



Submitted via regulations.gov

February 14, 2023

The Honorable Merrick B. Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530

Re: Proposed Rule, Inmate Financial Responsibility Program: Procedures, BOP Docket (BOP-2023-0001)

Dear Attorney General Garland:

FAMM submits this comment in response to the recent Proposed Rule regarding the Inmate Financial Responsibility Program (IFRP). The proposed rule would overhaul the IFRP. While we recognize the need to update this obsolete program, we disagree with the policy approach in the proposed rule. We write to advocate a final rule that will align with the purposes of the IFRP and prioritize equity over administrative convenience.

FAMM has been an engaged advocate for incarcerated people and their loved ones for more than three decades. We work on behalf of more than 75,000 members including incarcerated people and their family members. FAMM actively promotes legislation and policies that, among other things, ensure that conditions in correctional facilities are safe and humane.

For the reasons discussed below, we believe that the proposed rule would disproportionately and unduly harm indigent people in prison and their families. The proposed rule is also arbitrary and capricious. It undermines the regulatory purpose and is not supported by the evidence cited by the Bureau of Prisons. Finally, we believe that this proposal runs afoul of the First Step Act.



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## 1. Background

On August 16, 2021, Deputy Attorney General Lisa Monaco issued a directive to the Bureau of Prisons (BOP) to “take appropriate steps to prevent inmates from using [inmate trust fund accounts] to engage in unlawful activity or to avoid obligations like paying court-ordered restitution to victims.”<sup>1</sup> This directive came on the heels of a news story revealing that Larry Nassar had paid only \$100 a year in restitution to his victims, while spending more than \$10,000 from his BOP account on himself.<sup>2</sup> Although other stories have since come out documenting similar practices by people such as Djhokhar Tsarnaev and R. Kelly, most incarcerated people are not amassing wealth in their accounts.<sup>3</sup> Most incarcerated people use the money that family sends them for phone calls to loved ones, for food, for basic clothing, and for hygiene products.

In 2021, roughly 20 people incarcerated in the BOP had more than \$100,000 in their accounts.<sup>4</sup> That is a mere .01 percent of that year’s total prison population of more than 152,000 people.<sup>5</sup> In light of this data, the proposed rule sweeps far too broadly by instituting a 75 percent cut from money coming in from the community to everyone, no matter their financial status.<sup>6</sup> It also mandates that at least 50 percent of monthly pay from a UNICOR job, and 25 percent from a non-UNICOR job, be allotted toward the IFRP payment process. Although voluntary, not participating comes at a steep cost – First Step Act Time Credits are on the line, among other things.

The rule that the BOP has proposed appears to treat every incarcerated person the same, but it would disproportionately harm indigent people and their families. For example, if someone earns \$20 a month cleaning prison bathrooms, \$5 will go toward IFRP. They will then have \$15 left over. Imagine that their family sends \$100 to buy food and hygiene products. Seventy-five dollars will be allocated to IFRP, leaving the person with a total of \$40 in their account. Shampoo alone can cost \$10, food costs even more. As one incarcerated person wrote to FAMM:

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<sup>1</sup> U.S. Department of Justice, Memorandum from The Deputy Att’y General to the Dir. of the Bureau of Prisons, re: Inmate Financial Accounts (Aug. 16, 2021).

<sup>2</sup> Devlin Barrett, *Prison Officials Allowed Convicted Sex Abuser Larry Nassar to Pay Little to Victims while Spending Thousands on Himself*, The Washington Post (July 28, 2021), [https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06\\_story.html](https://www.washingtonpost.com/national-security/larry-nassar-prison-bank-account/2021/07/28/abdf6560-ee14-11eb-bf80-e3877d9c5f06_story.html).

<sup>3</sup> Devlin Barrett, *Prosecutors Seek Money From Boston Marathon Bomber’s Prison Bank Account*, The Washington Post (Jan. 5, 2022), [https://www.washingtonpost.com/national-security/boston-bomber-tsarnaev-prison-money/2022/01/05/f06963ee-166d-11ec-b976-f4a43b740aeb\\_story.html](https://www.washingtonpost.com/national-security/boston-bomber-tsarnaev-prison-money/2022/01/05/f06963ee-166d-11ec-b976-f4a43b740aeb_story.html); Devin Barrett, *Judge Orders R. Kelly’s Prison-Account Money be Turned Over to Court*, The Washington Post (Sept. 9, 2022), <https://www.washingtonpost.com/national-security/2022/09/09/r-kelly-prison-account/>.

<sup>4</sup> *Id.*

<sup>5</sup> See, U.S. Dep’t of Justice, Bureau of Justice Statistics, “Prisoners in 2021: Statistical Tables,” Tbl. 2 (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

<sup>6</sup> BOP proposed rule, Inmate Financial Responsibility Program: Procedures, 2023-00244 at 1336 (Jan. 9, 2023).

I am being told that 75% of my family's strain is going to be strained more, and yet commissary prices on everything is skyrocketing and we are getting paid less per month. It is impossible to live in here as it is. – W.W.

In our view, the proposed rule would punish everyone for the sake of extracting payments from the very small percentage of wealthy individuals in federal prison. This amounts to asymmetrical punishment. It is also arbitrary and capricious.

## 2. The Proposed IFRP Rule is Arbitrary and Capricious

The Administrative Procedures Act (APA) instructs courts to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>7</sup> Courts in D.C. have recognized agency action as arbitrary and capricious when “the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency,”<sup>8</sup> or when agency action is not supported by the “regulatory purpose.”<sup>9</sup> That is precisely what BOP has done here, by its own admission.

### A. BOP's Proposed Rule Undermines the Regulatory Purpose of the IFRP

On January 9, 2023, BOP published a proposed rule updating the IFRP. The purpose of the IFRP is to “encourage federal inmates in Bureau facilities to pay financial obligations; **and** to support federal inmates in developing financial planning skills.”<sup>10</sup> To that end, “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 . . . and any reasonable expenditures required by the inmate.”<sup>11</sup> But the program that BOP has proposed undermines this purpose. For financial planning to be effective, it must be personalized. Financial plans and financial planning best practices take into account an individual's circumstances and goals and allow the person to feel in control of their financial future.<sup>12</sup> The BOP's proposed rule elevates one purpose of the IFRP – meeting obligations – to the detriment of the other – helping with financial planning. Rather than suggest a policy that would truly individualize the financial payment and planning for an incarcerated person in a reasonable manner and promote financial planning skills, BOP has proposed that flat

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<sup>7</sup> 5 U.S.C. § 706(2)(A).

<sup>8</sup> *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 4392642, at \*12 (D.D.C. Sept. 8, 2022) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>9</sup> *Chiayu Chang v. United States Citizenship & Immigration Servs.*, 289 F. Supp. 3d 177, 188 (D.D.C. 2018).

<sup>10</sup> *Supra* note 6 at 1331 (emphasis added).

<sup>11</sup> *Id.* at 1333.

<sup>12</sup> *See, e.g.*, Consumer Finance Protection Bureau, *4 Elements Define Personal Financial Well-Being* (Jan. 27, 2015), <https://www.consumerfinance.gov/about-us/blog/4-elements-define-personal-financial-well-being/>.

percentages be used to determine how much money will be taken from all work income and, most concerning, from community deposits.

#### B. BOP's Proposed Rule Runs Counter to the Evidence Before the Agency

BOP proposes to withhold a flat percentage of earnings from prison jobs, and to take 75 percent of money received from the community, and apply those funds to court-ordered payments.<sup>13</sup> Taking 75 percent of the deposits received from people in the community and allotting that to restitution and other court-ordered payments would be arbitrary and capricious in light of the alternative approaches BOP considered and discarded, and particularly given that most people are not amassing wealth in their BOP accounts.

The BOP explained that it “considered a system similar to progressive taxation, which would apply a lower marginal rate to amounts below a certain threshold, and a higher marginal rate to amounts above that threshold.”<sup>14</sup> BOP further described what it found to be the myriad benefits of such a system. The BOP found those benefits to include enabling BOP to target those accounts with large balances – the headline-driven problem that caused BOP to revamp this rule in the first place. The BOP tellingly recognized that a rule that takes money based on the amount of income one has is “also more equitable.”<sup>15</sup> The BOP stated the obvious – that someone with an “account balance of \$100 and minimal incoming deposits is differently situated than one with an account balance of \$10,000 or one with numerous deposits.”<sup>16</sup> Financial planners would certainly agree and work with their clients to make plans tailored to their income and current assets.

And yet, BOP chose to propose a system that ignores this evidence. The BOP admits the proposed plan is less equitable and is ill-suited to address the problem it is intended to solve.<sup>17</sup> Furthermore, BOP does not even articulate a logical or defensible basis justifying the specific percentage point cutoffs. The agency does not explain why taking 75 percent versus 50 or 25 percent is tailored to the regulatory purposes of the IFRP. So why did BOP ultimately land on this approach? Because, it explains, the flat percentage system is easier to administer.<sup>18</sup>

Using the flat system, “[s]taff will be able to develop intelligible financial plans that are easily understood.”<sup>19</sup> But that is not the case. Taking a large amount of one’s income at a flat rate is not conducive to financial planning, for the reasons described above. Furthermore, BOP staff already must examine restitution orders and other financial obligations in every case. It must determine what restitution is owed, to whom, when, and in what order. Those incarcerated individuals with no court-ordered payment plan will be stuck with the proposal that BOP has

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<sup>13</sup> *Supra* note 6 at 1334.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (finding that a “progressive” system “would allow the Bureau to target large account balances...”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

crafted, unmoored from the purposes of this program and the evidence before the agency. Taking 75 percent of money sent from the community without articulating a reason why that blanket deduction is fair, reasonable, and/or fit to the program's goals is arbitrary.

### C. Administrative Considerations Should Not Drive Policy Choices

We urge the BOP to not let ease of administration drive policy choices. We believe, as BOP acknowledged, that a sliding-scale system based on the amount of money coming in from community deposits, in conjunction with a certain percentage point reduction for accounts with high balances, would be more equitable and would best serve the dual purposes of the IFRP. It would also help BOP target large account balances while ensuring that incarcerated people have enough money to meet their daily needs in prison.

For example, for individuals with small community deposits, BOP could take 15, 20, or even 25 percent of the money for restitution. The scale can increase to 50 percent and 75 percent should the amount coming in from the community grow. We caution that the allotment should not be recalculated based on one unusually large deposit, which may have been for a special occasion and is not likely to occur regularly. For those individuals with account balances greater than \$10,000, BOP could deduct a certain percentage point of that balance toward the court-ordered payments.<sup>20</sup>

A system calibrated to the amount of money a person has and the amount of money they receive will help advance BOP's interests without unduly penalizing people who are just trying to survive inside. Such a system will also help BOP teach incarcerated people about financial planning because the IFRP payment plan will be more tailored to the person's financial situation. As the proposed rule acknowledges, "[r]etaining sufficient funds to cover basic inmate needs during incarceration remains a priority when developing and updating an inmate's IFRP payment plan."<sup>21</sup> This proposed rule, however, pays lip service to that priority. Its enactment would undermine it. As one incarcerated FAMM member wrote to us:

I was taken from \$25 quarterly to \$289.60 a month and had 15 days to accept a new contract. I am now in refusal status, effecting my pending transfer to a low and I now earn \$5.25 month and I am restricted to \$25 a month for commissary. – A. L.

Another person highlighted the problem with basing deductions off an amount that someone received from the community:

A few weeks ago I was called into unit team to sign a paper for them to take \$297 per month when I only make \$12 per month. Granted I got a Christmas stipend and Christmas money and

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<sup>20</sup> As BOP acknowledged, a "progressive system" would better position the agency to actually target accounts with high balances. *See supra* note 6 at 1334. This also addresses the problem raised by the headline-stories discussed earlier. *See supra* notes 3-4.

<sup>21</sup> *Supra* note 6 at 1333.

birthday money from my family. This money is no guarantee. It's hit and miss if or when our family will send us money. If we don't pay the amount we go into refusal and lose our programming and whatever else BOP feels they want to take away from us. It says, this FRP program was originally set up to help us make viable payment arrangements and prepare us to save upon future release into the community. I can 100% understand them taking some of our earned wages here in prison but not our money from our outside sources that are no guarantee. – G.R.

### 3. BOP's Proposed Rule Runs Afoul of the First Step Act

In addition to the concerns above, we also believe that BOP's proposed rule runs afoul of the First Step Act. Participation in the IFRP is voluntary but is implemented under the guise of a First Step Act "productive activity."<sup>22</sup> The way that BOP has structured the IFRP, however, is counter to both the statute and BOP's own rulemaking.

The First Step Act instructs in numerous statutory provisions that designation in recidivism-reducing programming must be done on an individualized basis. For example, in assigning evidence-based recidivism reduction (EBRR) programs, the focus should be on the "best ways that the Bureau of Prisons can tailor the programs to the specific criminogenic needs of each prisoner so as to most effectively lower each prisoner's risk of recidivism."<sup>23</sup>

The BOP's own rulemaking echoes this goal. Successful participation in a productive activity "requires a determination by Bureau staff that an eligible inmate has participated in [programming] that the Bureau has recommended based on the inmate's *individualized risk and needs assessment*."<sup>24</sup> Congress recognized in the First Step Act that recidivist reduction activities look different for each prisoner. As such, a cookie-cutter programming plan is not appropriate. Yet, the BOP's proposed plan for IFRP is just that: a cookie-cutter approach that penalizes nearly every prisoner for the sake of extracting large amounts of money from a few. This scheme cannot, for the reasons discussed above, masquerade as individualized financial planning.

What is more, the administration of the IFRP is in tension with the statutory and commonsense notion of an "activity." The statute defines a productive activity as "either a group or individual activity that is designed to allow prisoners . . . to remain productive and thereby maintain a minimum or low risk of recidivating . . . ."<sup>25</sup> Some examples of productive activities recognized by BOP include: English-as-a-second language, Embracing Interfaith Cooperation, Getting to Know your Healthy Aging Body, House of Healing: A Prisoner's Guide to Inner

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<sup>22</sup> *Supra* note 6 at 1335.

<sup>23</sup> *See, e.g.*, 18 U.S.C. § 3632(b)(2); *see also id.* at § (a)(5)(B).

<sup>24</sup> 28 C.F.R. § 523.41(c)(2).

<sup>25</sup> 18 U.S.C. § 3635(5).

Power and Freedom.<sup>26</sup> All of these productive activities require a certain number of sessions and hours of active participation, in which the incarcerated person likely walks away with tangible skills and tools to better themselves and reduce the likelihood of recidivism. The IFRP – a program in which BOP does not engage the individual in financial planning but instead takes a flat percentage of money from each prisoner – does not comport with either the definition of productive activity or the other productive activities designed by BOP. Moreover, the enforced passivity of the IFRP is not an activity in the plain meaning of the word.<sup>27</sup>

The BOP has provided no evidence for or explained how the proposed IFRP makes people less likely to recidivate. In fact, it seems that this plan may have the opposite impact. Money that comes from the community can help prevent recidivism by connecting people to their families. The connection between maintaining family ties and reduced recidivism has long been documented.<sup>28</sup> Many aspects of the First Step Act were designed in recognition of the positive impact of family.<sup>29</sup> To that end, “evidence-based recidivism reduction programs” include programs that focus on “family relationship building.”<sup>30</sup> Now that money will no longer be held aside for phone calls,<sup>31</sup> this proposed rule threatens the family connection to incarcerated people by diminishing their ability to communicate over the phone and send gifts to their loved ones.

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<sup>26</sup> Evidence-based Recidivism Reduction Programs and Productive Activities, U.S. Department of Justice, Federal Bureau of Prisons, [https://www.bop.gov/inmates/fsa/docs/evidence\\_based\\_recidivism\\_reduction\\_programs.pdf](https://www.bop.gov/inmates/fsa/docs/evidence_based_recidivism_reduction_programs.pdf).

<sup>27</sup> See Miriam-Webster Dictionary, [www.miriam-webster.com/dictionary/activity](http://www.miriam-webster.com/dictionary/activity) (“an educational procedure designed to stimulate learning by firsthand experience; a pursuit in which a person is active”).

<sup>28</sup> C.F. Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, Office of Justice Policy (March 1988), [ojp.gov/ncjrs/virtual-library/abstracts/family-ties-during-imprisonment-do-they-influence-future-criminal](http://ojp.gov/ncjrs/virtual-library/abstracts/family-ties-during-imprisonment-do-they-influence-future-criminal).

<sup>29</sup> See, e.g., the First Step Act 500 mile rule; see also 18 U.S.C. § 3635(3)(C)(ii) (including as an EBRR “family relationship building, structured parent-child interaction, and parenting skills”).

<sup>30</sup> The First Step Act of 2018: An Overview, Congressional Research Service, <https://crsreports.congress.gov/product/pdf/R/R45558>.

<sup>31</sup> *Supra* note 6 at 1332-33.

4. Conclusion

FAMM appreciates the opportunity to comment and provide our insight on this matter, as well as the insight of our incarcerated members whom this rule will impact. We hope that BOP reconsiders its approach to one that will be more equitable and more in line with the regulatory purpose. We would be happy to provide further information, if requested.

Sincerely,



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FAMM



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