April 1, 2024

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 Discipline Program: Disciplinary Segregation and Prohibited Act Code Changes," RIN 1120-AB71, BOP-1171-P

The National Consumer Law Center (NCLC), on behalf of its low-income clients, and advocate Stephen Raher respectfully submit these comments in response to the Bureau of Prisons' Proposed Rule regarding the Inmate Discipline Program, RIN 1120-AB71, BOP-1171-P (Proposed Rule).[1] Our comments address a single subsection of the Proposed Rule, 28 C.F.R. 541, Table 1 to § 541.3(194). We write specifically about the proposed prohibition on incarcerated people's "use of fund transfer services such as CashApp" (hereinafter, the "Fund-Transfer Provision").

We urge the Bureau to strike this provision of the Proposed Rule because it: (1) is substantially ambiguous on its face; (2) lacks an adequate evidentiary record and a satisfactory justification, as required by the Administrative Procedure Act; (3) could be construed to prohibit conduct that is societally beneficial; and (4) appears to prohibit conduct the Bureau expressly authorizes. Finally, we explain that fund-transfer services in correctional facilities do in fact cause serious harms to vulnerable consumers, but the Proposed Rule does not address these harms. The Bureau's resources would be better spent addressing those harms, rather than advancing the ill-conceived Fund-Transfer Provision.

I. The Fund-Transfer Provision Is Remarkably Unclear

The Bureau should strike the portion of the Proposed Rule prohibiting "use of fund transfer services such as CashApp" because it is unclear. The Fund-Transfer Provision appears as part of number 194 of the Proposed Rule's enumerated list of "Greatest Severity Level Prohibited Acts." Number 194 provides, in full:

> 194. Accessing, using, or maintaining social media accounts (including, but not limited to the following: Facebook, Twitter, Instagram, Snapchat, TikTok, etc.), or directing others to establish or maintain social media accounts on the inmate's behalf for the purpose of committing or aiding in the commission of a criminal act; of committing or aiding in the commission of any Greatest category prohibited act; or of circumventing authorized communications monitoring for the purpose of committing or aiding in the commission of a criminal act or of any Greatest

[1] Bureau of Prisons, Proposed Rule, 89 Fed. Reg. 6455 (Feb. 1, 2024), https://www.federalregister.gov/documents/2024/02/01/2024-01088/inmate-discipline-program-disciplinary-segregation-and-prohibited-act-code-changes.

> category prohibited act. This code also prohibits inmates' use of fund transfer services such as CashApp, as explained in more detail below.[2]

This paragraph creates confusion about the relationship between the prohibition on social media usage and the prohibition on fund-transfer services. As quoted above, the sentence about social media and the sentence about fund transfers are the only two sentences that fall into enumerated "Greatest Severity Level Prohibit Act" number 194. It stands to reason, therefore, that the Bureau intends some connection between the two sentences. But it is unclear what that connection is. Are the people who would be subject to the provision supposed to infer that "fund transfer services such as CashApp" also cannot be used in the ways that social media usage is prohibited in this provision—i.e., when used for the purpose of committing or aiding in a criminal act or a "Greatest category prohibited act"? Or is the use of fund-transfer services prohibited more broadly or in some other way? Further, is use of fund-transfer services prohibited only when used directly by people who are incarcerated, or is it also forbidden for incarcerated people to "direct[] others to establish or maintain [fund-transfer services] on the[ir] behalf"? The Proposed Rule is ambiguous on these points.

Although the text of the Fund-Transfer Provision suggests that more explanation will follow, stating that the new code "prohibits [incarcerated people's] use of fund transfer services such as CashApp, *as explained in more detail below*" (emphasis added), the Bureau does not in fact provide any additional explanation in the Proposed Rule.[3] It appears that this portion of the Fund-Transfer Provision has been copied and pasted from the Supplementary Information.[4]

Regarding fund transfers, the Supplementary Information to the Proposed Rule states:

> This code also prohibits inmates' use of fund transfer services such as CashApp, as explained in more detail below.
>
> . . .
>
> We further propose to include language necessary to enable the Bureau to target and eliminate inmates' use of fund transfer services like CashApp. When inmates use these services to send and receive money, Bureau staff are unable to monitor those transfers. CashApp and similar applications employ encryption technology that enables inmates to avoid detection, allowing them to use these platforms for unlawful purposes such as money laundering. Without the ability to closely monitor fund transfers using CashApp and similar applications, Bureau staff are unable to advise and assist other federal, state, and local law enforcement entities with identifying criminal or potentially criminal activity in which a particular inmate is engaged. Thus, inclusion of this language will provide us with a tool to disincentive an inmate's use of these fund transfer services and to hold inmates accountable for violating the prohibition against such use.[5]

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[2] *Id.* at 6467.
[3] *Id.* (emphasis added).
[4] The identical sentence appears in the Supplementary Information—i.e., "This code also prohibits inmates' use of fund-transfer services such as CashApp, as explained in more detail below." *See id.* at 6458.
[5] Proposed Rule, 89 Fed. Reg. at 6467.

This explanation in the Supplementary Information does not resolve the ambiguity about the scope of the Fund-Transfer Provision. It remains unclear whether the Bureau intends only to ban incarcerated people's use of fund-transfer services for "unlawful purposes such as money laundering," or intends to ban "use [of] these services to send and receive money" more broadly. And the Supplementary Information does not shed light on whether the prohibition on fund-transfer services applies only to their direct use by people who are incarcerated, or whether the prohibition is intended to also apply to "directing others" to make transfers on one's behalf.

The Bureau's apparent drafting error and the lack of clarity concerning the Fund-Transfer Provision is particularly concerning given the consequences the Bureau proposes for violations of "Greatest Severity Level Prohibited Acts." As set forth in the Proposed Rule, available sanctions include recommending recission of one's parole date, the forfeiting of one's earned statutory good time, and up to two months in disciplinary segregation (also known as solitary confinement).[6] The people who would be subject to such severe consequences for violating the new Proposed Rule deserve, at the very least, to be able to understand what the Proposed Rule prohibits.

II. The Proposed Rule's Fund-Transfer Provision Lacks an Adequate Evidentiary Record and a Satisfactory Justification, As Required by the Administrative Procedure Act

The Administrative Procedure Act (APA) requires that, 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."[7] The Proposed Rule's Fund-Transfer Provision falls short of this requirement.

As quoted above, the Bureau vaguely references in the Supplementary Information "unlawful purposes such as money laundering" that incarcerated people can apparently use fund-transfer services for. The Bureau provides no indication, however, that it has gathered or analyzed relevant data on whether, how, or how often this practice is occurring. It is also entirely unclear what other "unlawful purposes" beyond money laundering the Bureau may have in mind, let alone what the relevant data might show regarding these other alleged unlawful purposes. In addition, the Bureau fails to acknowledge the potential negative consequences of the proposed provision, as discussed in Section III, below. These critically important considerations must be addressed as part of this rulemaking in order to balance the interests of different constituencies and quantify the effects of the Proposed Rule for purposes of the APA. The record currently contains no answers to these questions, nor even a suggestion that the Bureau gave reasonable consideration to the issues. This alone is grounds for judicial reversal of the rule.[8]

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[6] *Id.* at 6467; *see also* Natasha A. Frost & Carlos E. Monteiro, U.S. Dep't of Justice, Nat'l Institute of Justice, Administrative Segregation in U.S. Prisons (2016), 5 ("Solitary confinement in a restrictive housing unit for a specified period of time to punish behavior is generally referred to as disciplinary segregation." (emphasis omitted)).
[7] *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)).
[8] *See* Ronald M. Levin, et al., *A Blackletter Statement of Federal Administrative Law*, 54 Admin L. Rev. 17, 42–43 (2002) (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.").

The Bureau's stated justification for the ban is also unsupported by the salient facts. The Bureau claims that if incarcerated people use fund-transfer services like CashApp, Bureau staff will be "unable to advise and assist other federal, state, and local law enforcement entities with identifying criminal or potentially criminal activity in which a particular inmate is engaged." CashApp's privacy policy explains, however, that the company will disclose customer information when the company believes "disclosure is reasonably necessary . . . to comply with any applicable law, regulation, legal process or governmental request (e.g., from . . . law enforcement agencies)."[9] The company will also disclose customer information "for an investigation of suspected or actual illegal activity," as well as "to protect us, users of our Services or the public from harm, fraud, or potentially prohibited or illegal activities."[10] Accordingly, the Bureau is well-equipped to investigate nefarious uses of fund-transfer services, if it so wishes. This flawed—or at the very least, underexamined and underexplained—justification for the Fund-Transfer Provision—contravenes the APA's requirement that an agency provide a satisfactory explanation for its actions.

In addition, the Fund-Transfer Provision appears to only prohibit conduct that is already banned, further undermining the Bureau's justification. Specifically, it is not clear how an incarcerated person would use a fund-transfer service except via a cellphone, which the Bureau already considers to be contraband.[11] The Bureau does not adequately explain its rationale for inserting an ambiguous provision that is not only confusing but also harmful, merely to prevent conduct that is already prohibited. Moreover, to the extent that an incarcerated person communicates via phone, mail, or TRULINCS with a friend or relative on the outside for purposes of sending or receiving money through a fund-transfer service, such communications are subject to Bureau monitoring, and thus the Bureau does not suffer any impairment of its ability to subject incarcerated people and their loved ones to surveillance.

For all of these reasons, the Bureau has failed to "examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," with regard to its inclusion of the Fund-Transfer Provision in the Proposed Rule.[12] Accordingly, the Bureau should strike this provision.

III. The Fund-Transfer Provision Could be Construed to Prohibit Conduct by Family Members That Could Help Incarcerated People Maintain Their Financial Obligations and Facilitate Reentry

As noted above, the Fund-Transfer Provision is unclear as to whether fund-transfer service usage is prohibited only when used for the purpose of committing or aiding in a criminal act or a "Greatest category prohibited act," or whether usage is prohibited more broadly or in some other way. The Fund-Transfer Provision could be read to ban *any* "use of fund transfer services such

[9] CashApp, "Privacy Notice" (effective date Jul 28, 2023; last visited Mar. 25, 2024), https://cash.app/legal/us/en-us/privacy.
[10] *Id.*
[11] An incarcerated person could use MoneyGram or Western Union as a fund-transfer service without using a cellphone, via the system that the Bureau itself has set up. As discussed in Section IV, however, this fact merely renders the scope of the Fund-Transfer Provision more confusing.
[12] *Chamber of Commerce of the U.S.*, 412 F.3d at 140.

as CashApp," including banning an incarcerated person from authorizing someone on the outside to maintain a fund-transfer account on their behalf for any reason, including lawful reasons. The unclear scope of the fund-transfer prohibition is a serious problem in itself, as is discussed in Section I, above. However, if the Fund-Transfer Provision generally bans incarcerated people's loved ones on the outside from maintaining fund-transfer accounts on their behalf, this raises additional problems.

There are a variety of constructive reasons that an incarcerated person's family member may maintain a fund-transfer service account, such as on CashApp or Venmo, on their behalf. For one thing, an incarcerated person's financial obligations on the outside do not simply disappear once they are incarcerated. Accordingly, an incarcerated father, for example, may direct his daughter to use a fund-transfer service to transfer money from his bank account, so that she can make payments on his behalf on previously incurred or ongoing obligations for mortgages, credit card accounts, auto loans, or student loans.[13] Likewise, an incarcerated person may direct a loved one to use a fund-transfer service on their behalf in order to help pay for ongoing rent or utilities for their family on the outside, or to make other financial contributions to a family member's or other loved one's support.

In addition, fund-transfer services may be helpful for facilitating an incarcerated person's impending reentry. For example, they could be used to save money for payment of a security deposit, allowing a newly released person to secure housing.

In sum, the Fund-Transfer Provision could be construed to prohibit a range of otherwise lawful and societally beneficial uses of fund-transfer services.

IV. The Fund-Transfer Provision Appears to Prohibit Conduct That the Bureau Elsewhere Expressly Authorizes

As noted above, the only sentence of the Proposed Rule that discusses fund-transfer services is the following: "This code also prohibits inmates' use of fund transfer services such as CashApp, as explained in more detail below."[14] The Proposed Rule does not define what it means for an incarcerated person to "use" a fund-transfer service. Accordingly, the Fund-Transfer Provision could be interpreted to prohibit conduct that the Bureau otherwise expressly authorizes. Specifically, MoneyGram and Western Union are fund-transfer services, but a Bureau webpage titled "Stay in Touch" states:

[13] *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.
[14] Proposed Rule, 89 Fed. Reg. at 6467.

> Inmates can receive funds at a BOP-managed facility, which are deposited into their commissary accounts. You can send an inmate funds electronically using MoneyGram's ExpressPayment Program.[15]

And, similarly:

> Inmates can receive funds at a BOP-managed facility, which are deposited into their commissary accounts. You can send an inmate funds electronically using Western Union's Quick Collect Program.[16]

The Bureau's webpage then lists the steps necessary to send funds via these methods. If "use" encompasses receiving and using funds sent via a fund-transfer service, then incarcerated people would violate the Fund-Transfer Provision via their interactions with MoneyGram or Western Union. The Proposed Rule does not reconcile this discrepancy.

V. Fund-Transfer Services in Correctional Facilities Are Indeed Problematic, But the Proposed Rule Does Not Address these Problems

NCLC and others have extensively written about the myriad problems with fund-transfer services—also referred to as money-transfer services—that operate in correctional facilities.[17] In short, companies providing money-transfer services commonly possess a monopoly for a particular product or service within a particular correctional facility, and oligopolistic dynamics characterize the corrections market more broadly. Both market dynamics grossly distort the proper functioning of the market and contribute to widespread abusive conduct that causes severe harm to vulnerable consumers—namely, incarcerated people and their families. The Proposed Rule does not attempt to address the very real and serious consequences of money-transfer services that harm those in its custody. We urge the Bureau to focus on these problems instead of issuing an unclear, blanket prohibition on money-transfer services generally.

VI. Conclusion

For the reasons discussed throughout this comment, we strongly oppose the Fund-Transfer Provision, and we urge the Bureau to strike it from the Proposed Rule. If you have any questions about these comments, please contact Caroline Cohn at ccohn@nclc.org.

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[15] Bureau of Prisons, "Stay in Touch" (last visited Apr. 1, 2024), https://www.bop.gov/inmates/communications.jsp#:~:text=Please%20visit%20https%3A%2F%2Fwww,Visa%20credit%20card%20is%20required (this language appears below the subsection "Sending Money," under the tab "MoneyGram (Electronically)").

[16] *Id.* (this language appears below the subsection "Sending Money," under the tab "Western Union (Electronically)").

[17] *See, e.g.*, Comments of Nat'l Consumer L. Ctr., et al., in response to Fed. Trade Comm'n, Advance Notice of Proposed Rulemaking, 87 Fed. Reg. 67412 (Nov. 8, 2022), https://www.nclc.org/wp-content/uploads/2023/02/Unfair-or-Deceptive-Fees-ANPR-R207011_NCLC-et-al.pdf; Comments of Nat'l Consumer L. Ctr., et al., in response to Consumer Fin. Prot. Bureau, Statement of Policy Regarding Prohibition on Abusive Acts or Practices 22–26 (Jul. 3, 2023), https://www.nclc.org/wp-content/uploads/2023/08/Consumer-Coalition-Comment-on-Abusive-Practices.pdf.

Respectfully submitted,

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