February 18, 2025

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

Re: Supplemental Notice of Proposed Rulemaking, 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 Raher respectfully submit these comments in response to the Bureau of Prisons' (the "Bureau") Supplemental Notice of Proposed Rule regarding the Inmate Financial Responsibility Program ("IFRP"), RIN 1120-AB-78, BOP-1178 ("SNPR").[1]

In these comments, we first identify major deficiencies in the data relied upon in the SNPR. We explain how the reliance on inadequate data in developing the proposed rule results in unreasonable seizure rules that fail to protect basic subsidence needs for incarcerated people (Part I).

Second, we explain why the proposed rule would have the unintended effect of undermining public safety by eroding community support systems and financial resources available upon release that have been shown to support successful reentry (Part II).

Third, we discuss our concerns with several specific aspects of the SNPR and recommend alternatives (Part III). Most significantly, we express our objection to the SNPR's proposal to seize funds that incarcerated people's loved ones send them, including on the ground that the Bureau lacks statutory authority for such seizures (Part III.A). We also recommend that the Bureau eliminate several of the SNPR's seizure schedule provisions in favor of a final rule that adopts a more reasonable and easy-to-administer approach based on the Federal Poverty Level (Part III.B). We then recommend changes to the SNPR's garnishment provision (Part III.C), recommend the Bureau use the IFRP only for restitution (Part III.D), and recommend changes that would better facilitate reentry (Part III.E). We conclude this section by recommending the Bureau put interest accrued from incarcerated people's funds toward their legal financial obligations (LFOs) (Part III.F).

Finally, we summarize the benefits of our proposed approach as compared to the SNPR (Part IV).

[1] Bureau of Prisons, Supplemental Notice of Proposed Rulemaking ("SNPR"), 89 Fed. Reg. 242 (Dec. 17, 2024), https://www.govinfo.gov/content/pkg/FR-2024-12-17/pdf/2024-29692.pdf.

Table of Contents

I. The Bureau Based the SNPR on Inadequate Data

A. The Minimal Data the Bureau Considers Is an Insufficient Basis for the SNPR

The Bureau appears to rely only on (1) data regarding the current distribution of incarcerated people's commissary account balances (i.e., what percent of incarcerated people maintain account balances above or below certain amounts), and (2) a commissary price list from FCI-Lompoc. The Bureau uses this data to develop the account balance thresholds for the one-time payment at initial classification. The Bureau appears to rely on no additional data for the SNPR provisions dealing with wage garnishment and seizure of outside deposits. This minimal data is insufficient to support the SNPR. In particular, the Bureau's data deficiencies lead it to severely underestimate the cost of living for incarcerated people.

The SNPR explains:

> In determining the[] account balance thresholds [for the one-time payment at initial classification], the Bureau reviewed data on commissary account balances, which showed that the overwhelming majority of inmates maintain balances of $1,000 or less. In fact, as of December 4, 2024, approximately 77 percent of commissary account balances are $249.99 or less, and only 2 percent of commissary accounts have balances greater than $5,000.[2]

The Bureau used the above data to determine it would seize 0% of an incarcerated person's commissary account balance below $250, 100% of an incarcerated person's commissary account balance above $5,000, and 50% of the amount in between. This data regarding the current distribution of balances is relevant in considering the portion of people impacted and efficiencies of potential commissary seizure schemes, but it is an insufficient basis on which to set these thresholds or deduction rates as it fails to consider how these thresholds relate to the expenses and needs of people who are incarcerated. The fact that the majority of people in BOP custody have account balances less than $250 does not mean that this amount is enough to cover people's expenses while they're in prison and when they reenter society. Evidence shows that a significant portion of incarcerated people's families take on debt in order to maintain contact with their loved ones.[3] Likewise, the Bureau fails to explain how the mere fact that 2% of commissary account balances exceed $5,000 justifies its proposal to seize everything above that amount.

Instead of consulting data regarding incarcerated people's financial needs, the Bureau instead attempts to justify its $250 threshold for the one-time payment by providing an example of what

[2] SNPR, 89 Fed. Reg. at 102025.

[3] Saneta deVuono-powell, et al., Ella Baker Center for Human Rights, Who Pays? The True Cost of Incarceration on Families 30 (2015), https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf (finding that 34% of families with an incarcerated loved one who participated in the study went into debt trying to pay for calls and visits alone).

a single hypothetical incarcerated person could purchase with $250 at a single federal prison. Specifically, the SNPR states:

> The Bureau believes that setting the threshold for this initial payment at a $250 commissary account balance adequately protects the ability of inmates in custody at Bureau facilities to maintain contact with members of the community and purchase supplementary items from institution commissaries.[4]

The Bureau goes on to give a hypothetical example of "Mr. Roe" and lists items and communications he could purchase with $216.80 at FCI-Lompoc, including a book of stamps, a combination lock, and shower shoes.[5]

Providing the example of what a hypothetical "Mr. Roe" could purchase at a particular prison is helpful as an illustration. But it is an insufficient basis for determining what account balance "adequately protects the ability of inmates in custody at Bureau facilities to maintain contact with members of the community and purchase supplementary items from institution commissaries." There are numerous problems with relying on *one* institution's prices, at *one* point in time, and what *one* hypothetical person *might* buy to set the payment thresholds in the rule.

First, commissary items and prices can vary considerably from one federal prison to another. For example, reading glasses at USP-Atwater in 2023 cost $5.20; the same year at FCI-Danbury, they cost up to $7.80.[6] This is no small difference when one considers the extremely low wages paid to people incarcerated in federal prison. The $2.60 difference in price could mean multiple days of extra work for the person incarcerated in Danbury. The Bureau gives no explanation of why it chose to base this aspect of its proposed rule on the commissary prices at FCI-Lompoc. The Bureau does not indicate that FCI-Lompoc has average commissary prices, such that the Bureau could reasonably assert that $250 "adequately protects the ability of inmates in custody at [all] Bureau facilities to maintain contact" with loved ones and purchase items from all facilities' commissaries. As discussed below, we propose the Bureau rely on the Department of Health & Human Service's poverty guideline (the "federal poverty level" or "FPL") when crafting a final rule, which is much more appropriate for setting a policy that affects over 100 institutions nationwide.

Second, relying on commissary prices at a single point in time is inappropriate. Commissary lists provided to incarcerated people regularly state that prices are subject to change without notice.[7]

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[4] SNPR, 89 Fed. Reg. at 102025.
[5] SNPR, 89 Fed. Reg. at 102026.
[6] *Compare* U.S. Penitentiary, Atwater, Calif., "Commissary Shopping List" (rev. Jun. 29, 2023), https://www.bop.gov/locations/institutions/atw/atw_commlist.pdf?v=1.0.2 [hereinafter "USP-Atwater Commissary List"] *with* Fed. Corr. Inst., Danbury, Conn., "Commissary Shopping List" (2022) https://www.bop.gov/locations/institutions/dan/dan_commlist.pdf?v=1.0.0 [hereinafter "FCI-Danbury Commissary List"].
[7] *See, e.g.*, USP-Atwater Commissary List, *supra* note 7 ("**ALL SAFES ARE FINAL . . . PRICES AND AVAILABILITY ARE SUBJECT TO CHANGE WITHOUT PRIOR NOTICES**" (caps in original)); FCI-Danbury Commissary List, *supra* note 7 ("**PRICES ARE SUBJECT TO CHANGE WITHOUT NOTICE!**" (emphasis and caps in original)).

And indeed, commissary prices do increase.[8] Yet the seizure thresholds in the SNPR—which these commissary prices inform—do not adjust for inflation over time. This is an unreasonably flawed approach. Again, if the final rule were based on the FPL, as we recommend below, then the regulations would be based on a standard that adjusts over time based on inflation and other relevant factors.

Finally, although the Bureau's list of items that a hypothetical person might buy at the beginning of their incarceration with $250 seems reasonable on its face, it is arbitrary and leaves out a number of essential items. The Bureau does not appear to have considered any data regarding what items people typically buy at the beginning of their time in custody. Additionally, as we discuss in more detail in the Part I.C, *infra*, the Bureau bases the list on the inaccurate notion that commissary items are merely supplemental, rather than necessary, therefore leaving out various essential items. Moreover, the Bureau fails to consider that incarcerated people's account balance at the beginning of their incarceration may be the vast majority of funds that they need to rely on throughout their incarceration. *See* Part III.B.1.a, *infra.* This amount may need to last them not only through a single round of purchases, as in the SNPR's example, but over the course of a multi-year sentence during which time they will need to replace used and worn-out purchases.

The Bureau relied on inadequate data to develop the account balance thresholds for the one-time payment at initial classification. As noted above, the Bureau appears to rely on no additional data for the SNPR provisions dealing with wage garnishment and seizure of outside deposits, and the Bureau does not explain how the minimal data it does consider justifies these provisions.

B. The Bureau Has Failed to Produce Data Relevant to this Rulemaking

In our comments in response to the Bureau's Notice of Proposed Rulemaking (NPRM) in this proceeding, we called on the Bureau to collect and publish a variety of data relevant to this rulemaking. Data we requested included:

- "The Bureau's definition of 'basic inmate needs'[9] 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 average amount of community contributions people receive annually, and whether this amount typically diminishes over time."

[8] *See, e.g.*, 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 33 (2022), https://morethanourcrimes.org/wp-content/uploads/2022/09/Voices-from-Within-More-Than-Our-Crimes-Sept-2022.pdf (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"); *see also* Araceli Castro, Comment on SNPR, ID: BOP-2025-0001-0006 ("The cost of living is going up not only for us who are free but the prices have increased inside of the prisons.").
[9] The Supplementary Information to the Notice of Proposed Rulemaking used this phrase. Bureau of Prisons, Notice of Proposed Rulemaking ("NPRM"), 88 Fed. Reg. 1331, 1333 (Jan. 10, 2023), https://www.govinfo.gov/content/pkg/FR-2023-01-10/pdf/2023-00244.pdf.

- "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."[10]

The Supplementary Information does not discuss this data (or most of the other data we called for), and the Bureau does not appear to have taken it into account when drafting the SNPR.

In addition, five advocacy organizations (including NCLC) also submitted an expedited Freedom of Information Act (FOIA) request on March 31, 2023, requesting data and other information essential to assessing the impact of the Proposed Rule. In a letter accompanying the FOIA, we asserted that the "DOJ, BOP, and the public record lack sufficient data to understand the full impact of the [NPRM] and that to move forward without such data would be arbitrary and capricious."[11] The BOP granted the expedited FOIA request in April 2023, stating that its production would take up to 6 months—i.e., up to October 2023. To date, the Bureau has not produced any records pursuant to this FOIA request.

C. The Bureau Wrongly Assumes That Facilities Provide People in Their Custody with Essential Items

The Supplementary Information to the SNPR states:

> The Bureau believes that setting the threshold for [the one-time] initial payment at a $250 commissary account balance adequately protects the ability of inmates in custody at Bureau facilities to maintain contact with members of the community and purchase *supplementary* items from institution commissaries.[12]

Although the Bureau should provide those in its custody with all essential items for free, in practice, it does not. Indeed, the Bureau seemed to acknowledge this reality in the NPRM, stating 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."[13] The Bureau walks this back in the SNPR, referring to commissary items as merely supplemental.

Many commenters explain that incarcerated people need to purchase commissary items, further explaining that the SNPR's proposal to seize funds sent in by loved ones would greatly impair incarcerated people's ability to purchase necessities.[14] A quick skim of any federal prison's

[10] NCLC, et al., Comment on NPRM, *supra* note 10, Section V.A.2.a.
[11] Ltr. from Fines and Fees Justice Center, et al., to Daniel J. Crooks III, Asst. Gen. Couns., Legis. & Corr. Issues Branch, Off. of Gen. Couns., Bureau of Prisons (Apr. 4, 2023), https://www.nclc.org/wp-content/uploads/2023/04/2023.04.07_Ltr-to-BOP-attaching-FOIA.pdf.
[12] SNPR, 89 Fed. Reg. at 102025.
[13] *See* NPRM, 88 Fed. Reg. at 1333 (emphasis added).
[14] *See, e.g.*, Katie S., Comment on SNPR, ID: BOP-2025-0001-0014 ("Inmates are barely fed enough daily and have to pay for all of their necessities such as personal hygiene, extra food, clothes, stamps, etc. This will have a very negative impact on them and most are already struggling to survive as is"); Christi Snead, Comment on SNPR, ID: BOP-2025-0001-0009 ("[Incarcerated people] have to buy even basic needs that are not supplied while incarcerated.

commissary list also indicates that facilities do not provide necessary items—or do not provide them in sufficient amounts. Items on commissary lists include basic writing materials (e.g., paper, pens, envelopes); basic hygiene items (e.g., toothbrushes, tweezers, nail clippers, deodorant, soap, shampoo); basic medical items (e.g., an array of over-the-counter medications, sunscreen, chapstick, bandages); clothing to keep warm (e.g., thermal shirts, hats, scarves, gloves); religious items (e.g., Islamic prayer rugs, kufis); and reading glasses. These are necessities, not extravagances. It stands to reason that incarcerated folks would not spend their limited resources buying basic goods if the Bureau adequately provided them.[15] Yet in the Supplementary Information's list of $216.80 worth of commissary purchases that the hypothetical Mr. Roe might make upon entering FCI-Lompoc, the Bureau does not include any of the above necessities except for a couple of over-the-counter medications (ibuprofen and foot powder). Mr. Roe's list of purchases also does not include any food.[16]

D. The Bureau Fails to Account for Other Costs Incarcerated People Face

In addition to commissary items, the Bureau appears to have ignored various other expenses people have while incarcerated. For example, the Bureau does not appear to have considered that people in federal prisons are required to pay medical co-pays[17] or that 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] Furthermore, the SNPR does not account for educational or job training

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Maybe they are supposed to be supplied but we all know how that goes. . . . [N]ow you want to take the little money their family can send to help make them a little more full when the meal didn't even come close to fulfilling their needs. You want to take away the money they will use to buy Tylenol or cold medicine when they are sick. Or take the money they use to communicate with their wife or children or elderly mother that may die while they are incarcerated"); Tisha Andrews, Comment on SNPR, ID: BOP-2025-0001-0020 (Food is scarce unless you can buy extra food. . . . This would end up being a huge burden for my family."); Anon. Comment on SNPR, ID: BOP-2025-0001-0018 ("In my opinion this will cause people to NOT give inmates money which they need to survive."); Paul Tallini, Comment on SNPR, ID: BOP-2025-0001-0024 ("The food in the BOP is horrible. Prisoners are made to buy their own hygiene and toilet paper. Medical care, it seems, is non-existent."); Anon. Comment on SNPR, ID: BOP-2025-00011-0025 ("Buying food is necessary for AIC's [adults in custody], the food they are served is often unidentifiable or not nutritious. Plus hygeine items, clothing, shoes, pen/paper/envelopes/stamps, etc all cost a pretty penny"); Anon. Comment on SNPR, ID: BOP-2025-0001-0030 ("Commissary funds are used to provide essential items for inmates, including hygiene products, clothing, and other basic necessities."); Tony Capone, Comment on SNPR, ID: BOP-2025-0001-0012 ("In Federal prison food is poor and the diet is low in protein. The cost of food and hygiene products is very high in the commissary."); Anon. Comment on SNPR, ID: BOP-2025-0001-0013 ("[The SNPR] will really limit them on buying there essentials"); Randall Morris, Comment on SNPR (explaining that when he entered FCI-Seagoville in the summer—an federal prison in Texas that lacks air conditioning—he was issued only khaki uniforms and boots, so he had to purchase shorts for $27, alternate shoes for $70, and two plastic fans for $60).

[15] *See, e.g.*, USP-Atwater, *supra* note 7; FCI-Danbury Commissary List," *supra* note 7.

[16] *See, e.g.*, Kanav Kathuria, "The Invisible Violence of Carceral Food," *Inquest* (Jan. 4, 2022), https://inquest.org/the-invisible-violence-of-carceral-food/; *see also* note 14, *supra* (multiple commenters on the SNPR highlighted the inadequacy of the food provided in prison, in terms of both quantity and quantity).

[17] *See, e.g.*, Anna Anderson, NCLC, Medical Debt Behind Bars: the Punishing Impact of Copays, Fees, and Other Carceral Medical Debt 16 (2024), https://www.nclc.org/wp-content/uploads/2024/09/202409_Report_Medical-Debt-Behind-Bars-1.pdf.

[18] *See* Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace 22 (2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf (noting there is no national data on the debt burden of incarcerated individuals, but citing studies from two states discussing percentage of

expenses, notwithstanding that incarcerated people should be encouraged to pursue such training because it can help them succeed upon reentry and even increase their likelihood of being able to pay their LFOs.

II. The SNPR Would Undermine Public Safety by Hindering Successful Reentry

The SNPR is inconsistent with the Trump Administration's focus on enhancing public safety and promoting successful reentry. Most of the people in federal prisons will ultimately be released and need to reintegrate back into society. Ensuring their successful reentry is paramount to safeguarding the security of our communities. Indeed, as the Supplemental Information notes, the "spirit and intent" of President Trump's signature First Step Act of 2018—passed by an overwhelming majority of Congresspeople from both parties—was to facilitate reentry.[19]

By seizing an unreasonable amount of money from incarcerated people, the vast majority of whom lack meaningful financial resources, the SNPR would severely undermine reentry efforts. It would do so 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.

A. Erosion of Community Support Systems

Research shows that those who maintain contact with their families during incarceration are more likely to reenter successfully.[20] As one researcher summarized, "*Every* known study that 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."[21] 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."[22] In recognition of the importance of communication with loved ones outside prison, jurisdictions around the country have started to

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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] SNPR, 89 Fed. Reg. at 102029.

[20] *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 reduce the likelihood of recidivism; more consistent and/or frequent phone calls were linked to the lowest odds of returning to prison."); Kelle Barrick, et al., *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, The Prison Journal (2014), 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.

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

[22] Bureau of Prisons, "Stay in Touch" (last visited Feb. 3, 2025), https://www.bop.gov/inmates/communications.jsp.

make phone calls free,[23] and Congress passed bipartisan legislation to clarify the Federal Communications Commission's ability to regulate rates charged for phone and video calls from correctional facilities.[24]

In contrast to state and Congressional efforts in this area, the Bureau's proposal would weaken incarcerated people's ability to maintain the community support systems critical to successful reentry. Garnishing 10% of prison wages, seizing up to 100% of funds that incarcerated people receive from family and friends, and effectively reducing the $450 set-aside to $250—as the Bureau has proposed in the SNPR—would hinder incarcerated people's ability to communicate consistently and effectively with their loved ones. Phone and video calls and electronic messages cost money, and incarcerated people typically heavily rely on funds their loved ones send to access these essential communications.

The proposed changes would be all the more disruptive to incarcerated people's relationships with loved ones on the outside because they would come into effect soon after the end of a policy that allowed free phone calls for all people in Bureau custody.[25] The SNPR includes a footnote stating that incarcerated people "who are successfully participating in evidence-based recidivism reduction programming receive up to 510 minutes of phone time per month," free of charge.[26] The SNPR does not provide data on how many people this policy will exclude, however, requiring them to newly pay for phone calls. (We note a lack of clarity concerning the new phone policy. The SNPR notes that, "[p]ursuant to the First Step Act of 2018, . . . inmates in Bureau custody who are successfully participating in evidence-based recidivism reduction programming receive up to 510 minutes of phone time per month[,] . . . and they are not required to pay for these minutes." In contrast, the information on the Bureau's "Phone Call Policies" webpage does not mention the 510 minutes that the First Step Act requires. It instead states: "all individuals

[23] California, Colorado, Connecticut, and Minnesota have made phone calls for their prison populations, Massachusetts made phone calls free for their prison and jail populations, and New York City, Los Angeles, San Francisco, and San Diego have made jail phone calls free. *See* "Massachusetts Makes Calls Free from Prisons and Jails," Prison Legal News (May 1, 2024), https://www.prisonlegalnews.org/news/2024/may/1/massachusetts-makes-calls-free-prisons-and-jails/ (discussing the five states that have made phone calls free); 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).

[24] 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, https://www.congress.gov/bill/117th-congress/senate-bill/1541/text.

[25] *Compare* SNPR, 89 Fed. Reg. at 102026 & n.3 (discussing the BOP's communications rates "effective as of January 1, 2025") *with* 28 C.F.R. § 540.106(a), Video visiting and telephone calls under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 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).

[26] SNPR, 89 Fed. Reg. at 102026 n.3.

participating in First Step Act (FSA) Evidence-Based Recidivism Reduction (EBRR) programs . . . will receive *300* free phone minutes each month."[27])

The SNPR would thus undermine public safety by eroding the support systems many incarcerated people will need to rely on to support their successful reentry.

B. Depletion of Financial Resources Available Upon Release

The SNPR would further undermine successful reentry by reducing the financial resources people will have available upon their release from Bureau custody—including by seizing money that their friends and family send and garnishing a portion of their already-meager prison wages. As the Bureau recognized in the Supplemental Information to the NPRM, "the availability of financial resources" is a key component of planning for reentry.[28] The SNPR reaffirms this principle, requesting feedback on whether to add a provision exempting incarcerated people from IFRP participation for a certain length of time prior to their reentry.

Research also bears this out. People need money upon release to pay for essentials like transportation home from prison and getting something to eat on the way.[29] They also need money for things necessary for survival on the outside, such as rent (and often start-up fees for new housing, like application fees, security deposits, and first and last month's rent), a cell phone, clothing, and transportation to job interviews. Even with some start-up funds, justice-involved individuals will face significant barriers to securing employment, such as their criminal records[30] and time out of the workforce. People who have spent time in prison have lower earning potential for the rest of their lives.[31] Accordingly, ensuring that people have funds

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[27] Bureau of Prisons, "FBOP Updates to Phone Call Policies and Time Credit System" (last visited Feb. 3, 2025), https://www.bop.gov/resources/news/20241004-fbop-updates-to-phone-call-policies-and-time-credit-system.jsp#:~:text=Changes%20to%20Phone%20Call%20Policies&text=As%20an%20incentive%20for%20programming,free%20phone%20minutes%20each%20month (emphasis added).

[28] NPRM, 88 Fed. Reg. at 1331.

[29] 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 Feb. 18, 2025), 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.

[30] *See, e.g.*, Kira Nikolaides, *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/; Caroline 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. *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 (2009).

[31] 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), 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

available when they leave incarceration is part of the bare minimum for supporting successful reentry and preventing recidivism.

Although we commend the Bureau for inviting comment on a possible reentry-exemption provision, the SNPR fails to effectively support reentry. This is because, as we discuss in the remaining sections of this comment, the SNPR takes an overbroad, overly draconian approach to seizing people's funds.

In addition, we noted in our previous comments that "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."[32] Since we submitted our previous comments, the Bureau proposed a rule to implement this statutory reentry requirement. Although the provisions in that proposed rule directly relate to the provisions in this SNPR, the SNPR makes no acknowledgment of that other rulemaking. It is entirely unclear how the two proposed rules would interact, and it is therefore possible the SNPR might undermine the First Step Act's reentry goals the other rulemaking is trying to effectuate.

III. The Bureau Should Reconsider Several of Its Proposed Changes to the IFRP

In the sections that follow, we discuss our concerns with several specific aspects of the SNPR and recommend changes. We first discuss our grave concerns with the SNPR's proposal to seize funds that incarcerated people's loved ones send them, and we recommend this proposal be omitted from any final rule (Part A). Next, we explain why we recommend that the Bureau eliminate several of the SNPR's provisions in favor of a final rule that adopts a more reasonable and easy-to-administer approach based on the Federal Poverty Level (Part B). Third, we explain why the Bureau should adopt a final rule that allows wages to be garnished only if they are at least minimum wage (Part C). Fourth, we offer recommendations aimed at promoting public safety by fostering successful reentry and reducing recidivism risks. Specifically, we recommend that the Bureau (1) exempt incarcerated people from IFRP participation for at least two years prior to their reentry, and (2) remove counterproductive consequences of nonparticipation in the IFRP (Part D). Finally, to facilitate victim compensation, we recommend that the Bureau put interest accrued from incarcerated people's funds toward LFOs (Part E).

A. Community Resources Should Not Be Subjected to the IFRP

Under the SNPR, Bureau staff would review the total value of "outside deposits" placed into an incarcerated person's account over the past six months from any source. "Outside deposits" includes funds contributed by the person's loved ones (sometimes referred to as "community resources"), tax refunds, litigation settlements, state benefits, inheritance, and stock dividends.

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mass incarceration punishes families," Prison Pol'y Initiative Blog (Aug. 11, 2022), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/.

[32] NCLC, et al., Comment on NPRM, *supra* note 10, Section II.A.2 (quoting 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")).

Depending on the total value of these deposits, a certain percentage of each *future* outside deposit received would be seized to be put toward the IFRP.[33]

We oppose consideration of community resources as part of the IFRP. We object to this aspect of the SNPR on several grounds, described in the sections below.

1. The Bureau Lacks Authority to Seize Community Resources

As we explained in our comments responding to the Bureau's Notice of Proposed Rulemaking in this proceeding, the Bureau lacks statutory authority to seize a percentage of community resources via the IFRP.[34] In our prior comments, we noted that the Supplementary Information accompanying the Notice of Proposed Rulemaking lacked any reference to a statutory authority. The Supplementary Information accompanying the SNPR also fails to cite any statutory authority for the seizure.

We further pointed out in our previous comments that the actual text of the Proposed Rule contained in the Notice of Proposed Rulemaking retained existing language, from 28 C.F.R. § 545, that cites seventeen statutes (plus a series of repealed statutes) as general authority for the IFRP.[35] We explained that those statutes contain no grant of authority by which the Bureau could seize community resources (or indeed, any property other than wages). The actual text of the rule proposed in the SNPR relies on these same, inadequate statutes.[36] In addition, we explained in our previous comments that the Bureau's general enabling statutes do not give it the authority to deprive incarcerated people of their interest in property for reasons unrelated to the operation of the prison system itself. Finally, we explained that the nominal "voluntary" nature of the IFRP is not a defense to lack of statutory authority. The Bureau did not address any of these legal deficiencies in the SNPR, and the legal landscape has not changed in such a way as to provide the relevant authority.

The Supreme Court's recent decision in *Loper Bright* further bolsters the concerns raised in our previous comments regarding the lack of statutory authorization for seizure of community resources.[37] There, the Supreme Court held "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative

[33] SNPR, 89 Fed. Reg. at 102023 (listing sources of income), 102025 (discussing seizure of outside deposits).
[34] *See* NCLC et al., Comment on NPRM, ID: BOP-2023-0001-1094, Section IV.A, available at https://www.regulations.gov/comment/BOP-2023-0001-1094 and attached as Exhibit A.
[35] 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.")
[36] SNPR, 89 Fed. Reg. at 102030.
[37] *See* NCLC., Comment on NPRM, ID: BOP-2023-0001-1094, Section IV.A, available at https://www.regulations.gov/comment/BOP-2023-0001-1094 and attached as Exhibit A ("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." . . . Accordingly, to the extent the Proposed Rule seeks to [deduct community resources], it exceeds the Bureau's authority and would thus be invalid under the APA.") (quoting 5 U.S.C. § 706(2)(C))).

Procedures Act] requires."[38] Here, the Bureau will act outside its statutory authority if it seizes community resources, in violation of the APA, because the statutory authority for the Bureau's proposed action is nonexistent.

2. Seizing Community Resources Would Severely Burden Families—Including Children—Who Are Already Struggling

Any final rule should exclude consideration of community resources. This aspect of the proposed rule would severely burden hardworking families who are already struggling to make ends meet.

Families send their incarcerated loved ones money to help pay for a variety of expenses.[39] Women overwhelmingly bear these costs.[40] These are generally mothers, grandmothers, and wives who are simply trying to stay connected to their incarcerated children, grandchildren, and husbands and ensure they can meet their basic needs.

Seizure of money sent by non-incarcerated family members exacerbates the financial insecurity experienced by children of incarcerated parents. The majority of people incarcerated in federal prisons have minor children. According to a Bureau of Justice Statistics report, 57% of people incarcerated in federal prisons have one or more dependent children.[41] In total, 221,600 minor children have one or more parents in federal prison.[42] Even without the effects of the SNPR, "[c]hildren of incarcerated parents experience more economic instability and are more likely to become poor."[43] More than half of all incarcerated people were the primary income providers for their families before being imprisoned.[44] But because incarcerated people make little or no money, "incarceration usually means a sharp decline in (or the complete loss of) family income."[45] Unsurprisingly, "[t]he overwhelming majority of children with incarcerated parents have restricted economic resources available for their support."[46] The SNPR would require seizure of community funds from the caregivers of these dependent children of incarcerated parents, thereby causing unnecessary additional harm to these nearly quarter-million children.

The Supplemental Information suggests that low-income families will not be burdened by the SNPR because "only those inmates who receive significant deposits . . . would be assessed [i.e.,

[38] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).
[39] *See* Part I.C-D, *supra* (discussing incarcerated people's expenses).
[40] deVuono-powell, et al., *supra* note 3, 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 18, at 3 ("The financial burdens [of interacting with the criminal legal system] fall disproportionately on people of color, women, and people with lower incomes.").
[41] 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), https://bjs.ojp.gov/content/pub/pdf/pptmcspi16st.pdf.
[42] *Id.* at 2.
[43] Leila Morsy & Richard Rothstein, Econ. Pol'y Institute, Mass incarceration and children's outcomes: Criminal justice policy is education policy (Dec. 15, 2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/ (footnote omitted).
[44] *Id.* (citation omitted).
[45] 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/.
[46] Eric Martin, Nat'l Institute of Just., Hidden Consequences: The Impact of Incarceration on Dependent Children (Mar. 1, 2017), https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children.

have their future deposits deducted] at a rate of 55 percent or higher."[47] But the SNPR will hit low-income families hard. Even a struggling family may be able to scrape together $45 each month to help their son, daughter, or other incarcerated loved one. Under the SNPR, that family would need to increase their contributions by 25% in order to provide the same level of support to their incarcerated loved one—leaving less money available to pay bills and support children and other family members on the outside.[48]

Numerous comments submitted in the first six weeks following the SNPR's publication speak to the hardships that this aspect of the SNPR would impose. Family members of incarcerated people explained to the Bureau that they are already struggling financially and otherwise, and that the SNPR would exacerbate their difficulties, including causing harm to children.[49] Multiple people also noted that imposing this rule now would be particularly painful, given inflated prices for everyday goods—both inside and outside of prison—and the fact that the Bureau recently ended its free phone call policy.[50]

In short, seizing community resources through the IFRP will financially hurt the families—including children—of incarcerated people. The Bureau should exclude this proposal from any final rule.

3. Seizing Community Resources Would Unjustly Shift Responsibility for LFOs from Incarcerated People to Their Loved Ones

Finally, the Bureau should not subject community resources to the IFRP because doing so would unfairly shift responsibility for paying LFOs from incarcerated people onto their loved ones.

In contexts outside the Bureau of Prisons, the federal government has recognized that family members who are not liable for a debt should not have their funds seized to pay it.[51] Such

[47] SNPR, 89 Fed. Reg. at 102028.

[48] Calculation: $45 x 6 months = $270 over a 6-month period. Under the SNPR, if total deposits over the previous six months are over $250, then 25% of future deposits are seized and put toward the IFRP.

[49] *See, e.g.*, Anon. Comment on SNPR, ID: BOP-2025-0001-0025 ("[The SNPR] will make a whole new class of victims; the [incarcerated person's] family. . I'm raising her five children, if I'm having to pay restitution (because that's basically what would be happening) and then trying to make sure she has her basic human needs met, that's money taken away from the kids."); Anon. Comment on SNPR, ID: BOP-2025-0001-0030 ("As a family member of someone incarcerated, I strongly believe that this policy change will place undue hardship on families—especially single mothers—who are already bearing the burden of supporting their loved ones."); Cheundra Bailey, Comment on SNPR, ID: BOP-2025-0001-0016 ("it's already hard on us as family").

[50] *See, e.g.*, Tony Capone, Comment on SNPR, ID: BOP-2025-0001-0012 ("Their family on the out are barely making it. Now for us to have to pay for phone calls on top of all of this spike in the cost of living is horrible. We can't afford to send our loved one's money & pay for their phone calls & comm[is]sary as it [is] now to take that money away to pay what they owe from the inside getting paid penny on the dollar is not fair."); Araceli Castro, Comment on SNPR, ID: BOP-2025-0001-0006 ("The cost of living is going up not only for us who are free but the prices have increased inside of the prisons. It is my opinion that this shall only hurt the working class.").

[51] 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*, https://www.irs.gov/irm/part25/irm_25-018-005 (IRS on "injured spouses"); 31 C.F.R. § 285.2, https://www.govinfo.gov/content/pkg/CFR-2021-title31-vol2/pdf/CFR-2021-title31-vol2-sec285-2.pdf (advising a

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 SNPR would punish children through government seizure of up to 100% of the funds their caregiver provides—including funds provided to help maintain the child's connection with their parent.

In many comments to the Bureau, family members emphasized the harm and unfairness of this aspect of the SNPR.[52] The families of incarcerated people didn't commit the crime that landed their loved one in prison, and they don't owe the accompanying LFOs. Accordingly, their money shouldn't be seized for that purpose.

B. Replace the SNPR's Three Different Schedules for Seizure with Our Streamlined Alternative

The SNPR would require one seizure to be made at the time of the person's initial classification. To determine the amount of the seizure, Bureau staff must apply one or two different percentages to the full account balance or part of the account balance, depending on which of three ranges a person's account balance falls into. Then, a second schedule of percentage deductions applies throughout a person's sentence. This schedule includes five different ranges that a person's deposits over the previous six months could fall into, and Bureau staff must apply a different percentage to future deductions depending on both the total value of deposits the person received over the prior six months and the person's account balance prior to the deposits. Finally, Bureau staff are required to apply a third approach to account balances over $5,000.

In the sections that follow, we explain that this approach is not only complex and difficult to administer (and potentially difficult for people subject to the seizures to understand), but it is also based on flawed reasoning. One flaw that applies to each of the Bureau's seizure schedules is that they do not adjust for inflation over time. We propose that the Bureau replace the SNPR's three different schedules for seizure with their various deduction rates with a single threshold

"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").

[52] *See, e.g.*, Anon. Comment on SNPR, ID: BOP-2025-0001-0030 ("More troubling . . . is the fact that families, particularly mothers, who have no involvement in the crimes committed, will be indirectly forced to shoulder the financial responsibility for restitution. This is simply unfair. The families of incarcerated individuals should not have to pay the price for a crime they did not commit. . . ."); Amber Baird, Comment on SNPR, ID: BOP-2025-0001-0010 ("My primary concern is that the inmate, having committed a crime, is the one who should be held accountable for restitution or any related financial obligations. By allocating 75 percent of their trust fund, the burden shifts to the individual supporting the inmate, effectively removing accountability from the inmate."); Anon. Comment on SNPR, ID: BOP-2025-0001-0018 ("I understand that restitution for inmates need to be paid back but why do the loved ones of the inmate have to pay for that? In my opinion this will cause people to NOT give inmates money which they need to survive"); Paul Tallini, Comment on SNPR, ID: BOP-2025-0001-0024 ("[It's an] unfair rule to force [incarcerated people's] families to pay for their fines or restitution."); Anon. Comment on SNPR, ID: BOP-2025-0001-0019 ("The people that support their loved ones that are incarcerated should not be held responsible for the monies owed, yet the BOP makes it so. This is ridiculous!"); Lauretta Moore, Comment on SNPR, ID: BOP-2025-0001-0015 ("That's not right family and friends shouldn't have to pay. . . . Now you want punish the families[.]"); Donna Nichols, Comment on SNPR, ID: BOP-2025-0001-0022 ("I send these funds under the understanding that these funds would be available to my son for the above basic necessities, NOT TO PAY HIS RESTITUTION, FINES AND FEES, WHICH I AM NOT RESPONSIBLE FOR.").

figure for asset protection (based on the federal poverty level or FPL) and a single deduction rate (25%).

1. Remove Provision Requiring One-Time Payment toward LFOs at Initial Classification (§ 545.11(b)(1))

Current guidance to Bureau staff provides that staff should *encourage* incarcerated people to make a one-time payment to satisfy an LFO if the obligation is $100 or less. The SNPR would amend the regulations to *require* incarcerated people with commissary balances greater than or equal to $250 at the time of their initial classification to make a one-time payment toward their LFOs, according to a specified, progressive rate.[53] We believe inclusion of a one-time payment requirement at the time of initial classification is: (1) based on flawed reasoning—namely, a failure to recognize that a person's initial deposit of their funds from the outside world may be the *only* funds they have to rely on over a multi-year (or even a multi-decade) term of incarceration; (2) risks unfairness by treating similarly situated people very differently; and (3) would be difficult for the Bureau to administer. As we discuss in Part III.B.2, *infra*, we recommend the SNPR adopt a streamlined approach that treats commissary accounts the same way for IFRP purposes throughout the incarcerated person's sentence (until their period of pre-release exemption from the IFRP), rather than having multiple different schemes. We accordingly recommend the Bureau remove this proposed provision from the SNPR.

In addition, we agree with the recommendation the Fines and Fees Justice Center submitted in response to the SNPR that incarcerated people should be exempt from IFRP participation for at least the first six months of their incarceration, in recognition of the costliness of and difficulties inherent in transitioning into custody. The Bureau also acknowledges the difficulties of this transition, stating that it "recognizes that newly sentenced and designated inmates need to maintain some funds to aid in the transition into custody, including by maintaining family contact and purchasing commissary items that may help ease that transition."[54]

a. This Provision is Based on Unsupported Assumptions and Flawed Reasoning

The provision requiring an initial one-time payment relies on flawed reasoning. We urge the Bureau to remove it from any final rule. The SNPR explains that "part of the intent of this provision is to prevent the inmate from accumulating a significant account balance prior to initial classification and program review, and then using that large initial balance to evade making any future payments."[55] At the same time, the Bureau states that it is "sensitive to the fact that the initial period of time at a designated institution can be a significant adjustment for many in its custody" and accordingly "specifically invites comment on the $250 threshold from the public."[56]

[53] SNPR, 89 Fed. Reg. at 102024–26. Table 1 shows the progressive rate of commissary deduction for the one-time initial payment.
[54] *See* SNPR, 89 Fed. Reg. at 102025.
[55] *Id.*
[56] SNPR, 89 Fed. Reg. at 102026.

The Bureau is correct that incarcerated people may have relatively more funds at the beginning of their sentence—that is, at the time of their initial classification and program review. The major oversight in the Bureau's analysis, however, is the failure to recognize that a person's initial deposit of their funds from the outside world may be the only or nearly the only funds they have to rely on over a multi-year (or even a multi-decade) term of incarceration. Indeed, if the Bureau were to collect the relevant data we called for in this rulemaking regarding deposit patterns and balances over time, the results may well show that incarcerated people deposit most of their funds at the beginning of their incarceration and then must rely on those funds with minimal additional deposits for many years. This is both because people may initially deposit their pre-incarceration savings, and wages while incarcerated (if a person is able to work) are often mere cents per hour, and because support from family and friends to incarcerated people may drop off over time.

Consider the Supplementary Information's example of Jane Smith. Jane attends her initial classification and program review meeting with $6,000 in her commissary account. This $6,000 may be the sum of Jane's life savings, which she deposited upon being imprisoned, and she may be serving a 20-year sentence. Under the SNPR, $3,375 would immediately be seized for LFOs, leaving her with $2,625. If Jane does not have community support—or her loved ones are unable to support her financially while supporting themselves—this may be essentially all she has for 20 years. That's less than $11 per month, plus whatever minimal prison wages she can earn. If Jane has allergies and is in Alabama, that's about two months' rationing simply to purchase Nasacort Triamcinolone to treat those symptoms.[57] If she's in Connecticut's colder climate, that's about three months of rationing to purchase a polar fleece.[58]

The SNPR's question of whether its $250 threshold is sufficient to account for "the initial period of time at a designated institution" is therefore the wrong one. The correct question is whether its $250 threshold and progressive seizure above that amount—including seizure of 100% of funds over $5,000—is sufficient to account for the incarcerated person's likely needs over the term of their sentence, taking into account any likely subsequent deposits and wages. Put plainly, does the seizure schedule makes sense when a person's initial funds may be virtually all they have for their entire sentence? It plainly does not.

The SNPR also explains that part of the rationale for the one-time payment is to teach incarcerated people that "payment of financial obligations based on their financial means is an expected part of their term of imprisonment and that they would not be permitted to maintain significant balances . . . and stay in compliance with IFRP."[59] The one-time payment at initial classification is not necessary to satisfy this purpose. This purpose would be satisfied by the person's participation in the IFRP throughout the remainder of their sentence.

For these reasons, as well as the lack of data relevant to this aspect of the SNPR (*see* Part I, *supra*), we recommend the Bureau remove this provision from any final rule.

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[57] Fed. Corr. Inst., Talladega, Alabama, "Commissary Sales List" (Jun. 6, 2024), https://www.bop.gov/locations/institutions/tdg/tdg_commlist.pdf?v=1.0.2 (showing Nasacort Triamcinolone sold for $20 at commissary).

[58] "FCI-Danbury Commissary List," *supra* note 7 (listing multiple sizes of polar fleece at $32.50 each).

[59] SNPR, 89 Fed. Reg. at 102025.

b. This Provision Risks Unfairness

The SNPR's one-time payment requirement also risks unfairness by treating similarly situated people very differently, a consequence the Bureau states it wishes to avoid.[60] Specifically, the amount of funds that the Bureau proposes to seize from an incarcerated person with the same account balance would depend on the timing of their initial classification.

For example, if someone has put their life savings of $900 in their account immediately before their initial classification meeting at the Bureau of Prisons, $325 will immediately be seized. If they enter Bureau custody with no funds and make the $900 deposit one day after their initial classification meeting, none of that money would be seized; instead, 25% of their deposits made over the next six months would be (which may amount to no seizure if there are no deposits made during that period).[61] The SNPR even acknowledges this possibility, stating, "While for some inmates this [initial classification will occur relatively quickly after they enter Bureau custody, other inmates may have spent substantial time in Bureau custody pre-trial and accumulated significant funds in their commissary account."[62] Yet the SNPR does not attempt to address this risk of unfairly treating essentially identical people differently, merely based on the timing of their initial classification meeting.

To eliminate this risk of unfairness, the Bureau should simply use one deduction system throughout the person's involvement in the IFRP and eliminate the provision regarding one-time payments at the time of initial classification.

c. This Provision Would Be Difficult for Bureau Staff to Administer

Finally, it is unnecessarily complicated to apply one set of seizure thresholds and rates to a one-time payment at classification, and then apply entirely different seizure thresholds and rates for all future deposits to an incarcerated person's account. Using multiple different schemes merely confuses matters for both the incarcerated people participating in the IFRP and Bureau staff attempting to administer it.

No compelling reasons outweigh this administrability challenge. To the contrary, the previous two sections further tip the scale in favor of eliminating the one-time payment provision from any final rule. As we discuss in Part III.B.2, *infra*, the Bureau should instead adopt the simpler-to-administer system we lay out, which uses the same scheme throughout an individual's IFRP involvement. Even if the Bureau declines to adopt our proposed alternative approach, it should still eliminate the provision regarding one-time payment.

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[60] *See* SNPR, 89 Fed. Reg. at 102028 (listing the "risk of unfairness by treating inmates with similar balances differently" as something the Bureau sought to avoid).

[61] *Compare* SNPR, 89 Fed. Reg. at 102025, Table 1 (explaining that if the commissary account balance is between $250 and $5,000, then 50% of the amount between $250 and $5,000 will be deducted for the one-time initial payment; in our example, that would mean 50% of $650 [i.e., the amount between $900 and $250] would be seized) *with id.* at 102027, Table 3 (explaining that if the total value of deposits over the prior six months was between $250 and $999.99, then 25% of future outside deposits will be deducted to be put toward the IFRP).

[62] SNPR, 89 Fed. Reg. at 102025.

2. Use the Annual Federal Poverty Level as the Threshold, or "Set-Aside," Amount

Under the current IFRP regulations, when developing an incarcerated person's financial plan, Bureau staff are required to subtract $450 from consideration in evaluating that person's available financial resources. This is sometimes referred to as a "set-aside." In the SNPR, the Bureau effectively proposes a much lower $250 set-aside. Specifically, the SNPR provides that:

> [A]n inmate who receives less than $250 in deposits over the six months prior to program review would generally not be required to pay *any* percentage of their outside deposits towards IFRP. The only circumstance in which this inmate would be required to pay a percentage of his outside deposits is if the inmate has accumulated a commissary account balance of $250 or more at the time of program review.

The Bureau explains that, in its view, "if the inmate has $250 in their commissary account, regardless of their deposit activity over that time period, then the rationale behind the set-aside is satisfied, and the inmate should pay a percentage of his future incoming deposits towards IFRP obligations."

We agree that an easily determinable amount of money should be protected from seizure through the IFRP. However, instead of $250, the Bureau should adopt a threshold, or "set-aside," amount that aligns with the Department of Health and Human Services' federal poverty guideline (colloquially referred to as the "federal poverty level," or "FPL).[63] Incorporating this figure into the language of the SNPR (suggested language in bold), it would read:

> [A]n inmate who receives . . . deposits over the six months prior to program review **that amount to less than half of the Department of Health and Human Services' federal poverty guideline for that year** would generally not be required to pay *any* percentage of their outside deposits towards IFRP. The only circumstance in which this inmate would be required to pay a percentage of his outside deposits is if the inmate has accumulated a commissary account balance of **an amount that is equal to or greater than the Department of Health and Human Services' federal poverty guideline for that year** at the time of program review.

In 2025, the annual FPL is $15,650 for a one-person household. Given the SNPR's 6-month period, the relevant figure for outside deposits over that 6-month period would be half of that, or $7,825.[64]

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[63] *See* U.S. Dep't of Health and Hum. Servs., Poverty Guidelines, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines.

[64] In our comments responding to the NPRM, we proposed the Bureau use the FPL as an *interim* rule, and that the Bureau adopt a final rule that "uses a data-informed minimum threshold." Upon further reflection and after reviewing the SNPR, we recommend using the FPL as a final rule because it is simpler, more administratively feasible, and is a recognized federal poverty standard that will adjust over time to account for inflation and changes in cost of living. If the Bureau declines our recommendation and decides to use a threshold other than the FPL, however, it should do so only if its threshold is based on adequate data. We discussed the data the Bureau should

The Bureau should adopt our proposal instead of its $250 proposal for multiple reasons. First, as we discuss in Part I, *supra*, the Bureau has failed to cite adequate data and provide sufficient justification in support of a commissary account balance of $250. This seemingly arbitrary figure fails to account for many expenses incarcerated people face.

Second, the $250 figure is not consistent with other federal guidelines regarding poverty. The FPL, on the other hand, is a recognized federal poverty standard based on complex and comprehensive data provided by the Census Bureau.[65] Because the Bureau has failed to provide data about the amount of income incarcerated people need to meet their basic needs, or data on how that amount differs from people who are not incarcerated, the Bureau should adopt existing federal guidelines rather than establish an arbitrary alternative.

Third, $250 is a static figure. The Bureau would need to conduct future rulemakings to adjust this figure in the future. Conversely, the FPL adjusts each year, taking into account factors like inflation and changing costs of living,[66] which would save the Bureau considerable resources it would otherwise need to expend on rulemakings to update the regulations.

Finally, although this figure is higher than the one the Bureau proposes in the SNPR, it will nonetheless solve the problem that spurred this proposed rulemaking in the first place. This rulemaking seemingly was prompted by a series of articles in the *Washington Post*,[67] which reported that "more than 20 inmate accounts in 2021 [were] holding more than $100,000, for a total exceeding $3 million."[68] Using the FPL will still allow the Bureau to target recovery from these high-balance individuals and facilitate victim compensation, while also ensuring that people incarcerated in federal prisons—the majority of whom lack any significant financial resources—can meet their basic needs and successfully reenter society. Indeed, other federal government agencies use higher multiples of the FPL—from 150% to 250%—as their threshold for when government seizure of funds is likely to cause economic hardship.[69] Furthermore, we

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rely on in detail in our comments to the NPRM. *See* NCLC, et al., Comment on NPRM, *supra* note 10, Section V.A.2.a.

[65] *See* U.S. Dep't of Health and Hum. Servs., Poverty Guidelines, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (explaining that "[t]he January 2025 poverty guidelines [we]re calculated by taking the 2023 Census Bureau's poverty thresholds and adjusting them for price changes between 2023 and 2024 using the Consumer Price Index").

[66] *Id.*

[67] *See* Sens. Durbin, Booker, Whitehouse & Coons, Comment on NPRM, ID: BOP-2023-0001-1141 https://www.regulations.gov/comment/BOP-2023-0001-1141 (summarizing the *Washington Post*'s reporting and explaining that "[i]n response to the Post's reporting, the Judiciary Committee called for BOP to provide information on its management and oversight of the [IFRP] to the Senate Judiciary Committee," which was then followed by this rulemaking).

[68] *See, e.g.*, Devlin Barrett, "Federal Prisoners hold $100 million in government-run accounts, shielded from some criminal scrutiny and debt collection," *Washington Post* (Jun. 9, 2021), https://www.washingtonpost.com/national-security/bureau-of-prisons-bank-system/2021/06/08/2aff9766-c3d1-11eb-8c18-fd53a628b992_story.html; Devlin Barrett, "Prison officials allowed convicted sex abuser Larry Nassar to pay little to victims while spending thousands on himself," *Washington Post* (Jul. 28, 2021), https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06_story.html.

[69] As the National Taxpayer Advocate explained in the 2019 Purple Book (recommendation 28), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook_03_ImproveAssmtCollect_p.pdf, "Both the law and IRS procedures

propose using the figure for a single-person household, notwithstanding that many people who are incarcerated have families, including dependent children.[70] In short, our proposed threshold—the federal poverty level—is modest.

3. Eliminate the Provision Targeting "High-Value" Accounts

By adopting the FPL as the IFRP threshold, the Bureau can eliminate its provision targeting "high-value" accounts. Under the SNPR, the Bureau proposes to apply a progressive-seizure approach to accounts between $250 and $4,999.99 and to seize 100% of funds in an incarcerated person's account at or above $5,000. Further, any deposits intended for the individual when their account is at or above $5,000 would also be seized and put toward LFOs.[71] For the reasons we explained in the previous section, the Bureau should use the FPL as its threshold amount.

The FPL exceeds $5,000 and would therefore obviate the Bureau's need for including an additional provision regarding how to treat accounts with balances greater than or equal to $5,000. Thus, in addition to producing the benefits described in the previous section, our proposed approach of using the FPL would enable the Bureau to further simplify the rule. More specifically, it would be easier to administer than the SNPR, which would apply one approach to accounts between $250 and $4,999.99 and a different approach to accounts $5,000 and above.

In the Supplemental Information to the SNPR, the Bureau explains that "[i]n the Bureau's experience, the vast majority of inmates carry commissary account balances of under $5,000."[72] For example, the SNPR goes on, "[a]s of November 2024 . . . only two percent of BOP's inmate population of over 158,000 inmates had a commissary account balance of $5,000 or more."[73] This data is certainly relevant to the Bureau's development of a proposed rule regarding the IFRP, but it is insufficient. The fact that very few people have $5,000 in their commissary account does not mean that $5,000 is enough to cover people's expenses inside and outside prison. As we discussed in Part I, *supra*, the BOP has provided inadequate data on people's expenses inside and outside prison. Furthermore, seizing 100% of people's funds once their account hits a certain balance would severely undermine incarcerated people's ability to save for reentry, deter their loved ones from providing financial support, and also—as the Supplemental Information acknowledges—encourage incarcerated people to "decline to participate in IFRP."[74]

We therefore propose the Bureau eliminate its proposed provision regarding targeting accounts greater than $5,000 in favor of our suggested alternative, which uses the threshold figure of the

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 the SAVE plan finalized in 2023 protects 225% FPL against financial hardship. See analysis in Proposed Regulations Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (January 11, 2023).

[70] *See* Part III.A.2, *supra*. If the Bureau wants to incorporate household size when setting a threshold, we would not oppose that approach.

[71] SNPR, 89 Fed. Reg. at 102029.

[72] *Id.*

[73] *Id.*

[74] *Id.*

FPL. Our proposed approach is both more administratively feasible and better reasoned than the approach proposed in the SNPR.

4. Deduct 25% of Qualifying Outside Deposits

The SNPR relies on a complex progressive approach to seizing outside deposits in which the amount seized from future deposits depends on both the total value of deposits the person received over the prior six months and the person's account balance prior to the deposits. There are five different ranges of past deposits which correspond to one or two different possible percentages for deductions from future deposits. Instead of relying on this complex and difficult to administer approach, we propose that the Bureau use a single percentage: 25%. Additionally, as discussed in the previous section, we propose that the Bureau only deduct 25% of future deposits if outside deposits over the previous six-month period collectively exceeded half the FPL (as noted, in 2025, this figure is $7,825) or the accumulated account balance is over the FPL (in 2025, this figure is $15,650).

We acknowledge that we recommended a progressive approach in our comments responding to the NPRM. We continue to believe that applying a progressive approach *above a much higher minimum threshold* is still a fair and reasonable approach. If efficiency and ease of administration are top concerns, however, then using a single percentage of 25% is preferable. For one thing, it is significantly simpler to administrate than the approach advocated in the SNPR. Second, it would be more protective of people incarcerated in federal prisons who lack financial resources when combined with the other modifications we suggest—in particular, using the FPL as the set-aside amount, not seizing community resources, and not seizing wages unless they are at least minimum wage.

C. Amend Garnishment Provision to Ensure Wages Are Not Garnished Unless Wages Are At Least Minimum Wage

The SNPR proposes to garnish 10% of incarcerated people's wages to put toward LFOs. This proposal is an improvement from the NPRM, which proposed to seize a whopping 25 to 50% of wages. Nevertheless, garnishing wages from people whose wages are far closer to zero than to the minimum wage would not address the primary concerns that prompted the Proposed Rule—namely, preventing a very small minority of incarcerated individuals from storing assets in their commissary accounts and avoiding paying LFOs. We urge the Bureau to eliminate wage garnishment from any final rule unless and until incarcerated workers receive at least minimum wage.

As the Supplemental Notice to the NPRM recognized, 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.[75] Workers in non-UNICOR jobs can make even less: from $0.12/hour to $0.40, depending on grade.[76] The vast majority of eligible people do not have the (relatively) more desirable UNICOR

[75] 88 Fed. Reg. at 1333.
[76] *Id.*

assignments: Only 8% of work-eligible people participate in the UNICOR program; approximately 25,000 people are waiting to work those jobs.[77]

Thus, seizing wages would not enable the Bureau to take meaningful steps toward achieving its primary goal, considering people are paid next to nothing for their work. To the contrary, it would only hurt people's ability to access necessities while incarcerated, such as basic over-the-counter medication, hygiene products, and the means to communicate with their support system on the outside. Assume, for example, that Mr. Doe has the highest paid non-UNICOR job at FCI Lompoc I and therefore makes $0.40/hour. If none of his wages were garnished, it would take him six and a half hours to purchase ibuprofen from the commissary.[78] Under the SNPR, Mr. Doe would have 10% of his wages garnished, effectively making his wages $0.36/hour. He would have to work for over 7 hours—a full day's work—to purchase ibuprofen the next month. One book of stamps would cost him an entire week's wages.[79]

In short, no one is amassing wealth from working in prison. Seizing a few cents per hour from people who are making less than a dollar per hour would be pointless. It would not address the Bureau's goal of preventing people with significant commissary account balances from avoiding their LFOs. Any final rule should ensure wages are not garnished for IFRP purposes until and unless incarcerated people are paid at least minimum wage.

D. Use the IFRP Only for Restitution

The Bureau should adopt a final rule that requires the IFRP to be used only to collect victim restitution. This rulemaking was seemingly spurred by reports of high-profile, wealthy people incarcerated in federal prison who were allegedly amassing significant amounts of money in their prison accounts and failing to pay court-ordered restitution to victims.[80] Yet under the SNPR, the BOP would take funds from incarcerated people and their families to pay for things that have nothing to do with restitution. For example, deductions through the IFRP would go to paying fines, fees, and other costs that generate revenue for the courts and the federal government. The IFRP should not be used for this purpose.

Even if the Bureau declines our recommendation to use the IFRP only for restitution, it should at the very least not use the IFRP to collect state court debt obligations. We agree with the Fines and Fees Justice Center that the BOP should leave questions about enforcement of state fines and fees to the states, for the reasons they lay out in their comments.

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[77] Bureau of Prisons, "UNICOR," https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited Jan. 28, 2025).
[78] SNPR, 89 Fed. Reg. at 102026, Table 2 (listing ibuprofen as $2.60).
[79] *Id.* (listing a book of stamps as $12.60). $12.60 divided by $0.36 = 35 hours.
[80] *See, e.g.*, Sens. Durbin, Booker, Whitehouse & Coons, Comment on NPRM, *supra* note 67 (noting that "the *Washington Post* published a series of articles reporting how notorious criminals, including disgraced USA Gymnastics doctor Larry Nassar, singer R. Kelly, and Boston Marathon Bomber Dzhokhar Tsarnaev, held thousands of dollars in their inmate trust accounts while paying little to nothing to their victims" and "[i]n response to the *Post*'s reporting, the Judiciary Committee called for BOP to provide information on its management and oversight of the Trust Fund Program").

E. Incorporate Provisions that Would Improve Public Safety by Fostering Successful Reentry

1. Exempt Incarcerated People from IFRP Participation for at Least Two Years Prior to Reentry

In the SNPR, the Bureau states it is:

> interested in receiving comments on the topic of whether an inmate should be exempt from IFRP participation for a certain length of time prior to reentry. For example, the inmate could be exempt from IFRP participation during the 90 or 180 days prior to either (1) the inmate's transition to a residential reentry center or home confinement, or (2) expiration of the inmate's term of imprisonment, if the inmate is not participating in community confinement.

We commend the Bureau for incorporating reentry considerations into the SNPR, and we agree with the Bureau's proposal to exempt people nearing the end of their sentence from the IFRP. We urge the Bureau to exempt incarcerated people from IFRP participation for at least two years prior to reentry.

We believe a minimum of two years' IFRP exemption is necessary to support successful reentry. The SNPR gives examples of 90- and 180-day exemptions. Incarcerated people receive so little in wages that even using the longer of the two periods—180 days—the IFRP exemption would not lead to protection of an amount of money that would come close to adequately supporting reentry.[81]

Consider the following example: Assume an incarcerated person has the *highest* paid non-UNICOR job, which makes $0.40 per hour. Assuming a 40-hour workweek for 26 weeks (roughly 180 days), that person would end up with only $416 for reentry.[82] This is a best-case estimate because it assumes the incarcerated person is able to obtain 40 hours of work per week, is paid for any holidays or sick days during the 180-day period, and does not spend *any* money during that period. Even using this best-case scenario figure, $416 is unlikely to cover minimum basic expenses associated with reentry—such as transportation home, clothing, food, and lodging expenses—until the person can find a job on the outside. Indeed, the average price of a dorm bed in a hostel for just two weeks already exceeds this amount; it's $505, not including taxes and fees.[83]

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[81] As noted previously, support from family and friends on the outside may drop off over the course of one's sentence, and some incarcerated people never have community support at all. Accordingly, it makes sense to look only at wages for purposes of this provision.

[82] Calculation: $0.40/hour x 40 hours/week x 26 weeks = $416. We cannot simply multiply $0.40/hour x an 8-hour workday x 180 days because the 180-day period prior to reentry would not be made up of only workdays.

[83] Budget Your Trip, "USA Average Hostel Costs: Dorm and Private Room Prices" (last visited Jan. 30, 2025), https://www.budgetyourtrip.com/hostels/united-states-of-america-US#:~:text=The%20average%20price%20of%20a%20dorm%20bed%20in%20a%20hostel,not%20including%20taxes%20and%20fees).

A minimum 2-year exemption is considerably more reasonable. Again, conservatively assuming an incarcerated person has the *highest* paid non-UNICOR position, is able to get 40 hours of work per week, is paid for holidays and sick days, and does not spend *any* money during the 2-year period, they would save $1,664 to use for reentry. This is a modest amount for someone trying to reintegrate back into society after incarceration. And it is only a small fraction, for example, of the median transaction account balance of $8,000 for people on the outside.[84]

For these reasons, we urge the Bureau to incorporate an exemption period into the SNPR that is at least two years long.

2. Remove Counterproductive Consequences of Nonparticipation in the IFRP

We commend the Bureau for examining the consequences of nonparticipation in the IFRP and its proposal to remove several such consequences. We urge the Bureau not to include two other consequences of nonparticipation.

First, we repeat here our recommendation that the Bureau strike the following consequence of nonparticipation in the IRFP: "The inmate will not receive a release gratuity unless approved by the Warden." This consequence runs counter to the Bureau's goals of promoting public safety by fostering successful reentry and reducing recidivism risks. Given the importance of financial resources to successful reentry, the Bureau should not maintain a rule that directly stymies this goal.[85] Retaining this consequence of nonparticipation would not only negatively impact those in Bureau custody, it would also harm the families and communities to which people return by undermining the prospects of successful reentry. The Bureau should eliminate this short-sighted and counterproductive provision from its final rule.

Second, we agree with the Georgetown Civil Rights Clinic's arguments that conditioning First Step Act time credits on IFRP participation goes against the spirit of the First Step Act and would disincentivize participation in First Step Act reentry programs. We therefore urge the Bureau not to include this consequence in any final rule.

F. Put Interest Accrued from Incarcerated People's Funds Toward LFOs

In our comments responding to the NPRM, we recommended that the Bureau consider putting interest accrued on its trust funds toward legal financial obligations.[86] We noted previously that

[84] The median transaction account balance is $8,000, according to the Federal Reserve's Survey of Consumer Finances, with the most recently published data from 2022. Transaction accounts include savings, checking, money market and call accounts, as well as prepaid debit cards. *See* Board of Governors of the Federal Reserve System, "Changes in U.S. Family Finances from 2019 to 2022: Evidence from the Survey of Consumer Finances," 16 (Oct. 2023), https://www.federalreserve.gov/publications/files/scf23.pdf.

[85] *See also* Part II.B, *supra*, 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.

[86] Bureau of Prisons, "Trust Fund/Deposit Fund Manual," 15 (March 14, 2018), 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.

at least some of these funds are invested and earn interest,[87] and we urged the Bureau to explore using this source of money to help pay legal financial obligations instead of using it to pay for prison operations. The Bureau did not address this recommendation in the SNPR, and we encourage it to do so.

IV. Summary of Benefits of Our Proposed Approach Compared to the SNPR

Our alternative approach would better achieve the following Bureau goals:

- *Victim Compensation.* A key purpose of the IFRP is to encourage people incarcerated in Bureau facilities to pay their legal financial obligations. Our approach—using the FPL—would allow the Bureau to focus its collection efforts on those individuals who have significant resources and therefore could be making bigger payments toward their LFOs. Using the FPL is a modest approach, especially when one considers that other federal government agencies use higher multiples of the FPL—from 150% to 250%—as their threshold for determining when government seizure of funds is likely to cause economic hardship.[88] Moreover, we propose using the figure for a single-family household, notwithstanding that many incarcerated people have families, including dependent children.[89] In short, our approach would facilitate victim compensation while also ensuring that people incarcerated in federal prisons—the majority of whom lack financial resources—can survive and successfully reenter society.

  Efficiency. The Trump Administration has stated it is focused on maximizing governmental efficiency. Our proposed approach is more efficient than the SNPR's because it would enable the Bureau to focus on collecting from people who have meaningful resources to put toward LFOs, rather than requiring significant administrative effort to collect very small sums of money.[90] Additionally, by tying the IFRP to the FPL, our approach would allow the relevant set-aside amount to automatically update to account for inflation and changes in cost of living. The various threshold figures in the SNPR, on the other hand, would quickly become outdated, thereby necessitating another rulemaking and the significant time and resources such rulemakings entail.

[87] 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.'" 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." Bureau of Prisons, "Trust Fund/Deposit Fund Manual," 15 (March 14, 2018), https://www.bop.gov/policy/progstat/4500.12.pdf. In 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), 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.

[88] *See* Part III.B.2, *supra*.

[89] *See* Part III.A.2, *supra*.

[90] The Bureau lacks a fully automated process to make IFRP withdrawals from an account, so these deductions seemingly would need to be at least partly manual. *See* SNPR, 89 Fed. Reg. at 102028; NPRM, 88 Fed. Reg. at 1334.

- *Administrability*. The Bureau has repeatedly emphasized its desire for a rule that avoids administrative and technological challenges.[91] Our alternative approach would be considerably easier to administer than the SNPR because it would replace the SNPR's three different schedules for seizure with their various deduction rates with a single threshold figure (the FPL) and a single deduction rate (25%). Our approach would be less time consuming for Bureau staff and reduce the risk of errors.

- *Public Safety & Reentry*. As discussed in Part II, promoting successful reentry and public safety was the aim of popular, bipartisan legislation during the first Trump administration. The Bureau also acknowledges the "importance of planning for reentry."[92] Our alternative proposal would advance these reentry goals by ensuring the IFRP does not drain funds that allow incarcerated people to maintain community contact while incarcerated and that will 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 exempt incarcerated people from IFRP participation for at least two years prior to their release, further increasing people's ability to build adequate resources for when they return to society.

- *Basic Needs*. In the SNPR, 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."[93] In this SNPR, the Bureau attempts to factor in those needs. As discussed in Part I, however, the SNPR relies on inadequate data, which has resulted in greatly underestimating these costs. This is reflected in many aspects of the SNPR, including the one-time seizure at initial classification and the $250 threshold figure. By relying on the FPL, our approach is grounded in a recognized federal poverty standard based on the Census Bureau's complex and comprehensive data. Unlike the SNPR, our approach will ensure the IFRP does not prevent incarcerated people from meeting their basic needs.

- *Harm to Families & Children*. As discussed in Part II.C, the SNPR would likely cause significant, unnecessary harm to hardworking families, including children. Our proposal would lessen these harsh impacts, including by better safeguarding funds for incarcerated parents to speak with their children and by eschewing the SNPR's draconian approach to seizure of community contributions.

- *Compliance with the Administrative Procedures Act*. Finalizing the proposal in the SNPR—which is based on inadequate data, flawed reasoning, adopts arbitrary thresholds, and would seize community resources without statutory authority—risks violation of the Administrative Procedures Act.[94]

[91] *See* SNPR, 89 Fed. Reg. at 102028; NPRM, 88 Fed. Reg. at 1334.
[92] NPRM, 88 Fed. Reg. at 1331.
[93] *See* NPRM, 88 Fed. Reg. at 1333.
[94] In addition to the arguments raised in these comments, see NCLC, et al., Comment on NPRM, *supra* note 10, Section IV.

V. Conclusion

We recommend that the Bureau adopt the alternative approaches we describe above in any final rule. In the alternative, the Bureau should withdraw the SNPR. If you have any questions about these comments, please contact Caroline Cohn at ccohn@nclc.org.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)
Prison Policy Initiative
Stephen Raher

Exhibit A:

Comments of the National Consumer Law Center, Prison Policy Initiative, and Stephen Raher on the NPRM

March 13, 2023

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 Raher 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, Safter 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'cns 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.

Table of Contents

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 balance[8] 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-pays[12] 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

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[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. 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 Raher, *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 Raher, 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.

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[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 Nikolaides, *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

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[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'cns 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

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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.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1008 (California law); https://worthrises.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 home[32] 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 records[33] 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.

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[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 alone[41]—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. population[46] but are 38.4% of the federal prison population.[47] Similarly, Hispanic people make up only 18.9% of the U.S. population[48] 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 the 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]

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[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/pptmcspi16st.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. <u>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</u>

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:

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[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]

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[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.

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[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?=v1.0.0 (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]

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[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 *government* 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.SC. § 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 *general* 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 *supra,* 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 *individualized* 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

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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 judgment[113] 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

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[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.

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[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

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[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.

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[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 Raher, "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.

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[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 communication[151] 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 IRFP 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 Raher at stephen@amalgamatedpolicy.com.

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[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,

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Prison Policy Initiative
Stephen Raher