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Via regulations.gov

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

Re: Proposed Rule, “Reservation of Funds for Reentry Under the First Step Act,” RIN 1120-AB81, BOP-1181-P

The undersigned civil rights, consumer rights, faith-based, criminal justice, and reentry organizations respectfully submit the following comments in response to the Bureau of Prisons’ (“Bureau” or “BOP”) Proposed Rule on “Reservation of Funds for Reentry Under the First Step Act,” RIN 1120-AB81, BOP-1181-P (“FSA Proposed Rule” or “current Proposed Rule”).¹ Our comments proceed in two parts. In Part I, we suggest ways the Bureau should modify the Proposed Rule to effectuate Congress’s mandates in the First Step Act. In Part II, we urge the Bureau to publish a formal Notice of Withdrawal of its earlier proposed rule regarding the Inmate Financial Responsibility Program,² in order to ensure the Bureau complies with the reentry objectives dictated both by the Biden Administration and by Congress in the First Step Act.

I. The Bureau Should Revise the Current Proposed Rule to Better Accord with the First Step Act

To better comply with the First Step Act, the Bureau should amend the current Proposed Rule to (1) make reentry funds available to incarcerated people before their release, so long as the funds will be used for costs associated with their release from custody (Part A); (2) ensure that funds set aside for reentry costs are made fully and maximally available for that purpose (Part B); and (3) ensure that incarcerated people who will *not* be released from prison are not harmed by the rule (Part C). Below, we explain how each of these recommendations would better effectuate the First Step Act.

A. The Bureau Should Modify the FSA Proposed Rule to Make Reentry Funds Available to Incarcerated People Before Their Release

The Bureau proposes to hold onto an incarcerated person’s reentry funds “until the inmate leaves BOP secure custody,” explaining that doing so will give “full effect to Congress’s directive that these funds be reserved to help inmates with costs they will incur once they release

¹ Bureau of Prisons, FSA Proposed Rule, 88 Fed. Reg. 77064 (Nov. 8, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-11-08/pdf/2023-24619.pdf>.

² Bureau of Prisons, IFRP Proposed Rule, 88 Fed. Reg. 1331 (Jan. 10, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-01-10/pdf/2023-00244.pdf>.

[sic] from prison.”³ The Bureau’s interpretation of the First Step Act is too narrow. Congress’s directive is that funds be used to “assist . . . with costs *associated with* release from prison,”⁴ not simply costs *incurred after* release. By withholding reentry funds until the day a person is released from custody, the Proposed Rule would prevent incarcerated people from addressing various costs associated with release from custody that arise prior to the date of release, in contravention of the First Step Act’s requirements.

Many “costs associated with release from prison” arise before the person is released from custody. For example, to secure a place to live upon their release, an incarcerated person may need to provide a landlord with a security deposit or first and last months’ rent in advance. If the Bureau does not make an incarcerated person’s reentry funds available to them until they are released from custody, that may be too late for them to secure an apartment, thereby risking the person experiencing homelessness or housing instability. Numerous studies have demonstrated the important link between stable housing and successful reentry.⁵ One recent study even found that a person’s housing situation is the *most* important factor in predicting recidivism, “above and beyond demographic markers, criminal risk, behavioral health problems, social support, and financial insecurity.”⁶ Certainly it is not Congress’s intent that the Bureau deprive an incarcerated person of reentry funds that would allow them to secure stable housing upon release, an important component of successful reentry.

Another cost associated with reentry is renewing one’s driver’s license, which may have expired during incarceration. Many states charge a fee for driver’s license renewal.⁷ Having a valid driver’s license can be crucial to a person’s ability to find and maintain a job, open a bank account, pursue educational opportunities, care for one’s family, and otherwise succeed in society after incarceration.⁸ Opening a bank account is still another cost associated with reentry, because many financial institutions require a minimum deposit to open an account.⁹ Having a

³ FSA Proposed Rule, 88 Fed. Reg. at 77065.

⁴ 18 U.S.C. 4126(c)(4) (emphasis added)].

⁵ See, e.g., Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism*, 47(9) Crim. Just. Behav. 1097–1115 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/> (surveying empirical research finding (1) “homelessness (at or following release from prison) is associated with increased risk of rearrest among formerly incarcerated people and those on parole,” after controlling for a number of other factors; (2) “housing insecurity is associated with increased risk of recidivism”; and (3) “residential instability (i.e., number of moves) is associated with increased risk of recidivism among people on parole, after adjusting for demographic markers, social and economic factors, and criminal history”).

⁶ *Id.*

⁷ Fiscal Policy Institute, *Driver’s License Fees by State*,” <https://fiscalpolicy.org/wp-content/uploads/2016/09/List-of-Driver-License-Fees-by-State.pdf>.

⁸ See generally Joni Hirsch & Priya S. Jones, *Driver’s License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. Mich. J.L. Reform 875 (2021); Consumer Fin. Prot. Bureau, “Can I get a checking account without a driver’s license?” (last reviewed Aug. 19, 2020), <https://www.consumerfinance.gov/ask-cfpb/can-i-get-a-checking-account-without-a-drivers-license-en-927/>; Consumer Fin. Prot. Bureau, *Justice-Involved Individuals and the Consumer Marketplace* (2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf.

⁹ See John Egan, et al., “Bank Account Minimum Deposit and Minimum Balance Requirements,” *Forbes Advisor* (Jan. 24, 2023), <https://www.forbes.com/advisor/banking/bank-account-minimum-deposit-minimum-balance-requirements/#:~:text=A%20minimum%20opening%20deposit%20is,require%20a%20minimum%20opening%20deposit.>

bank account can increase a person’s chances of achieving financial stability, and research has shown it is correlated with avoiding re-incarceration.¹⁰

In order to give “full effect” to Congress’s directives in the First Step Act, the Bureau should permit reentry funds to be made available to incarcerated people *before* their release, so long as the funds will be used for costs associated with their release from custody. The Bureau may do so by replacing the following proposed language:

The reserved funds will be made available to the inmate upon completion of their sentence through release from custody, placement in pre-release custody (e.g., home confinement or Residential Reentry Center), or conditional release.

with:

The reserved funds will be made available to the incarcerated person whenever they have an expense associated with reentry, so that the incarcerated person can use the funds for that purpose. Any reserved funds that remain upon completion of the incarcerated person’s sentence—i.e., through release from custody, placement in pre-release custody (e.g., home confinement or Residential Reentry Center), or conditional release—shall be provided to the incarcerated person at that time.

This replacement should be made in each place where the Bureau proposed to include the former language—namely: 28 C.F.R. §§ 345.51(b)(2), 545.26(e)(4), 545.26(f)(3), and 545.26(g)(3).

B. The Bureau Should Modify the FSA Proposed Rule to Ensure the Full Amount of Reserved Funds Is Made Available for Reentry Purposes

Congress directs that “not less than 15 percent of [an incarcerated person’s applicable compensation] shall be reserved . . . and made available to assist the inmate with costs associated with release from prison[.]”¹¹ To be consistent with this statutory language, the Bureau must modify the FSA Proposed Rule to ensure that funds set aside for reentry costs are made fully and maximally available for that purpose.

First, the Final Rule should make clear that funds set aside for reentry cannot be seized for any other purpose, including the Inmate Financial Responsibility Program (“IFRP”). Likewise, the Bureau should provide the funds to incarcerated people in a way that does not allow third parties to take a cut. For example, reentry funds should not be provided to people via fee-laden prepaid debit cards,¹² but rather in a way that will allow the full amount of funds to be put toward the incarcerated person’s reentry costs. The Bureau’s failure to make these changes

¹⁰ John E. Wetzel & Robin L. Wiessmann, *Finances After Prison: A Collaborative Approach*, 2, <https://www.dobs.pa.gov/Documents/Publications/Reports/Financial%20Capability%20for%20Reentry.pdf>.

¹¹ 18 U.S.C. § 4126(c)(4).

¹² Stephen Rahe, *Insufficient Funds: How Prison and Jail “Release Cards” Perpetuate the Cycle of Poverty*, Prison Policy Initiative (May 3, 2022), <https://www.prisonpolicy.org/blog/2022/05/03/releasecards/>; see also Worth Rises, *The Prison Industry: How It Started. How It Works. How It Harms* 59, 62–63 (2020), <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cfa/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf>.

would cause the incarcerated person to receive less than 15 percent of their applicable compensation, in violation of the statutory mandate.

Finally, the First Step Act provides that the funds must be “reserved in the [Prison Industries F]und or a separate account.”¹³ To implement this provision, the Bureau proposes to hold the “reserved funds . . . in the existing Inmate Deposit Fund.”¹⁴ The Bureau should instead hold the reserved reentry funds in an interest-bearing account, which would allow the incarcerated person’s earned income to collect interest that could also be put toward their reentry costs.

These minor adjustments to the FSA Proposed Rule would best comply with Congress’s instructions regarding the reservation and availability of funds to assist incarcerated people with their reentry costs.

C. The Bureau Should Ensure that People Who Will Not Be Released Are Not Harmed by the FSA Proposed Rule

As noted above, the First Step Act directs that “not less than 15 percent of [an incarcerated person’s applicable compensation] shall be reserved . . . and made available to assist the inmate with *costs associated with release from prison*[.]”¹⁵ The Bureau should ensure that incarcerated people who will *not* be released from prison are not harmed by the FSA Proposed Rule.

For example, if a person is serving a 200-year sentence, a portion of their compensation should not be set aside for costs associated with release from prison, given that they will not experience release.¹⁶ Rather, they should have access to these funds during their confinement.

In addition, if a person dies while incarcerated, the Bureau should ensure that any reentry funds that have been set aside pursuant to the FSA Proposed Rule are made available to the person who is designated by the deceased to receive their property. Such a policy would be consistent with the Bureau’s Program Statement regarding “management of deceased inmates’ funds,” regarding funds that remain in the deceased’s “Deposit Fund.”¹⁷ The Bureau should make clear in the final FSA Rule that this policy applies to set-aside reentry funds, as well.

¹³ 18 U.S.C. § 4126(c)(4).

¹⁴ FSA Proposed Rule, 88 Fed. Reg. at 77065.

¹⁵ 18 U.S.C. § 4126(c)(4) (emphasis added).

¹⁶ It is possible that a person serving such a sentence could benefit from a change in the law or a change in circumstances (e.g., a pardon or exoneration), and consequently be released. Such cases are rare. The Bureau can address them by working with the individual who is challenging their conviction or sentence to determine whether and when the person wishes to begin setting aside reentry funds. This would not impose a substantial burden on the Bureau, given that Bureau staff already meet with each incarcerated person every six months to assess their finances. If such a person’s challenge is unsuccessful, they should be able to access any funds they had set aside, for use during their incarceration.

¹⁷ BOP, Program Statement No. 4500.11, “Trust Fund/Deposit Fund Manual” (Apr. 9, 2015), Chap. 8.7, https://www.bop.gov/policy/progstat/4500_011.pdf (“[P]ayment of the balance remaining in the inmate’s Deposit Fund account may be made to the individual designated on the Acknowledgment of Inmate Form without referring the claim to the Government Accountability Office (GAO), if it is believed that the person designated may be trusted to make proper disposition of the effects of the deceased inmate, including funds credited to his/her account.”).

In short, Congress’s intent in the First Step Act is to assist incarcerated people with costs associated with reentry, but Congress does not intend to harm those who are unable to benefit from reentry. Accordingly, the Bureau should modify the Proposed Rule along the lines outlined above to ensure that such unintended consequences do not occur.

II. The Bureau’s Proposed Rule on the Inmate Financial Responsibility Program Is at Odds with Its Obligations to Promote Successful Reentry and Reduce Recidivism—Including as Expressed in the Current Proposed Rule—and Should Be Formally Withdrawn

Within the past year, the Bureau has proposed two rules that implicate people’s ability to succeed after leaving incarceration: (1) the present proposed rule, and (2) the rule the Bureau proposed in January regarding the Inmate Financial Responsibility Program (“IFRP Proposed Rule” or “Proposed Rule on the IFRP”).¹⁸ It is not clear how these two proposed rules interact with one another, nor do the proposed rules make any attempt to explain their interaction. Most concerning for present purposes,¹⁹ the IFRP Proposed Rule threatens to undermine, rather than advance, the objectives of the Biden Administration and existing Bureau policies regarding reentry, as well as Congress’s reentry directives in the First Step Act. We urge the Bureau to formally withdraw the IFRP Proposed Rule by publishing a Notice of Withdrawal in the Federal Register.

A. The Bureau Is Obligated to Promote Successful Reentry and Reduce 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.

. . .

¹⁸ IFRP Proposed Rule, 88 Fed. Reg. 1331.

¹⁹ Individuals and organizations—including the undersigned—provided numerous reasons the Bureau should withdraw the IFRP Proposed Rule, in comments responding to that rulemaking. We do not reiterate those reasons here. We instead focus on reentry concerns, because that is the main source of conflict between the IFRP Proposed Rule and the current one.

²⁰ White House, “Fact Sheet: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons” (Apr. 26, 2022), <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), <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/> (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”).

Advancing successful reentry outcomes makes our communities safer, disrupts cycles of economic hardship, and strengthens our economy.²¹

President Biden has given these sentiments on reentry the power of law by issuing Executive Order 14074, which mandates 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

The Bureau itself has stated that it aims to promote successful reentry. On its website, the Bureau states that its “philosophy [is] that release preparation begins the first day of incarceration.”²³ And in the Supplementary Information to the current Proposed Rule, the Bureau explains that “[o]ne of the expected benefits of this regulation is that inmates will be more financially prepared for reentry.”²⁴ This aim is appropriately consistent with one of the First Step Act’s chief aims—namely, fostering successful reentry and reducing recidivism.²⁵

B. The Proposed Rule on the IFRP Undermines the Bureau’s Reentry Obligations and Must Be Formally Withdrawn

As numerous commenters have pointed out, the Bureau’s Proposed Rule on the IFRP would severely undermine its obligations to promote successful reentry.²⁶ For the reasons explained thoroughly in those comments, it would undermine these reentry efforts in at least two ways: (1) by eroding incarcerated people’s support systems and connections with the outside world (including by hindering incarcerated people’s ability to communicate with their loved ones); and (2) by depleting the financial resources people will have available upon their release.²⁷

In the Supplementary Information to the IFRP Proposed Rule, the Bureau indicated it would reconcile its reentry obligations with the IFRP in a future proceeding, stating:

²¹ White House, Second Chances Fact Sheet, *supra* note 20.

²² Exec. Order 14074, “Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety” (May 25, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/05/25/executive-order-on-advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and-public-safety/>.

²³ Bureau of Prisons, “Reentry Programs” (last accessed Nov. 30, 2023), https://www.bop.gov/inmates/custody_and_care/reentry.jsp.

²⁴ FSA Proposed Rule, 88 Fed. Reg. at 77065.

²⁵ *See, e.g.*, Bureau of Prisons, “An Overview of the First Step Act” (last accessed Dec. 1, 2023), <https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=The%20First%20Step%20Act%20requires,needs%20and%20reduce%20this%20risk> (discussing the First Step Act’s provisions aimed at promoting a “Reduction in Recidivism”).

²⁶ *See, e.g.*, Comments of Nat’l Consumer L. Ctr., et al., in response to Bureau of Prisons, IFRP Proposed Rule, 88 Fed. Reg. 1331, pp. 7–10, https://www.nclc.org/wp-content/uploads/2023/03/FILED_PR-re-IFRP_NCLC-et-al.pdf (signed by two organizations); Comments of Fines and Fees Justice Center in response to Bureau of Prisons, IFRP Proposed Rule, 88 Fed. Reg. 1331, p. 5, <https://www.regulations.gov/comment/BOP-2023-0001-0979> (“Although the Bureau recognizes the importance of ‘planning for reentry, including the availability of financial resources, this proposed amendment would make it increasingly difficult for incarcerated people to save in preparation for reentry.’”).

²⁷ *Id.*

[I]n 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 2018²⁸

Even though the Proposed Rule on the IFRP acknowledged the Bureau’s reentry obligations—including by explicitly contemplating that reentry funds under the First Step Act would be “treated differently for purposes of the IFRP”—the current Proposed Rule makes no mention of the IFRP or what this different treatment would look like. And indeed, it is unclear how the two proposed rules would interact with each other. Especially in the absence of any reconciliation of the two rules or modification of the IFRP, the IFRP Proposed Rule continues to threaten to severely undercut the Bureau’s reentry obligations.

Indeed, the Bureau’s failure to reconcile the two rules coupled with other actions suggest strongly that the Bureau has implicitly withdrawn the Proposed Rule on the IFRP. For example, the DC Corrections Information Council—an agency mandated by Congress to inspect, monitor, and report on conditions of confinement at facilities where DC residents are incarcerated, including BOP facilities²⁹—issued a Tweet on March 31, 2023, stating: “Update: the BOP has halted any changes to the Inmate Financial Responsibility Program (IFRP).”³⁰ Under these circumstances, we assume the Bureau has informally withdrawn the Proposed Rule on the IFRP.³¹

We urge the Bureau to make its withdrawal explicit by publishing a Notice of Withdrawal of the Proposed Rule on the IFRP. Doing so is necessary to ensure that the Bureau’s obligations to promote successful reentry are realized and to provide the clarity the public—particularly the incarcerated people and their families who would be subject to the rule—deserves regarding that rulemaking process. The Biden Administration has withdrawn other proposed rules, citing as the reason the desire to reevaluate the program at issue based on more recent research.³² Here, too, the Bureau would benefit from reevaluating the IFRP after collecting and publishing data on the program, as many organizations have called on the Bureau

²⁸ IFRP Proposed Rule, 88 Fed. Reg. at 1331.

²⁹ DC Code § 24-101.01; *see also* DC Corrections Information Council, “About the DC Corrections Information Council” (last accessed Nov. 30, 2023), <https://cic.dc.gov/page/about-cic>.

³⁰ @dc_cic_info, Twitter (X) (Mar. 31, 2023, 3:41 PM), https://twitter.com/dc_cic_info/status/1641888511665098764?s=46&t=iRA3hGvIB2UnwxIunBdINg.

³¹ *See* Bridget C.E. Dooling, *Going Through Regulatory Withdrawal*, Yale J. on Regulation (Dec. 13, 2020), <https://www.yalejreg.com/nc/going-through-regulatory-withdrawal/>; *see also* Congressional Research Service, *Agency Recissions of Legislative Rules* (Feb. 8, 2021), <https://crsreports.congress.gov/product/pdf/R/R46673>.

³² *See* Dep’t of Agric., PR, 86 Fed. Reg. 70755-01 (Dec. 13, 2021), 2021 WL 5866832.

to do in response to the Proposed Rule on the IFRP³³ and through a Freedom of Information Act request for said data.³⁴

To ensure consistency with the FSA Proposed Rule and to ensure that the Bureau is furthering its and the Biden Administration's reentry goals, the Bureau should withdraw the Proposed Rule on the IFRP. It should issue a new proposed rule on the IFRP (or Request for Information or Advanced Notice of Proposed Rulemaking) only if, after evaluating the data, it determines that doing so would further the Biden Administration and Bureau's objectives, including promoting successful reentry.

III. Conclusion

The undersigned thank the Bureau for considering our comments. For the reasons stated above, we urge the Bureau to: (1) modify the current Proposed Rule to make reentry funds available to incarcerated people before their release, to be used for costs associated with reentry; (2) modify the current Proposed Rule to ensure that funds set aside for reentry costs are made fully and maximally available for that purpose; (3) modify the current Proposed Rule to ensure that incarcerated people who will not be released from prison are not harmed by it; and (4) formally withdraw its Proposed Rule on the IFRP.

If you have any questions about these comments, please contact Caroline Cohn at ccohn@nclc.org.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
Fines and Fees Justice Center

Life Unbolted Inc.
Prison Policy Initiative
Southern Poverty Law Center Action Fund
United Church of Christ Media Justice Ministry
Worth Rises

³³ See Comments of Nat'l Consumer L. Ctr., et al., in response to Bureau of Prisons, IFRP Proposed Rule, 88 Fed. Reg. 1331, pp. 30–31, https://www.nclc.org/wp-content/uploads/2023/03/FILED_PR-re-IFRP_NCLC-et-al.pdf.

³⁴ Wash. Lawyers' Comm. for C.R. and Urb. Affs., et al., Freedom of Information Act Request to Bureau of Prisons (Mar. 31, 2023), https://www.nclc.org/wp-content/uploads/2023/04/2023.04.07_Ltr-to-BOP-attaching-FOIA.pdf.