ADDRESSING BUDGETARY CHALLENGES THROUGH A NEGLECTED TYPE OF AUTOMATIC SPENDING: TAX EXPENDITURES

Lily L. Batchelder
Professor of Law and Public Policy, NYU School of Law

Testimony before the House Committee on the Budget Hearing on The Need to Control Automatic Spending and Unauthorized Programs

June 9, 2016

Good morning, Mr. Chairman, Ranking Member Van Hollen, and Members of the Committee. My name is Lily Batchelder and I am a professor at NYU School of Law. Thank you for the opportunity to testify before you today on the need to control automatic spending and unauthorized programs. I would like to focus my testimony on a major type of automatic spending that receives far too little attention: tax expenditures. My testimony makes three main points.

- Regardless of whether the goal in controlling automatic spending is reducing deficits
 or paying for important new investments, Congress should focus on cutting tax
 expenditures. Tax expenditures are simply a type of mandatory spending. With rare
 exceptions, tax expenditures continue automatically and anyone eligible can claim
 them, regardless of the budgetary impact. Tax expenditures are tremendously costly
 and are growing over time. Moreover, most are highly regressive and many are
 poorly structured. In contrast, almost all traditional mandatory spending programs
 are progressive and many are well designed.
- Deficit reduction will require compromise and tough policy choices. Budget process reform is not the answer, but rather bipartisan dialogue and compromise. In order to be bipartisan, deficit reduction will require both revenue increases and spending cuts, but it should be weighted towards revenues. Congress has made deep cuts in discretionary spending in recent years. In addition, the aging of the population, the retirement of the Baby Boom generation, and natural health care cost growth all mean we will need to spend more on traditional mandatory spending programs in the coming decades just to maintain our current commitments.
- Caps or limits, enforced by automatic across-the-board cuts, are a bad way to reduce traditional mandatory spending, and this is true of tax expenditures as well. Caps on traditional mandatory spending are pro-cyclical, automatically reducing spending at precisely the wrong time during economic downturns. Caps on the annual cost of tax expenditures are unworkable. Such caps take a meat axe to complicated policy problems where a scalpel is needed. However, reforming multiple tax expenditures at the same time in a sensible way, such as limiting their value to 28 cents on the dollar, could be a promising approach.

I. Any Effort to Control Automatic Spending Should Focus on Tax Expenditures

The federal government serves many important functions, and the demands on it are mounting as the population ages, the Baby Boom generation retires, income disparities widen, and our infrastructure crumbles. These trends mean that Social Security and health-related mandatory spending programs will grow as a share of GDP in the coming decades, increasing budget deficits — even if we just maintain our current commitments to near retirees. These trends also imply that Congress should consider enacting or expanding programs that accelerate broad-based growth, such as investing in infrastructure, child care, pre-K, paid family leave, and work incentives for adults.

Regardless of whether one's goal is to reduce deficits or pay for important new spending programs, Congress should focus on cutting one type of automatic spending: tax expenditures.

Tax expenditures are provisions that provide benefits to certain taxpayers who engage in behavior or investments that Congress has at some point deemed socially valuable or administratively necessary. They are functionally equivalent to traditional mandatory spending programs. With rare exceptions, tax expenditures continue automatically and anyone eligible can claim them, regardless of the budgetary impact. Their only differences compared to traditional mandatory spending programs are which agency administers them and the line in which they appear in budget tables.

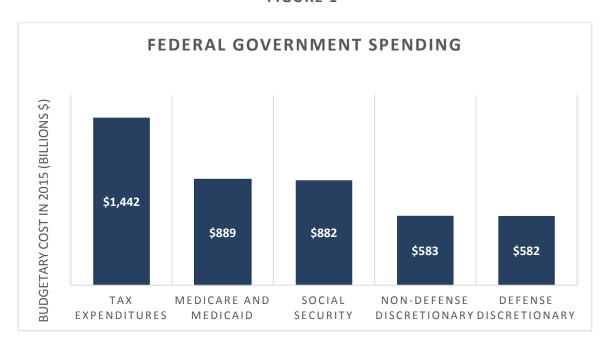
For example, suppose Congress wanted to cut the budget for Medicare. One way it could do so is to enact a "Medicare Provider Tax Credit" equal to the amount that Medicare providers currently bill the government, and end Medicare provider reimbursements paid by CMS at the same time. In one fell swoop, Medicare "spending" would drop dramatically, and "revenues" would shrink. Supporters of the Medicare Provider Tax Credit could proudly declare that they cut the size of government. But actually nothing would be different, other than more work for the IRS and an exciting new business opportunity for tax accountants.²

Tax expenditures are extraordinarily expensive. According to JCT and CBO's most recent estimates, they cost almost \$1.5 trillion in 2015. As illustrated in Figure 1, this is more than the Federal government spends on Medicare and Medicaid, more than it spends on all of Social Security, and more than all defense and non-defense discretionary spending combined.

¹ One exception is the so-called tax extenders, which do not continue automatically but rather expire every year or two. However, most were made permanent in the PATH Act at the end of 2015. Another exception is provisions like the Low-Income Housing Tax Credit, which is not open-ended but rather authorizes states to distribute a fixed amount of tax credits to low-income housing developers and their partners each year. However, these expiring and capped tax expenditures represent a very small minority of the total cost of tax expenditures.

² The late economist David Bradford made a similar tongue-in-check proposal for a Weapons Supplier Tax Credit in order to cut defense spending.

FIGURE 13



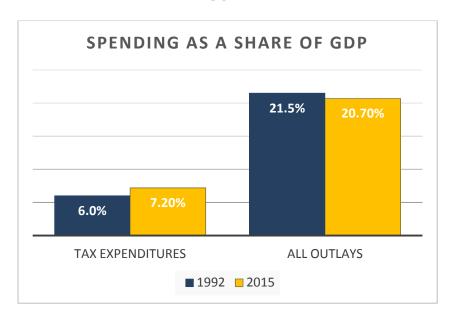
Tax expenditures have also grown rapidly over time, and their growth is projected to continue unabated. Since 1992, tax expenditures have grown from 6.0% of GDP to 7.2% in 2015, as shown in Figure 2.⁴ In contrast, traditional Federal spending has actually declined as a share of GDP over that period, from 21.5% to 20.7%. Mandatory non-interest spending has increased, but this is largely attributable to the growth in Social Security and Medicare spending, which is in turn due almost entirely to the aging of the population and health care costs growth, not programmatic expansions.

.

³ Data from Congressional Budget Office, The Budget and Economic Outlook: 2015 to 2025, 102 (Jan., 2015) and Congressional Budget Office, The Budget and Economic Outlook: 2016 to 2026, tbls. 3-1 & 3-2 (Jan. 25, 2016). The tax expenditure estimate does not include behavioral responses, interactions, or the cost of the "tax extenders" made permanent and retroactive in the PATH Act at the end of 2015. It does include the full cost of refundable tax credits, as well as the impact of tax expenditures on payroll and excise tax receipts to the extent these impacts are estimated by OMB.

⁴ Data from Allison Rogers and Eric Toder, *Trends in Tax Expenditures, 1985-2016* (Tax Policy Center, Sept. 16, 2011) and Office of Management and Budget, Fiscal Year 2017 Historical Tables, Budget of the U.S. Government, tbls. 8.1 & 8.5 (2016). Tax expenditure estimates do not include behavioral responses or interactions. All figures exclude interest.

FIGURE 2



Experts on both sides of the aisle have long recognized that reducing tax expenditures is the most efficient and fair way to reduce automatic spending. As Harvard economist Martin Feldstein, former chair of President Reagan's Council of Economic Advisers, put it: "cutting tax expenditures is really the best way to reduce government spending." In negotiations over the fiscal cliff, House Republican leadership suggested raising all of a proposed \$800 billion in revenue by cutting back on tax expenditures. More recently, the Peterson Foundation "Solutions Initiative" asked think tanks to provide long-term plans to address the deficit. The five organizations that submitted plans span the ideological spectrum – the American Action Forum, American Enterprise Institute, Bipartisan Policy Center, Center for American Progress, and Economic Policy Institute – and each proposed cutting tax expenditures, increasing revenue levels by 2025, and increasing them further by 2040.

Unlike traditional mandatory spending, tax expenditures are, on average, highly regressive. As illustrated in Figure 3, the top quintile receives 51% of the benefit of the largest tax expenditures, and the top 1% receives an astonishing 17% of the benefits. Figure 4 shows that the average dollar value of tax expenditures for the bottom quintile is about \$640, compared to about \$154,860 for the top 1%.

⁵ Martin Feldstein, *The 'Tax Expenditure' Solution for Our National Debt*, WALL St. J. (July 20, 2010).

⁶ Letter from John Boehner, Eric Cantor, Kevin McCarthy, Cathy McMorris Rodgers, David Camp, Paul Ryan and Fred Upton to the President (Dec. 3, 2012), *available at*

http://www.speaker.gov/sites/speaker.house.gov/files/documents/letter_to_wh_121203.pdf.

⁷ Peter G. Peterson Foundation, The Solutions Initiative III (May, 2015). Both the Bowles-Simpson and Rivlin-Domenici panels also proposed significant cuts to tax expenditures. The National Commission on Fiscal Responsibility and Reform, The Moment of Truth (Dec., 2010); Bipartisan Policy Center Debt Reduction Task Force, Restoring America's Future (Nov., 2010).

FIGURE 3⁸

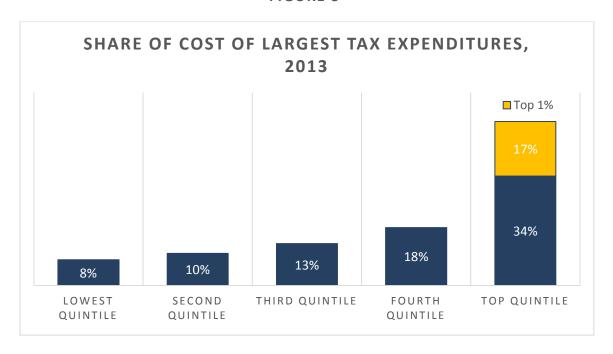
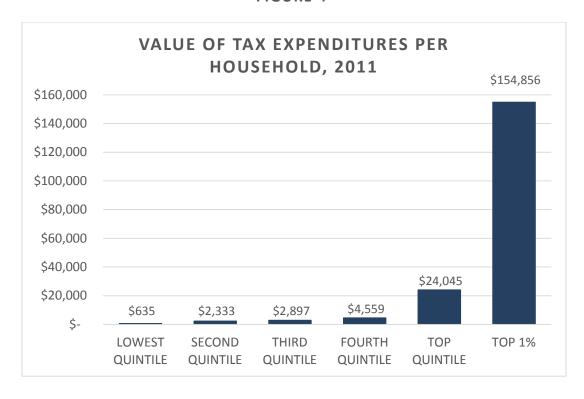


FIGURE 49



⁸ Data from CBO, The Distribution of Major Tax Expenditures in the Individual Income Tax System (May, 2013). These estimates do not incorporate behavioral responses. They do include interactions, the cost of refundable tax credits, and the effect on payroll tax receipts of the exclusions for health insurance and retirement plans.

⁹ Data from Tax Policy Center, Model Estimates, tbls. T12-0135, T12-0137, T12-0139, T12-0141, T12-0143 (2011).

The reason tax expenditures are so regressive is that the vast majority are not refundable credits – and any other form of tax expenditure is inherently worth more to wealthier households as a share of their income. Preferential rates in income from saving are the most regressive because the vast majority of households have little or no net savings outside their home and retirement account. 10 For example, the top 0.1% of households earn about half of all capital gains, and the richest 400 households earn about 12% of capital gains or \$230,000,000 per household. 11 This means the preferential rate for capital gains is extraordinarily regressive.

Itemized deductions are the next most regressive because only 30% of households itemize (as opposed to claiming the standard deduction) and they are disproportionately higher-income. 12 In addition, among those who do itemize, the value of the deduction rises with their marginal tax rate and, therefore, their income. This latter feature is also true of above-the-line deductions, exclusions, and deferral provisions as well, making them the third most regressive type of tax expenditure.

For example, consider the mortgage interest deduction. A married banker with two children making a salary of \$1 million per year would probably be in the top bracket of 39.6%. For each dollar she spent on interest on her mortgage, she would save 39.6 cents in taxes. If she was instead a teacher making \$60,000, she might be in the 15% bracket. 13 Chances are she would not itemize so the mortgage interest deduction would be worth nothing to her. 14 But if she did itemize, it would only be worth 15 cents for each dollar she spent on interest on her presumably much smaller mortgage. And if she was a house cleaner making the minimum wage, she would almost certainly not itemize so the deduction would be worth nothing to her.

Finally, non-refundable credits are regressive because they provide no benefit to the roughly 40% of households who have no Federal income tax liability in a given year, for example because they are elderly or working for poverty-level wages. 15 But at least nonrefundable credits can provide the same benefit to any household that has enough income tax liability.

¹⁰ About 55% of households cannot even replace one month of their income through liquid savings (savings outside their home and retirement accounts). THE PEW CHARITABLE TRUSTS, THE PRECARIOUS STATE OF FAMILY BALANCE SHEETS 12 (Jan., 2015). The typical household has \$3,800 in liquid savings and one-third of households have no savings at all. THE PEW CHARITABLE TRUSTS, THE ROLE OF EMERGENCY SAVINGS IN FAMILY FINANCIAL SECURITY 1, 6 (Nov., 2015).

¹¹ Jared Bernstein, *Marco Rubio's tax plan gives a huge gift to the top 0.0003 percent*, WASH. POST (Nov. 5, 2015).

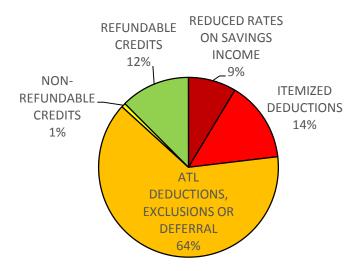
 $^{^{12}}$ For example, 92% of households earning over \$1 million itemize, but only 12% of those earning between \$20,000 and \$30,000. IRS, STATISTICS OF INCOME, INDIVIDUAL STATISTICAL TABLES BY SIZE OF AGI, tbl. 1.2 (2013).

¹³ About 80% of households are in the 15% bracket or below. Tax Policy Center, *Number of Tax Units by Tax* Bracket Under Current Law, 2014-2018, tbl. T15-0032 (June 23, 2015).

¹⁴ Only 42% of households making \$50,000 to \$75,000 per year itemize. IRS, STATISTICS OF INCOME, INDIVIDUAL STATISTICAL TABLES BY SIZE OF AGI, tbl. 1.2 (2013).

¹⁵ Tax Policy Center, Tax Units with Zero or Negative Income Tax Liability Under Current Law, 2004-2024 (tbl. T13-0228 estimate for 2016) (Aug. 26, 2013). The vast majority of households have positive tax liability when one accounts for payroll taxes, and even more if one accounts for other taxes and considers tax burdens over multiple years. See, e.g., id; Lily L Batchelder, Fred T. Goldberg, Jr. and Peter R. Orszag, Efficiency and Tax Incentives: The Case for Refundable Tax Credits, 59 STAN. L. REV. 23 (2006).

FIGURE 5¹⁶



By contrast, refundable tax credits are the only type of tax expenditure that is not regressive. Unlike all the other forms of tax expenditures, they can provide the same benefit to all households, whether as a dollar amount or a share of their income. Unfortunately, only about 12% of tax expenditures are structured as refundable credits, as illustrated in Figure 5.

The regressivity of tax expenditures is not only unfair, it is inefficient. As Fred Goldberg, Peter Orszag, and I have explained, deductions can be efficient if they are designed to measure income or ability to pay. ¹⁷ Deductions for business expenses are one such example. But where (as with most tax expenditures) the goal is to promote socially valued activities or investments, the most efficient default structure is a uniform incentive – unless there is evidence that certain households are more responsive to the incentive or generate larger social benefits from engaging in the activity. Such uniform benefits can only be accomplished through a refundable tax credit. Moreover, even when there is empirical evidence suggesting that the optimal tax incentive should vary by household income or other characteristics, the most efficient incentive is almost certainly still some type of refundable credit. It is extremely unlikely that there is a sharp break in social benefits or responsiveness to a tax incentive exactly at the point of no income tax liability and the rate bracket thresholds. But these types of discontinuities are inherent in all other types of tax expenditures.

In part because they are regressive, many tax expenditures are poorly designed and have a low bang-for-the-buck. For example, we spent about \$130 billion on tax expenditures for employer-based retirement savings in 2015, but 33% of all private-sector workers do not have access to an employer-sponsored retirement plan, and 63% of those who work part-time do

¹⁶ My calculations based on OMB, Analytic Perspectives FY2017, tbl. 14-2, Year 2016 (2016).

¹⁷ Lily L. Batchelder, Fred T. Goldberg, Jr. and Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006).

not.¹⁸ Meanwhile, about 9,000 individuals are receiving tax preferences for Individual Retirement Accounts worth over \$5 million.¹⁹ To provide another example, many would argue that the purpose of the tax exemption for state and local bonds is to support investments by state and local governments, effectively devolving federal revenue to them. But about 20% of the value of the exemption goes to high-bracket investors in the form of above-market after-tax interest rates, rather than to state and local governments in the form of lower interest costs.²⁰ If Congress replaced the exemption with a refundable tax credit, as was the case with Build America Bonds, we could deliver the same amount of aid to state and local governments at a much lower budgetary cost.

Other tax expenditures do not appear in the tax expenditure budget because they derive from tax regulations or are part of larger tax expenditures, but should be reformed nonetheless. For example, allowing fund managers to pay capital gains rates on their carried interest means that some multi-millionaires pay lower tax rates than their secretaries.²¹

This is not to say that all tax expenditures are bad policy. Indeed some have been remarkably effective. For example, the Earned Income Tax Credit (EITC) and Child Tax Credit (CTC) are some of our most effective policies for reducing poverty and increasing employment. In 2013, they kept 8.8 million people out of poverty, including 4.7 million children. ²² The EITC results in about 1 in 10 parents entering the labor force who otherwise would not do so. ²³ In addition, mounting research suggests that the EITC and CTC improve health outcomes, school performance, educational attainment, and long-term earnings, including for the next generation. ²⁴ The premium tax credits in the Affordable Care Act (ACA) are another example. The ACA has resulted in 20 million Americans gaining health care coverage, about half of which

_

¹⁸ JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015-2019 (Dec. 27, 2015); BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2015, tbl. 1 (July 24, 2015).

¹⁹ GOVERNMENT ACCOUNTABILITY OFFICE, INDIVIDUAL RETIREMENT ACCOUNTS: IRS COULD BOLSTER ENFORCEMENT ON MULTIMILLION DOLLAR ACCOUNTS, BUT MORE DIRECTION FROM CONGRESS IS NEEDED (Oct., 2014).

²⁰ CONGRESSIONAL BUDGET OFFICE AND JOINT COMMITTEE ON TAXATION, SUBSIDIZING INFRASTRUCTURE INVESTMENT WITH TAX-PREFERRED BONDS 34 (Oct., 2009). CBO and JCT estimate that state and local governments are able to pay interest at a rate that is 21% below that of comparable taxable bonds because of the exemption. This implies that investors in tax brackets above 21% benefit from the exemption by an amount equal to their marginal tax rate minus 21% multiplied the amount of tax-exempt interest they receive. Id at 31-33.

²¹ For further examples of tax expenditures that are poorly designed or have questionable objectives, see Chuck Marr, Chye-Ching Huang, and Joel Friedman, *Tax Expenditure Reform: An Essential Ingredient of Needed Deficit Reduction* (Center on Budget and Policy Priorities, Feb. 27, 2013).

²² EXECUTIVE OFFICE OF THE PRESIDENT AND US TREASURY DEPARTMENT, THE PRESIDENT'S PLAN TO HELP MIDDLE-CLASS AND WORKING FAMILIES GET AHEAD 2 (Apr., 2015).

²³ Id, citing Bruce D. Meyer and Dan T. Rosenbaum, *Welfare, the Earned Income Tax Credit, and the Labor Supply of Single Mothers*, 116 Q. J. Econ. 1063 (2014).

²⁴ Chuck Marr, Chye-Ching Huang, Arloc Sherman, and Brandon DeBot, *EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children's Development, Research Finds* (Center on Budget and Policy Priorities, Oct. 1, 2015).

is attributable enrollment in the health care exchanges, which are subsidized by the premium tax credit.²⁵ Notably, all three of these provisions are refundable credits.

But these positive examples are unfortunately the exception and not the norm. Many tax expenditures are ripe for reform. Some, such as delaying tax on like-kind exchanges or tax incentives for oil and gas, serve dubious objectives. ²⁶ Many others – including many of the most expensive ones – could more effectively accomplish their laudable goals at a much lower budgetary cost.

II. Deficit Reduction Will Not Succeed on a Bipartisan Basis Unless It Includes Revenues

In my view, any effort to control automatic spending should focus on tax expenditures on policy grounds. But it is also the case that any deficit reduction effort will not succeed on a bipartisan basis unless it includes revenues.

From 2010 to 2014, I served as the Majority Chief Tax Counsel for the Senate Finance Committee and then from 2014 to 2015 as the Deputy Director of the National Economic Council. In these roles, I advised former Chairman Baucus and Director Zients on a variety of actual and potential budget deals, including discussions of a possible grand bargain, the Super Committee, and the fiscal cliff. These experiences confirmed my belief that deficit reduction can only happen, at least on a bipartisan basis, if it includes both spending cuts and revenue increases.

Moreover, deficit reduction should be weighted towards revenues as a policy matter. The aging of the population, the retirement of the Baby Boom generation, and natural health care cost growth due to the discovery of better but more costly cures, all mean we will need to spend more on existing mandatory spending programs in the coming decades just to maintain our current commitments. This is true even though health care cost growth has slowed dramatically over the past several years, thanks in part to reforms in the Affordable Care Act. Further, we are unlikely to be able to reap significant reductions from discretionary spending, which has faced the brunt of deficit reduction efforts over the past few years and is already nearing modern lows. In addition, if we want to accelerate broad-based growth, we will need to invest more in our crumbling infrastructure, our labor force and our children. This leaves tax expenditures as the most ripe area to cut spending.

²⁶ Tax expenditures for oil and gas cost about \$3 billion annually. Joint Committee on Taxation, Estimates Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2017 Budget Proposal (Mar. 24, 2016). The tax expenditure for like-kind exchanges cost about \$17 billion. Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019 (Dec. 27, 2015). A remarkable 66% of the dollar amount of like-kind exchanges is claimed by the vehicle industry, including rental car companies. Amy S. Elliott, *Obama's Expanded Attack on Like-Kind Exchanges Went Unnoticed*, Tax Notes (Aug. 27, 2016).

²⁵ Namrata Uberoi, Kenneth Finegold, and Emily Gee, *Health Insurance Coverage and the Affordable Care Act,* 2010–2016, ASPE ISSUE BRIEF (Mar. 3, 2016).

The budget process is not the problem. Instead, the problem is a lack of political will to compromise on the tough policy choices that deficit reduction entails. Budget process reform is not the answer; instead we need bipartisan dialogue and compromise.

III. Annual Caps Are Bad Policy for Traditional Mandatory Spending and Tax Expenditures

While I generally believe that budget process reforms simply rearrange the deck chairs, some types of budget process reforms can be actively harmful. One example is any reform that creates an artificial crisis. For example, while strictly speaking not a budget process initiative, the ongoing need to continue the tax extenders has been a major barrier to tax reform. This annual ritual has consumed vast amounts of resources and floor time, leaving little time or energy for Members and their staff to address the deeper problems in the tax code.

Annual caps on the amount of automatic spending, enforced by across-the-board cuts, are an even worse example of a harmful budget process reform.²⁷ Such caps take a meat axe to complicated policy problems where a scalpel is necessary. And this meat axe can create dire situations that engender artificial crises.

When applied to traditional mandatory spending, such caps are pro-cyclical, automatically reducing spending at precisely the wrong time – during economic downturns – and increasing it when it is least needed. For good reason, mandatory programs are designed to shrink or grow depending on circumstances, such as the health of the economy. True, the design of traditional mandatory spending programs can and should be amended as we gain wisdom from experience, and their average cost must be sustainable. But the answer is to act deliberately, enacting evidence-based reforms, while deciding how generous they ought to be and raising the revenue sufficient to cover their costs on average over time. The answer is not arbitrary dollar caps devoid of evidence or economic context. The very nature of health insurance, deposit insurance, retirement annuities, and unemployment benefits (to name only four examples) is that households must be able to count on them being available when needed.

When applied to tax expenditures, such caps are simply impossible to implement. Consider the second largest tax expenditure: deductions, exclusions and deferral for retirement savings. If we decided to cap tax expenditures at \$X trillion per year, what would we do when CBO's projections were off, as they are bound to be? Would we tell people at tax time that they actually have to withdraw 12.7% of their contributions to their 401(k) because CBO's projections were off and we hit the tax expenditure spending cap? Would we tell charities to send back 12.7% of the donations they received?

To be sure, there are ways that we could reform multiple tax expenditures at the same time in a sensible way. The Administration's proposal to limit the value of many tax expenditures to 28 cents on the dollar is one such example. It raises about \$540 billion over the

10

²⁷ Annual caps on discretionary spending can be workable, depending on how realistic they are. This is because, unlike traditional mandatory spending, discretionary programs are intended to undergo annual decision making on their appropriate funding size, and are designed with this purpose in mind.

budget window, and has been praised by experts on both sides of the aisle as making tax expenditures more efficient. ²⁸ But this proposal does not cap the annual amount of automatic spending on tax expenditures as a dollar amount or share of GDP. Instead, it reduces the regressivity of the covered tax expenditures and cuts their projected cost, while also increasing their bang for the buck.

Conclusion

As this Committee continues its important work on addressing our long-term budgetary challenges, I urge you to focus your attention on one type of automatic spending that is both enormously costly and too often overlooked: tax expenditures. The aging of the population, rising income disparities, and the natural growth of health care costs mean demands on federal resources are not going away. Cutting tax expenditures represents the fairest and most efficient way to address our nation's fiscal needs. And within that category, I urge you to focus on cutting those tax expenditures that are the most regressive, the most distortionary, or the least beneficial for society as a whole.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.

_

²⁸ See, e.g., Alan Cole, The Best Provision in Hillary Clinton's Tax Plan, Tax Foundation Tax Policy Blog (June 6, 2016); JOINT COMMITTEE ON TAXATION, ESTIMATES BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2017 BUDGET PROPOSAL (Mar. 24, 2016).