



Yale Law School

ARTHUR LIMAN PUBLIC INTEREST PROGRAM

March 13, 2023

Submitted online via regulations.gov

Comments on Inmate Financial Responsibility Program: Procedures

We write to comment on the proposed amendment to 28 CFR 545 regarding what is termed the "Inmate Financial Responsibility Program" (IFRP), at 88 FR 1331. We are very concerned about a specific facet of this proposal, which provides:

"In addition, in recognition of the importance of satisfying financial obligations, including restitution owed to victims of criminal conduct, inmates will also be expected to allot 75% of the deposits received into their commissary accounts from sources outside the institution to the IFRP payment process. As indicated, however, 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."

We write to record our opposition and to request it be withdrawn. Each of us has learned a great deal about the economic challenges facing people in the criminal legal system through our work, including for some of us activities related to the Arthur Liman Center for Public Interest Law at Yale Law School. We know how limited are the resources of the vast majority of people who intersect with the system and how critical is support for family and community members.

We were surprised and dismayed to learn of the proposal to commandeer three-quarters of outside contributions to a person's commissary account so as to direct those funds to pay off court-ordered fines, fees, and restitution. Simply put, were that proposal to go into effect, it would do harm to tens of thousands of people who are low-income and who are incarcerated by the Bureau of Prison (BOP). As is obvious,

given the demographics of detained populations, it would be a serious blow to communities of color – working directly against the Administration's directive to "allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities." Below, we outline some of the resulting inequalities. We counsel against pursuing this plan because it would be a source of new forms of injustice that would undercut the many efforts – across the political spectrum – to shift to a less harmful and more equitable criminal law enforcement system.

1. Commissary funds need to be available to pay for basic necessities.

As is familiar, the vast majority of individuals incarcerated under the BOP have very limited resources. Researchers have documented that before incarceration, the median annual income for incarcerated people between the ages of 27 and 42 was \$19,185, and that was about forty percent less than their non-incarcerated peers. See Bernadette Rabuy & Daniel Kopf, "Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned," Prison Policy Initiative, July 2015, available at <https://www.prisonpolicy.org/reports/income.html>.

As is also familiar, if in BOP custody, people have very limited opportunities to earn money and make between 12 cents and 40 cents per hour. See Federal Bureau of Prisons, "Work Programs" webpage, available at: https://www.bop.gov/inmates/custody_and_care/work_programs.jsp. As a result, many people must depend on their families to send funds to purchase essentials that, as of this writing, the BOP does not provide in sufficient amounts. Examples include food items, toiletries, hygiene products, underwear, laundry detergent, and over-the-counter medications. In addition, people are charged for medical visits and phone calls.

As is again well-known, the likelihood of having a family member incarcerated is 61 percent higher for adults from households earning less than \$25,000 per

year than those earning over \$100,000 per year. Equal Justice Initiative, "Half of Americans Have Family Members Who Have Been Incarcerated," December 2018, available at: <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated/>.

Moreover, survey data from formerly incarcerated people and their families reported that about two thirds relied on family members to cover conviction-related costs, often that they could not readily afford, and low-income Black women have a heavier burden than people in other demographics. See Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design, 9 (September 2015), www.whopaysreport.org.

It is thus a remarkable testament to family and friendship that so many people who themselves have limited resources send money to incarcerated relatives. This proposal to take 75 percent of outside contributions to an individual's commissary account undercuts that love and generosity and instead penalizes family members and friends who are helping people manage the perils of incarceration. As one concrete example, were the proposal to be in effect, a mother trying to help her imprisoned son or daughter have basic necessities would need to send \$400 a month to enable that child to have \$100 in a commissary account. That is not only an undue but an unwise and unfair burden.

2. The proposed amendment is not responsive to the problem identified and undermines commitments to improving the equity of the criminal law enforcement system.

As we understand it, some of the "triggers" for the idea of confiscation comes from news reports of high-profile, wealthy federal prisoners who have funds in their prison accounts and are not paying court-ordered restitution. Instead of responding to high-income non-paying individuals and requiring that funds go to restitution, the proposal would harm low-income people, many of whom are struggling to pay all kinds of debts, fees, and restitution orders. Moreover, as we understand it, some of the people who have sparked

the public attention are not necessarily participants in IFRP.

To the extent rules need to be made, they need be focused on a very small subset of detained people. Moreover, to the extent victims need compensation, the BOP has itself revenue from Inmate Trust Fund accounts, and inquiry should be directed to how those funds are spent.

Indeed, in its own proposal, the Department of Justice acknowledged that it would be possible to implement a "more equitable" approach - "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." See 88 FR 1331. The concerns raised in the proposed rule merit repeating.

"A 'progressive' system tied to deposit amounts could mitigate this latter concern. For instance, 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. In that scenario, an inmate who deposited \$500 in a 365-day period would pay \$125 (25% of the \$500). An inmate who deposited \$501 in a 365-day period would pay \$125.50 (25% of the first \$500, and 75% of the amount-over \$500).

This solution, however, brings technological and administrative challenges for the Bureau. The 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. An individual inmate's IFRP financial plan is first manually entered by unit team staff and payments are manually withdrawn and paid to the correct payee by a Trust Fund staff member pursuant to the terms of the financial plan the inmate has agreed to. In developing the financial plan, unit team staff look at the prior 180 days of financial activity in the inmate's account to determine how much the inmate will be expected to pay; the inmate then signs the financial plan and agrees to abide by that

plan until the next review. Because deposits can fluctuate significantly from one six-month period to the next (for example, if an inmate receives a tax refund or other one-time payment), basing an inmate's future payment obligations on past deposits is administratively difficult.

As a result of the concerns addressed above, the Bureau ultimately concluded in this proposed rule that it would treat all community deposits equally for IFRP purposes. 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. At the same time, the Bureau understands the concerns with this system and will consider input in finalizing the rule as to this proposed structure, as well as suggestions for how to make a 'progressive' system more practicable notwithstanding the challenges described above."

We are appalled that the proposal decided to go forward to make less of a burden on the BOP, even as it reflects some understanding of the stunning burden imposed on people in detention and their families. Moreover, it is hard to understand the claim of burden on the BOP. Given the very small number of people with resources in detention and the technology available, this justification is inexplicable.

All the more surprising is that the proposal conflicts with President Biden's Executive Order 13985 - Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. The goal of that order was that all federal agencies evaluate whether their policies produce racially inequitable results when implemented and to make the necessary changes to ensure underserved communities are properly supported. See Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 20, 2021, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>. Likewise, the proposal is an affront to the Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government, February 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/.](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/)

Furthermore, the proposal would undercut efforts at facilitating returns to communities. See Fact Sheet: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons, The White House, April 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/>

Instead of following these directives and policies to lessen inequalities, the BOP proposal would go in the opposite direction. We urge that the proposal be withdrawn, and we look forward to additional opportunities to comment on new regulations.

Please note: all institutional affiliations are for identification purposes only; the views expressed are by the individual signatories.

Sincerely,

Dennis Curtis
Clinical Professor of Law, Emeritus

Hannah Duncan
Curtis-Liman Fellow

James Foreman, Jr.
J. Skelly Wright Professor of Law

Miriam Gohara
Clinical Professor of Law

Brian Highsmith
Senior Researcher, Liman Center
Fellow in Law and Public Policy,
Princeton University

Grace Li
Fellow in Residence, Clinical Lecturer
in Law

Tracey L. Meares
Walton Hale Hamilton Professor of Law

Hope Metcalf
Executive Director and Lecturer in Law
Schell Center for International Human
Rights

Judith Resnik
Arthur Liman Professor of Law

Jennifer Taylor
Director, Liman Center

Michael Wishnie
Deputy Dean for Experiential Education
and William O. Douglas Clinical
Professor of Law

Yale Law School, New Haven, Ct.