient for two reasons. First, the Proposed Rule dismisses a progressive-deduction system based on the Bureau’s existing technology, but does not discuss what would be required to upgrade to a more robust system. By not considering modernization of its accounting systems to achieve more equitable policies, the Bureau has clearly failed to take a hard look at alternatives. Second, the Bureau fails to acknowledge that a progressive or threshold-based system could actually be *more* administratively efficient, as discussed in detail in Part V.E.2, *infra*.

Finally, the Proposed Rule is arbitrary and capricious because it fails to address the Bureau’s statutory requirement to help incarcerated people prepare for reentry. It is a “well-established rule that when an agency fails to consider a factor mandated by its organic statute, this omission is alone sufficient to establish an arbitrary-and-capricious decision requiring vacatur of the rule.”¹¹⁵ The Bureau is subject to multiple statutory requirements related to reentry support.¹¹⁶ As

¹⁰⁹ *NLRB v. Agents’ Int’l Union*, 361 U.S. 477, 499 (1960); *see also MCI Telecomm’cns v. AT&T Co.*, 512 U.S. 218, 229 (1994) (“[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.”).

¹¹⁰ Ronald M. Levin, et al., *A Blackletter Statement of Federal Administrative Law* 54 Admin L. Rev. 17, 42 (2002) (the higher the stakes of a rulemaking, the more rigorous review is expected by federal courts).

¹¹¹ 5 U.S.C. § 706(2)(A).

¹¹² Proposed Rule, 88 Fed. Reg. at 1334.

¹¹³ *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327-328 (5th Cir. 2001).

¹¹⁴ *Sierra Club v. U.S. EPA*, 167 F.3d 658, 663 (D.C. Cir. 1999) (rulemaking was arbitrary and capricious because “[a]lthough EPA said that it believed the [data supported the final rule], it never adequately said why it believed this”); *Am. Petroleum Institute v. Johnson*, 541 F.Supp.2d 165, 184 (D.D.C. 2008) (vacating portion of final rule where agency’s explanation “is too conclusory to permit this Court to evaluate its rationality”).

¹¹⁵ *Owner-Operator Independent Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 587 (7th Cir. 2011) (citation and internal quotation marks omitted).

¹¹⁶ *E.g.*, First Step Act of 2018, Pub. L. 115-391, §§ 101-102, 132 Stat. 5194, 5195-5213 (2018); 18 U.S.C. § 4042(a)(7) (requiring the Bureau to “establish reentry planning procedures,” specifically including “[p]ersonal finance and consumer skills”).

we note above, the Proposed Rule is particularly disappointing in that it impairs people's ability to successfully plan for reentry and continues to delay full implementation of the First Step Act.¹¹⁷ The Proposed Rule materially impairs incarcerated peoples' ability to save money in anticipation of reentry, thereby contravening the Bureau's statutory duties and rendering the Proposed Rule arbitrary and capricious for purposes of the APA.

C. The Proposed Rule is Incompatible with Established Law Regarding Collection of Criminal Financial Obligations

The APA unsurprisingly prohibits rules that are "not in accordance with law."¹¹⁸ The Proposed Rule is not grounded in applicable law governing collection of legal financial obligations. Collection of federal fines and restitution is governed by the Federal Debt Collection Procedures Act (the "Procedures Act")¹¹⁹ and 18 U.S.C. §§ 3611-3615. Neither of these statutes delegates any authority to the Bureau to pursue collection activity on behalf of the United States. The Procedures Act dictates "procedures for the United States . . . to recover a judgment on a debt,"¹²⁰ but the Proposed Rule does not fit within the procedures defined in the statute.

More specifically, the Proposed Rule does not align with 18 U.S.C. § 3613 for two independent reasons. First, the Bureau proposes to seize 50% of wages from UNICOR positions in grades 1 through 4,¹²¹ but 18 U.S.C. § 3613(a)(3) provides that when the United States enforces a judgment imposing a criminal fine, "the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law."¹²² Section 303 of the Consumer Credit Protection Act, in turn, specifies that "the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed" the lesser of 25% of disposable earnings or the amount by which such earnings exceed thirty times the federal minimum wage.¹²³

The second problem arises from 18 U.S.C. § 3613(a)(1), which provides that the United States must honor certain exemptions (from § 6334 of the Internal Revenue Code) when collecting criminal fines. Among the exemption categories that potentially apply to some funds in inmate trust accounts are certain annuity and pension payments, workers compensation payments, and service-connected disability payments.¹²⁴

Accordingly, the Proposed Rule's blanket 50% garnishment for people holding certain UNICOR jobs, and the failure to honor specified mandatory exemptions, do not reflect the requirements of Procedures Act and should be revised accordingly.

¹¹⁷ See Part II.A.2, *supra*.

¹¹⁸ 5 U.S.C. § 706(2)(A).

¹¹⁹ 28 U.S.C. §§ 3001-3308.

¹²⁰ 28 U.S.C. § 3001(a).

¹²¹ Proposed 28 C.F.R. § 545.11(2)(i)(A).

¹²² 18 U.S.C. § 3613(a)(3).

¹²³ 15 U.S.C. § 1673(a).

¹²⁴ 26 U.S.C. § 6334(1)(6), (7), and (10).

D. The Bureau Lacks an Adequate Evidentiary Record and Has Failed to Consider Problems That Would Result from the Proposed Rule

When formulating a rule, an agency must “examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹²⁵ The Proposed Rule falls woefully short of this requirement because the Bureau has provided absolutely no indication that it has gathered or analyzed salient data.

Perhaps the most prominent deficiency in the record concerns the proposal to seize 75% of community resources. As of the date of this letter, over 960 people (many of them friends and relatives of incarcerated people) have already filed comments highlighting the financial stress that this proposal would cause them. These individual pleas are—by themselves—enough reason to remove the 75% deduction from the Proposed Rule; however, even if the Bureau were to adhere to its original proposal, the record has not even attempted to quantify the financial burden the rule would impose on family members. This is grounds for judicial reversal of the rule.¹²⁶

Many other questions remain unanswered. What is the total amount that incarcerated people owe in legal financial obligations? What is the average amount owed by individuals? How much is currently collected through the IFRP and how does that compare to what the Bureau expects to collect under the Proposed Rule? How much would it cost for the Bureau to develop the technology to implement a progressive or threshold-based alternative to the Proposed Rule? The Bureau states that “[r]etaining sufficient funds to cover basic inmate needs during incarceration” is a priority for the IFRP, but what does the Bureau consider “basic inmate needs,” and how much do they cost?¹²⁷ All of these are critically important questions that must be answered as part of this rulemaking in order to balance interests of different constituencies and quantify the effects of the Proposed Rule for purposes of the APA and Executive Order 12866 (*see infra*, section IV.F). The record currently contains no answers to these questions, nor even a suggestion that the Bureau gave reasonable consideration to the issues.

In addition to failing to ask important question, the Bureau has also advanced justifications for the Proposed Rule which are inconsistent or illogical, as discussed above in Part II.A.1. These flawed justifications contravene the APA’s requirement that agencies provide a *satisfactory* explanation for actions.

E. The Proposed Rule Contravenes Incarcerated Peoples’ Fifth Amendment Due Process Rights

Federal agencies may not issue rules that are “contrary to constitutional right, power, privilege, or immunity.”¹²⁸ It is established law that funds held in Bureau “inmate trust accounts” are the

¹²⁵ *Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 140 (D.C. Cir. 2005) (*quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹²⁶ *See Levin, et al., supra* note 110, at 42-43 (Courts will reverse a rule where “[t]he agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action, such as the effects or costs of the policy choice involved, or the factual circumstances bearing on that choice.”).

¹²⁷ Proposed Rule, 88 Fed. Reg. at 1333.

¹²⁸ 5 U.S.C. § 706(2)(B).

personal property of the incarcerated account beneficiaries.¹²⁹ The Bureau holds such funds in trust for incarcerated individuals under a fiduciary relationship.¹³⁰ Accordingly, the Bureau must manage trust accounts in the best interests of the individual beneficiaries, which duty includes not “allow[ing] attachment or levy on the prisoners’ trust funds as inconsistent with the provisions of the trust.”¹³¹ Under the APA, the Bureau owes a general obligation to respect trust-account beneficiaries’ constitutional property rights, and this obligation is only strengthened by the fiduciary role that the Bureau plays in holding such funds.

The Due Process Clause of the Fifth Amendment provides that “no person” may be “deprived of . . . property, without due process of law.”¹³² At the most basic level, due process requires notice to the impacted individual and a meaningful opportunity to be heard before an impartial decisionmaker.¹³³ In the context of collecting legal financial obligations, various laws (both federal and state, depending on the nature of the obligation) set forth procedures and protections for post-judgment collection, but the Proposed Rule does not reference such laws nor does it provide judgment debtors with an opportunity for a meaningful hearing. Quite to the contrary, the Proposed Rule stacks the deck against incarcerated obligors by establishing presumptive allotment schemes that unit staff are expected to impose. This structure is incompatible with principles of due process because there is no meaningful hearing (i.e., the rule creates a uniform system of repayment without respect to individual circumstances) and there is no disinterested decisionmaker (i.e., unit staff’s job performance is likely evaluated in part by reference to their IFRP collection activity).

Because the Proposed Rule fails to provide even the most minimal due process when depriving people of their property, it is invalid under the APA.¹³⁴

F. The Proposed Rule is a “Significant Regulatory Action” under Executive Order 12866 and the Bureau Must Conduct a Regulatory Analysis

The Bureau claims that the Proposed Rule is exempt from Office of Management and Budget review because it is not a “significant regulatory action” under Executive Order 12866.¹³⁵ The Bureau produces no data to support this conclusory statement, and available data suggests that the Proposed Rule would fall under the relevant definition of significant regulatory action.

¹²⁹ *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. OLC 127, 138 (1995) (“[T]he moneys in inmates’ Prisoners Trust Fund accounts are truly personal funds.”).

¹³⁰ 31 U.S.C. § 1321(a)(21).

¹³¹ *Fiduciary Obligations*, *supra* note 129, 19 Op. OLC at 138.

¹³² U.S. Const., art. V, cl. 4.

¹³³ *See e.g., Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950) (notice and right to be heard); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (independence of decisionmaker).

¹³⁴ Incarcerated peoples’ property interests in their trust accounts are so well established under federal law that the Proposed Rule is entitled to no deference under *Turner v. Safley*, 482 U.S. 78 (1987) and its progeny. Nonetheless, even if the Bureau were entitled to *Turner* deference (and we vigorously deny that it is), the Proposed Rule would still fail because the Bureau’s failure to seriously consider less-burdensome alternatives does not stand up to logical reflection.

¹³⁵ Proposed Rule, 88 Fed. Reg. at 1335.

Executive Order 12866 defines a significant regulatory action as including “a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more.”¹³⁶ It is incumbent on the Bureau to show that the Proposed Rule would not satisfy this threshold. The Bureau has failed to do so, and publicly available data casts grave doubt on the Bureau’s preliminary conclusion. Research based on data from multiple prison systems suggests that the average incarcerated person receives funds from community members (i.e., friends and families) in the amount of \$737 per year.¹³⁷ This data is from 2011 and thus the average amount has almost certainly increased due to inflation. Nonetheless, even if one were to use the conservative assumption that people held by the Bureau only receive \$737 in community support per year, this would yield total community support of \$106.69 million per year for incarcerated people in the Bureau’s custody.¹³⁸

Under the Proposed Rule, if family members want to provide their incarcerated loved ones with the same purchasing power, the 75% deduction rate for community support would force them to “gross up” their support, and transfer a total of \$426.76 million per year.¹³⁹ The difference between \$426.76 million and \$106.69 million is more than triple the \$100 million threshold established by Executive Order 12866. Accordingly, the Bureau must conduct a regulatory analysis examining the costs and benefits of the Proposed Rule, as required by Executive Order 12866. The current proposal fails to include such analysis and therefore is legally defective.

V. THE BUREAU SHOULD ADOPT ALTERNATIVE APPROACHES

As discussed in the previous section, the Bureau lacks the legal authority to implement certain provisions of the Proposed Rule. Without derogating from these arguments, we provide several proposals for alternative modifications to the IFRP rules in Parts V.A–D, *infra*. We then explain the benefits of our alternative approach over the Proposed Rule in Part V.E, *infra*.

A. The Bureau Should Adopt an Interim Rule Based on the Federal Poverty Level, and a Final Rule Informed by Relevant Data

In developing the Proposed Rule, the Bureau explains that instead of seizing 75% of community funds, it “considered a system similar to progressive taxation, which would apply a lower marginal rate to amounts below a certain threshold, and higher marginal rate to amounts above that threshold.”¹⁴⁰ “For instance,” the Bureau goes on, “such a system might set a marginal rate of 25% for the first \$500 in community deposits during a time period, with a rate of 75% for any deposits over \$500 during the same span.”¹⁴¹ The Bureau ultimately rejected this approach, citing potential administrability challenges. It instead proposes a single, flat allotment of 75% to

¹³⁶ Exec. Order. 12866, § 3(f)(1), 58 Fed. Reg. 51735, 51738 (Oct. 4, 1993).

¹³⁷ Stephen Raheer, “The multi-million dollar market of sending money to an incarcerated loved one,” Prison Pol’y Initiative Blog (Jan. 18, 2017), <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/>.

¹³⁸ Specifically, the Bureau reports a current total of 144,762 “federal inmates in BOP Custody.” Bureau of Prisons, “Statistics” (last visited Feb. 26, 2023), available at https://www.bop.gov/about/statistics/population_statistics.jsp.
144,762 x \$737 = \$106,689,594.

¹³⁹ I.e., if family members transfer an aggregate of \$426,758,376, this will yield \$106,689,594 million in net trust-account receipts after deduction of 75% as contemplated by the Proposed Rule.

¹⁴⁰ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁴¹ Proposed Rule, 88 Fed. Reg. at 1334.

apply to all community deposits, along with different allotments applicable to all wages, with the percentages varying only based on job categorization.

We believe a progressive approach is superior to a flat-percentage approach. We appreciate the Bureau’s invitation to commenters to provide “suggestions for how to make a ‘progressive’ system more practicable” notwithstanding the challenges the Bureau identified. Below, we describe the interim approach we recommend that the Bureau immediately adopt in lieu of the Proposed Rule. We then detail the data the Bureau should collect and publish in order to tailor and explain an alternative final rule.

1. Adopt an Interim Rule that Uses a Minimum Threshold Based on the Federal Poverty Level, and Apply a Progressive Approach Above this Threshold

Instead of garnishing wages and confiscating 75% of community funds, we propose that the Bureau adopt an annual minimum threshold equal to the Department of Health and Human Services’ federal poverty guideline for the 48 contiguous states (colloquially referred to as the “federal poverty level,” or “FPL”). Given that Bureau staff meet with each incarcerated person every six months to assess their financial plan, the relevant amount that should be shielded from IFRP seizure every six months is one half of the FPL. If a person’s wages and deposits over the previous six-month period collectively are below this threshold, the Bureau would not garnish any wages or confiscate any community funds for the IFRP. If they exceed this threshold, the Bureau should adopt a progressive approach to seizing any money above the threshold.

Using 2023’s federal poverty level for a household of one, this would mean that if a person’s wages plus deposits over the past six months are below \$7,290, the Bureau would not garnish wages or deposits from that person.¹⁴² If a person’s wages plus deposits over the past six months exceed \$7,290, the Bureau would set marginal rates for amounts above that threshold. For example, if a person’s wages plus deposits over the past six-month look-back period are \$7,390—i.e., \$100 over the FPL threshold—the Bureau might garnish 10% of that amount from their account (\$10). If wages plus deposits are \$200 over the threshold, it might seize 15%.¹⁴³

There is a lack of data on how much it in fact costs the average person to cover basic necessities while incarcerated in the federal prison system. That is why we recommend, in the next section, that the Bureau gather and publish this data, and then adopt a final rule that uses a threshold based on this data.

For the interim, however, using the FPL as the relevant threshold would appropriately balance the Bureau’s various goals and the needs of incarcerated people. The FPL should be high enough to ensure that people have enough funds to cover basic necessities while incarcerated, and for a

¹⁴² See Fed. Reg., “Annual Update of the HHS Poverty Guidelines (Jan. 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00885/annual-update-of-the-hhs-poverty-guidelines>. In 2023, the federal poverty level for a single-person household is \$14,580 annually. \$14,580 divided by 2 (to account for a review every six months) is \$7,290.

¹⁴³ We do not make more specific recommendations or comment here more extensively on what a progressive system above our proposed threshold should look like. Other commenters address the progressive approach, and the Bureau provides an example in the Supplementary Information.

short period of time upon reentry. But this approach would still only shield a modest amount of money, thus allowing the BOP to collect from incarcerated people who have access to funds above the poverty level. Other federal government agencies use higher multiples of the federal poverty level, from 150% to 250%, as their threshold for when government seizure of funds is likely to cause economic hardship.¹⁴⁴ Accordingly, our proposed threshold—the federal poverty level—is modest. Furthermore, we propose using the figure for a single-family household, notwithstanding that many people who are incarcerated have families, including dependent children.¹⁴⁵

2. *Adopt a Final Rule that Uses a Data-Informed Minimum Threshold, and Apply a Progressive Approach Above this Threshold*

a. Data

Data is critical for assessing the costs and benefits of any proposed rule, and for evaluating whether it is likely to achieve the Bureau’s goals. The Bureau should collect and publish the following data so that the public can meaningfully evaluate and comment upon any future proposed rule:

- The total amount that people in the Bureau’s custody owe in legal financial obligations.
- The average, median, and range that individuals owe in legal financial obligations.
- The amount of legal financial obligations currently collected through the IFRP.
- The Bureau’s definition of “basic inmate needs”¹⁴⁶ and how much they cost (including commissary items, medical copays, postage, phone charges, and TRULINCS fees).
- The extent to which incarcerated people use their wages or other funds in their trust accounts to meet financial obligations outside of prison or the IFRP program, such as contributing to family housing and support costs and making payments on loans and debts.
- The total amount of money held in the inmate deposit fund.
- The average, median, and range of individual sub-account balances in the inmate deposit fund, as well as a detailed breakdown of the top decile.
- The average amount of community contributions people receive annually, and whether this amount typically diminishes over time.

¹⁴⁴ As the National Taxpayer Advocate explained in the 2019 Purple Book (recommendation 28), available at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook_03_ImproveAssmtCollect_p.pdf, “Both the law and IRS procedures use the measure of 250 percent of the federal poverty level as a proxy for ‘low income’” and the IRS has already adopted that 250% threshold to “implement[] a ‘low income filter’ to exclude taxpayers with incomes below 250 percent of the federal poverty level from the automated levy program,” ensuring such filers are automatically protected from levy. Similarly, the Department of Education protects 150% FPL of income from payment of student loans under existing income-driven repayment plans, and in January proposed raising this protected amount to 225% FPL to protect against financial hardship. Proposed Regulations Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (January 11, 2023).

¹⁴⁵ See Part II.C, *supra*. If the Bureau wants to consider household size when setting a threshold, we would not oppose that approach.

¹⁴⁶ Proposed Rule, 88 Fed. Reg. at 1333.

- Whether people typically deposit all or most of their savings into their inmate trust accounts at the beginning of their incarceration, and whether the total amount diminishes over the course of their sentence.
- The average balance that individuals have in their inmate deposit fund sub-account when they are released.
- The amount of funds that are necessary to enable successful re-entry.
- How often wardens have exercised their discretion to provide people with more than one free call per month, and how often have directed the government to bear the expense of incarcerated people's telephone use.
- The administrative costs of the Proposed Rule, or of any future, revised rule.

b. Mechanics of the Alternative Final Rule

We recommend that the Bureau collect and publish the data described above and adopt a threshold based on this data. At a minimum, the Bureau should base the threshold on (1) the cost of communicating with one's loved ones, (2) the costs of essential goods from the commissary, (3) typical medical expenses, and (4) ensuring that people retain sufficient funds to facilitate their successful reentry. If a person's wages and deposits over the previous six-month period (collectively) are below this threshold, the Bureau would not garnish any wages or confiscate any community funds from this person for the IFRP. If wages and deposits exceed this threshold, the Bureau should adopt a progressive approach to any seizure of money above the threshold.¹⁴⁷

Additionally, based on the data it collects, the Bureau may find that people typically deposit most of their funds at the beginning of their incarceration and then rely on those funds with minimal additional deposits over a multi-year term of incarceration. If that is the case, the Bureau should include provisions in the final rule to protect a larger amount of those initial deposits. This will help ensure that people have sufficient funds to meet basic needs over the full course of their term, as well as to successfully reenter.

Finally, in the final two years before a person is scheduled or likely to be released, the Bureau should protect a higher threshold amount, to ensure that people are released with sufficient funds to promote their successful reentry.

We recommend the Bureau use this threshold-based system in place of the Proposed Rule's system of rigid wage and community-resource seizures that relies solely on warden discretion as the only safeguard against economic hardship. Additionally, if the Bureau were to adopt our threshold-based approach, the \$75 telephone set-aside provision would no longer be necessary. Rather, ensuring that people have sufficient funds to communicate with their loved ones would be incorporated into determining the minimum threshold of funds to protect.

B. Incorporate Reentry Protections into any Rule Revising the IFRP

In the Supplementary Information, the Bureau states:

¹⁴⁷ Like in the section discussing the interim rule, we do not comment here on what a progressive system above our proposed threshold should look like. Other commenters address the progressive approach, and the Bureau provides an example in its Supplementary Information to the Proposed Rule.

in recognition of the importance of planning for re-entry, including the availability of financial resources, the Bureau is separately exploring methods to encourage inmates to set aside and/or maintain a limited amount of funds specifically for re-entry assistance, which would be encumbered until re-entry and treated differently for purposes of the IFRP. These efforts include implementing section 605(c) of the First Step Act of 2018 (Pub. L. 115-391), which amended 18 U.S.C. 4126(c)(4) to indicate that inmates who work for Federal Prison Industries . . . will have 15 percent of their compensation reserved and made available to assist them with costs associated with release from prison.¹⁴⁸

Given the importance of reentry to the Bureau and Biden Administration in general,¹⁴⁹ and given the Congressional policy expressed in the First Step Act, the Bureau should not be considering its reentry objectives “separately” from the current proceeding. Indeed, by failing to consider reentry when developing the Proposed Rule, the Bureau has come up with a rule that would severely undermine people’s ability to successfully reenter in multiple ways.¹⁵⁰

Our proposed alternative rule would require the Bureau to take reentry into account as part of its final rule. It would do so by requiring the Bureau to consider the costs of communication¹⁵¹ and the costs of reentry when setting a minimum threshold of income and deposits to protect. And it would do so by requiring the Bureau to raise this minimum threshold in the final two years before a person’s scheduled or likely release. Even if the Bureau declines to adopt our proposed alternative, it nevertheless should consider reentry as part of the *current* proceeding revising the IFRP, rather than “separately explor[e]” and implement reentry protections at some unspecified future date.

C. Put Interest Accrued from Incarcerated People’s Funds Toward Legal Financial Obligations

In addition to looking to the IFRP as a means of satisfying legal financial obligations, the Bureau should consider putting interest accrued on its trust funds toward this purpose. Under 31 U.S.C. § 1321(a)(21)–(22), “Funds of Federal prisoners” and “Commissary funds[of] Federal prisons” are classified as trust funds. The “‘Commissary Fund’ is generally referred to as the ‘Trust Fund’ and the ‘funds of federal prisoners’ as the ‘Inmate Deposit Fund.’”¹⁵² At least some of these funds are invested and earn interest.¹⁵³ Instead of retaining the interest accrued on these funds

¹⁴⁸ Proposed Rule, 88 Fed. Reg. at 1331 (internal footnote omitted).

¹⁴⁹ See *supra*, Part II.A.

¹⁵⁰ See *id.*

¹⁵¹ As discussed in Part II.A.1, it is well-recognized—including by the Bureau—that communication with loved ones outside prison is strongly linked with successful reentry,

¹⁵² Bureau of Prisons, “Trust Fund/Deposit Fund Manual,” 15 (March 14, 2018), available at <https://www.bop.gov/policy/progstat/4500.12.pdf>. The Supplementary Information refers to “individual inmate commissary accounts” as the accounts at issue for IFRP purposes.

¹⁵³ The Bureau’s “Trust Fund/Deposit Fund Manual” explains that amounts in the Commissary Fund “that are not needed for operations are kept on deposit or invested in obligations of, or guaranteed by, the United States,” and “[e]arnings on investments are deposited in the Commissary Fund.” *Id.* In a recent response to a FOIA request, the Bureau stated that this interest “is captured in the Trust Fund and is used to defray its general operating expenses.” Bureau of Prisons, Response to FOIA Request of Jason Wojdylo (Jul. 18, 2022), available at

and using it to pay for prison operations, the Bureau should explore putting interest accrued on incarcerated people's trust funds towards their legal financial obligations.

D. Remove Counterproductive Consequences of Nonparticipation in the IFRP

As the Bureau reevaluates the IFRP, it should modify other aspects of the current rule to better align it with the Biden Administration and Bureau's objectives. In particular, the following consequence of nonparticipation in the IFRP should be struck: "The inmate will not receive a release gratuity unless approved by the Warden."¹⁵⁴ This consequence runs counter to the Biden Administration and Bureau's goals of promoting successful reentry and reducing recidivism risks.

The Bureau expressly recognizes in the Supplementary Information "the importance of planning for reentry, including the availability of financial resources."¹⁵⁵ It states that it is exploring ways to "encourage inmates to set aside and/or maintain a limited amount of funds specifically for reentry assistance."¹⁵⁶ Given the importance of financial resources to successful reentry, the Bureau should not maintain a rule that directly stymies this goal.¹⁵⁷

Retaining this consequence of nonparticipation would not just negatively impact those in Bureau custody. Undermining the prospect of a successful reentry also harms the families and communities to which people return. The Bureau should eliminate this short-sighted and counterproductive provision from its final rule.

E. Benefits of our Alternative Approaches

1. Our Alternative Would Better Achieve the Bureau's and Biden Administration's Various Goals

Our alternative proposal would better achieve the Bureau's and Biden Administration's goals than would the Proposed Rule:

- *Victim Compensation.* A key purpose of the IFRP is to encourage people incarcerated in Bureau facilities to pay financial obligations. One concern is that individuals may be maintaining large sums of money in their trust accounts while avoiding those responsibilities. Our threshold-based approach would allow the Bureau to focus its collection efforts on those individuals who are indeed amassing wealth and could be making bigger court debt payments. This targeted approach would facilitate victim compensation while ensuring that people incarcerated in federal prisons—the

<https://www.documentcloud.org/documents/22126952-2022-04342-wojdylo-response>. It is not clear whether interest is collected on Inmate Deposit Funds and, if so, what it is put toward.

¹⁵⁴ 28 C.F.R. § 545.11(d)(9) and (11).

¹⁵⁵ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁵⁶ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁵⁷ See also Part II.A., *supra*, and in particular subpart 2, "Depletion of Financial Resources Available Upon Release," for further discussion of the importance of incarcerated people having some financial resources at their disposal upon their release from Bureau custody, as it relates to successful reentry.

majority of whom lack financial resources—can survive and successfully reenter society.

- *Basic Needs.* The Bureau states that when developing and updating people’s IFRP payment plans, one “priority” is allowing people to “[r]etain[] sufficient funds to cover basic inmate needs during incarceration.”¹⁵⁸ Our alternative approach would better achieve this goal because, unlike the Proposed Rule, it would require the Bureau to determine what these basic needs cost and factor them into the rule. Specifically, our alternative rule would set a minimum threshold that ensures incarcerated people can afford these basic needs.
- *Reentry.* As discussed at length in Part II.A, *supra*, promoting successful reentry is a major focus of the Biden Administration, and it has been the subject of recent Congressional legislation. The Bureau also acknowledges the “importance of planning for reentry.”¹⁵⁹ Our alternative rule would advance these reentry goals because, unlike the Proposed Rule, it would ensure that people have funds to allow them to maintain community contact while incarcerated and to assist them with reentry upon release. Our proposal would also remove a counterproductive consequence of nonparticipation in the IFRP: the withholding of a release gratuity. Finally, our proposal would require the Bureau to consider reentry as part of any revision to the IFRP, including by implementing the First Step Act’s reentry mandates as part of the same proceeding.
- *Equity.* As the Bureau acknowledges, the approach it decided upon is less equitable than alternative approaches it rejected in favor of a supposedly more easily administered rule.¹⁶⁰ Our proposed alternative achieves more equitable results because its threshold approach guarantees that people will have sufficient funds to take care of their daily and future needs. Using a progressive approach for collection above the threshold of protected funds further ensures that payments will be commensurate with financial ability. And its reliance on established schedules and bright-line protections reduces the risk that discretion will contribute to racially disparate treatment.¹⁶¹ As discussed immediately below, our proposed approach achieves these equity goals without sacrificing efficiency.
- *Harm to Children.* As discussed in Part II.C, the Proposed Rule would likely cause significant, unnecessary harm to children, and particularly to poor children of color. Our proposal would lessen these harsh impacts, including by safeguarding funds for incarcerated parents to speak with their children (via the threshold approach), and by eschewing the Proposed Rule’s draconian approach to seizure of community contributions.

¹⁵⁸ See Proposed Rule, 88 Fed. Reg. at 1333.

¹⁵⁹ Proposed Rule, 88 Fed. Reg. at 1331.

¹⁶⁰ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁶¹ See Part II.B, *supra*.

2. *Our Alternative Would be More Efficient and More Easily Administered*

The Bureau explains that it rejected certain more equitable alternatives to the Proposed Rule because they would pose technological and administrative challenges.¹⁶² Not only is the Bureau obligated to carefully balance the equities of its proposal against administrative concerns,¹⁶³ but it is far from clear that the proposed approach is itself efficient and easy to administer, particularly when contrasted with our alternative.

By using our proposed threshold approach, the Bureau would be able to focus its time and resources on collecting from people who have sufficient funds to put toward financial obligations. And it would avoid wasting its efforts on those who do not. Bureau staff would simply determine whether an incarcerated person's total deposits and wages over the prior six months exceeded an established threshold. If they did not, no further action would be required. If they did, Bureau staff would follow an established schedule for seizing funds above that threshold.

In contrast, the Proposed Rule seemingly would require a significant administrative effort to collect very small sums of money. The Bureau proposes to garnish 25% or 50% of people's extremely meager wages from their prison jobs. As noted in the Supplementary Information, the hourly wage for a UNICOR job can be as low as 23¢, and the hourly wage for non-UNICOR jobs can pay as low as 12¢. The taking of such small sums is an exceedingly tedious way to try to collect financial obligations. This is particularly true given that the Bureau lacks a fully automated process to make IFRP withdrawals from an account,¹⁶⁴ so these deductions seemingly would need to be at least partly manual.

In addition, the Proposed Rule's heavy reliance on case-by-case determinations to protect necessary funds and services renders it inefficient and difficult to implement. The Supplementary Information describes the following instances of unit managers, associate wardens, and wardens being required to make highly individualized, discretionary determinations throughout the process:

- Although incarcerated people would be expected to give 75% of community funds to the IFRP process, “these percentage allotments may be altered on a case-by-case basis, as approved by the unit manager in consultation with the associate warden of the inmate's institution.”¹⁶⁵
- The \$75 set-aside for phone calls would be eliminated because “the concern that inmates without funds will be blocked from telephone use is remedied” by the fact that (1) the warden “has the discretion” to provide incarcerated people with more than one call per

¹⁶² Proposed Rule, 88 Fed. Reg. at 1334.

¹⁶³ See *infra* at Part IV.B.

¹⁶⁴ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁶⁵ Proposed Rule, 88 Fed. Reg. at 1334.

month, and (2) “the government may bear the expense of inmate telephone use under compelling circumstances.”¹⁶⁶

- Bureau staff would “work with inmates to structure a reasonable payment plan that is attainable for the inmate, in light of any funds coming into the account (whether from inmate work assignment pay or through outside sources) and any reasonable expenditures required by the inmate.”¹⁶⁷
- Each incarcerated person’s financial plan would be reviewed “at a minimum during the inmate’s program review meeting,” which “provide[s] staff with flexibility to adjust an inmate’s financial plan during the interim period between program review meetings in the event the inmate’s circumstances change (for example, a change in institution work assignment).”¹⁶⁸

Our alternative would avoid these many discretionary determinations.

One common thread uniting these provisions is that no guidance is given as to what factors should guide these discretionary decisions. For example, under what circumstances should the 75% allotment of community funds be adjusted up or down? When developing and revising a financial plan, what constitutes “reasonable expenditures required by the inmate”? Do these expenditures include the ability to call home, and if so, how frequently and for how long? And do these questions in turn depend on whether the incarcerated person has children at home, or is himself a teenager wanting to speak with his mother? The list could go on and on. Similarly, although the Bureau indicates that when developing and updating people’s IFRP payment plans, one “priority” is “[r]etaining sufficient funds to cover basic inmate needs during incarceration,”¹⁶⁹ no guidance is given as to what constitute “sufficient funds” or “basic needs,” or how much such “basic needs” cost.

Not only is all of this unfettered discretion likely to exacerbate racial inequalities (as discussed in Part II.B, *supra*) and lead to inconsistent treatment across incarcerated people and institutions, it is decidedly inefficient and difficult to implement. Our alternative approach—which provides clear rules for Bureau staff, automatically protects a threshold amount of funds, and targets high-balance accounts—would be much more efficient and easy to administer than the Proposed Rule, which requires numerous Bureau actors to make highly discretionary, highly case-specific determinations to ultimately collect very small amounts of money from most people.¹⁷⁰

¹⁶⁶ Proposed Rule, 88 Fed. Reg. at 1332.

¹⁶⁷ Proposed Rule, 88 Fed. Reg. at 1333.

¹⁶⁸ Proposed Rule, 88 Fed. Reg. at 1335.

¹⁶⁹ *See* Proposed Rule, 88 Fed. Reg. at 1333.

¹⁷⁰ Indeed, the Bureau claims that “certainty” and clear rules are precisely what it is looking for. In justifying its proposal to confiscate 75% of community contributions (instead of adopt a more progressive approach), it states: “Under this Proposed Rule, inmates will know with certainty what they will be expected to pay. Staff will be able to develop intelligible financial plans that are easily understood by inmates and appropriately implemented by BOP staff members.” Proposed Rule, 88 Fed. Reg. at 1334.

3. *Our Alternative Would Avoid the Challenges the Bureau Identified*

In addition to better achieving the Bureau's and Biden Administration's goals, our alternative rule would avoid the difficulties that the Bureau claims could result from the alternative approaches it considered and rejected.

The Bureau expressed concern that if it adopted a system similar to progressive taxation, people “might maintain deliberately small account balances through unlawful or illegitimate means (including having money held by other inmates), or otherwise engage in ‘structuring’ of deposits and other transactions, to avoid paying a higher percentage toward IFRP.”¹⁷¹ Our alternative would largely avoid this concern because it proposes to look at the *total* amount of deposits and wages earned in the previous six months, rather than consider whether each *individual* deposit exceeded a certain amount. This approach makes such “structuring” considerably more difficult. Plus, given that amounts above the threshold would be seized on a sliding scale, the incentive to engage in structuring would be lessened compared to a system with a steep cutoff. In any event, this hypothetical risk would be far outweighed by the manifold benefits of our proposed alternative.¹⁷²

The Bureau also suggested that the progressive approach would be administratively challenging because “[t]he Bureau lacks a fully automated process to ‘freeze’ funds or make IFRP withdrawals from an inmate’s account, which prevents the Bureau from automatically adjusting IFRP payments as the amount in the account increases or decreases, or an individual deposit is above or below a certain point.”¹⁷³ Our alternative avoids this difficulty because it is based on the total amount of deposits and wages earned in the previous six months, rather than individual deposit amounts or the current amount in an account. Thus, freezing and automatic adjustments are unnecessary. Bureau staff can instead continue meeting with IFRP participants every six months to evaluate their finances.

In these ways, our proposed alternative is superior to the Proposed Rule. We urge the Bureau to (1) adopt our interim rule for the time being, (2) collect and publish the data we have identified, and (3) propose an alternative rule along the lines we have suggested via an amended proposal or in a future rulemaking proceeding.

I. CONCLUSION

We oppose the Proposed Rule because it is unjustifiably inequitable and would harm incarcerated people who lack financial resources and their families. We therefore urge the Bureau to adopt the alternative approaches we describe.

If you have any questions about these comments, please contact Caroline Cohn at ccohn@nclc.org or Stephen Raheer at stephen@amalgamatedpolicy.com.

¹⁷¹ Proposed Rule, 88 Fed. Reg. at 1334.

¹⁷² Moreover, the very concept of structuring in this context is ill-defined and can be difficult to distinguish from responsible financial planning. *See, e.g.*, Fontanez, *supra* note 13 (“If prisoners know we must pay 25% of our income to restitution, isn’t it simply good practice to plan out what is needed for personal needs, then try to manage our finances in a way help them live within their means? In the ‘real world,’ that’s called financial literacy.”).

¹⁷³ Proposed Rule, 88 Fed. Reg. at 1334.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)

Prison Policy Initiative

Stephen Raher