TAX POLICY AND COVID-19: AN ARGUMENT FOR TARGETED CRISIS RELIEF

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The COVID-19 pandemic caused a sharp global economic decline. By the end of 2021, the U.S. government responded to the downturn with record fiscal legislation totaling over $5 trillion, which includes considerable tax relief. Most notably, the U.S. government distributed over $800 billion in three rounds of advanced refundable tax credits (known as recovery rebates, or stimulus checks) to most households. Tax relief has been unprecedented in scale but has often been the product of political circumstances rather than principled policy design. Tax relief thus remains largely undertheorized and politically motivated.

This Article examines the U.S. tax policy response to the COVID-19 crisis, focusing on recovery rebates for individuals. It evaluates considerations for reforming tax relief and proposes several changes for future crises. First, the Article recommends targeting credits to low-income households. This should be accomplished by decreasing phase out thresholds and increasing credit amounts. Second, the Article recommends targeting credits to households which lost income. This should be accomplished by implementing a recapture (repayment) requirement at the end of the tax year from households whose income increased beyond the phase out threshold, subject to a safe harbor. These proposals increase vertical equity and effectiveness, allow increased aid to those who suffered the most, and enhance economic stimulus. Additionally, the Article explores arguments for universal benefits and recurring payments. It thereby examines the widely publicized debate on fiscal response to COVID-19 and suggests meaningful improvements to tax policy response for future crises.

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INTRODUCTION

The COVID-19 pandemic has reshaped life around the world. The health and human tolls continue to increase, and as of May 2022, over 500 million infections and six million deaths have been reported to the World Health Organization.[1] Economies were shuttered, businesses closed, communities locked down, travel restrictions imposed, and life unequivocally disrupted in the effort to mitigate the spread of the virus.[2] The pandemic has led to a global economic decline, causing the greatest recession since World War II.[3] The World Bank estimated that the global economy contracted by 4.3% in 2020 because of the pandemic.[4] In the U.S., 2020 GDP decreased by 3.6%.[5]

The crisis has yielded unprecedented fiscal policy responses from governments worldwide to combat the pandemic, mitigate the economic decline, and provide immediate relief. The U.S. federal government provided more gross pandemic aid than any other country. By the end of 2021, the U.S. distributed over $5 trillion in aid, equivalent to approximately 25% of its GDP.[6] Tax policy has played a key role in this re-

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1 As of May 2022; WHO, *WHO Coronavirus Disease (COVID-19) Dashboard* (last visited May 20, 2022), https://covid19.who.int/. By May 2022 the U.S. alone recorded over eighty million infections and approximately one million deaths. *See* CDC, *CDC COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/ (last visited May 20, 2022).

2 *See* World Bank, *Global Economic Prospects: June 2020* (June 2020), at 3.

3 *Id.*

4 In the past 150 years, the COVID-19 recession has been exceeded only by the Great Depression and the two World Wars. *See* World Bank, *Global Economic Prospects: January 2021* (Jan. 2021) at 3 [hereinafter *Global Economic Prospects: January 2021*].

5 *Id.* at 4.

6 Mark Zandi & Bernard Yaros, *The Biden Fiscal Rescue Package: Light on the Horizon* (Jan. 15, 2021) 1, 2 [hereinafter *The Biden Fiscal Rescue Package: Light on the Horizon*];

sponse. Most notably, the U.S. government distributed three rounds of advanced refundable tax credits, commonly known as "recovery rebates", "economic impact payments", or "stimulus checks." The COVID-19 recovery rebates collectively provided up to $3,200 to individuals ($6,400 for married couples filing a joint return), not including payments for eligible dependents and child tax credits.[7] These three rounds of payments were unparalleled in scope and collectively cost over $800 billion.

Recovery rebates have been the subject of significant public discourse. Their scope and design have also been greatly debated among policymakers. Recovery rebates incorporate immense program costs and were largely distributed irrespective of whether individuals were negatively affected by the crisis. They enjoyed less bipartisan support as pandemic legislation progressed, eventually becoming entirely partisan. Whereas Democratic lawmakers have endorsed substantial credits and even recurring payments, Republican lawmakers have largely dismissed them as untargeted and unnecessary.[8] Thus, tax policy response to the crisis continues to be a politically controversial and broadly disputed issue.

This Article analyzes the tax policy response to the COVID-19 crisis, focusing on recovery rebates for individuals. It evaluates considerations for targeted tax relief, with suggestions for policy approaches for future crises. The Article distinguishes between targeting crisis relief to lower-income households, and targeting relief to households which lost income and were ultimately negatively affected by the crisis. The Article recommends targeting credits to lower-income households on the grounds of equity and effectiveness. It proposes reducing phase out thresholds while increasing credit amounts and maintaining program costs. The Article also recommends targeting credits to households which lost income. This should be accomplished by requiring repayment (recapture) at the end of the tax year from taxpayers whose income surpassed the phase out threshold, subject to a safe harbor. The Article also examines arguments for universal benefits, recurring payments, and the notable counterarguments to its proposals. It concludes with a summary of recommendations and an outlook for future crises.

Committee for a Responsible Federal Budget, COVID Money Tracker (last visited Mar. 13, 2021), https://www.covidmoneytracker.org (providing that total fiscal support collectively amounts to $5.8 trillion). Note, however, that the U.S. is not the greatest spender by the percentage of GDP – a figure which continues to change as more countries continue to spend.

[7] *See* Internal Revenue Service Media Relations Office, *IRS Fact Sheet: IRS Updates Several Frequently Asked Questions to Assist Those Claiming the 2021 Recovery Rebate Credit* (Feb. 2022) at 2; Internal Revenue Service Media Relations Office, *IRS Fact Sheet: IRS Updates the 2020 Recovery Rebate Credit Frequently Asked Questions* (Feb. 2022) at 4.

[8] *See* 116 CONG. REC. S7972, (Dec. 30, 2020) (statement of Sen. McConnell).

I. PANDEMIC, BACKGROUND, AND LEGISLATIVE HISTORY

A. *COVID-19 Crisis Relief Legislation*

The U.S. fiscal response to the COVID-19 crisis has been unprecedented, and intended to provide relief for households, businesses, and states. Through March 2021, Congress enacted three notable rounds of pandemic relief legislation, collectively providing over $5 trillion in aid.[9] These include the $2.2 trillion Coronavirus Aid, Relief, and Economic Security Act (CARES Act) passed in March 2020;[10] the $900 billion stimulus provisions passed within the COVID-related Tax Relief Act of 2020 (COVIDTRA) of the omnibus $2.3 trillion Consolidated Appropriations Act, 2021, in December 2020;[11] and the $1.9 trillion American Rescue Plan Act of 2021 (American Rescue Plan), passed in March 2021.[12] Recovery rebates were the most significant tax provisions and costliest individual relief program within COVID-19 legislation. Recovery rebates were provided through advanced refundable tax credits under sections 2201 of the CARES Act; 272 of COVIDTRA; and 9601 of the American Rescue Plan.

Nonrefundable credits are limited to the taxpayer's income tax liability and reduce income taxes owed, dollar for dollar.[13] Refundable credits, such as the recovery rebates, are not limited to the taxpayer's tax liability. If the credit amount exceeds taxes owed the taxpayer receives a refund for the difference. Taxpayers with little or no tax liability can therefore benefit from refundable credits as well.[14] The refundable credits were *advanced* to taxpayers, meaning that taxpayers received direct payments in the current year and before filing their tax returns for that year.[15]

Refundable credits are not a new instrument: they were first introduced during the Gerald Ford administration in the form of Earned Income Tax Credits (EITCs) through the Tax Reduction Act of 1975.[16] The

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9 *The Biden Fiscal Rescue Package: Light on the Horizon*, *supra* note 6, at 2.

10 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116–136, 134 Stat. 281 (2020) [hereinafter CARES Act]; *See* CBO, *Preliminary Estimate of the Effects of H.R. 748, the CARES Act, Public Law 116–136* (Revised Apr. 27, 2020), at 2, 7.

11 *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, 134 Stat. 1182 (2020).

12 *See* American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4 (2021).

13 Congressional Research Service, *COVID-19 and Direct Payments to Individuals: Considerations on Using Advanced Refundable Credits as Economic Stimulus* (Mar. 17, 2020), at 1.

14 *See id.*

15 *See id.* at 2.

16 The EITC was an initially modest tax credit that provided financial assistance to low-income, working families with children. *See* Margot L. Crandall-Hollick, Congressional Research Service, *The Earned Income Tax Credit (EITC): A Brief Legislative History* (Mar. 20, 2018) at p.2 (Summary).

use of advanced refundable tax credits through a tax rebate became more prominent in 2001 and 2008-2009 legislation. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), passed during the George W. Bush administration, provided recovery rebates to taxpayers who filed a tax return for the year 2000.[17] The rebates were advanced payments of credits for taxes withheld for the 2001 year, that were no longer owed because of an overall reduction in income tax rates. Credit maximums were $300 for individuals ($600 for married couples filing a joint return) and $500 for heads of households.[18] During the 2008 global recession, the Economic Stimulus Act of 2008 provided qualifying taxpayers with credits equal to the lesser of the taxpayer's net income tax liability or $600 ($1,200 for married couples filing a joint return).[19] Credits were at least $300 ($600 for married couples filing a joint return) for eligible taxpayers with a qualifying income of at least $3,000.[20] Subsequently, the American Recovery and Investment Act of 2009, passed in February 2009 during the Barack Obama administration, provided economic recovery payments to beneficiaries of federal programs.[21] Eligible persons were individuals receiving benefits under Social Security, Supplemental Security Income, Railroad Retirement, and Veterans Disability Compensation or Pension Benefits.[22] The COVID-19 recovery rebates were largely designed similar to recovery rebate schemes in past crises, yet are exceptional in their scope and scale.

1. The CARES Act

The CARES Act responded to the onset of the crisis and the need to provide immediate aid during the sudden economic downturn. COVIDTRA and the American Rescue Plan responded to the pandemic's latter stages to stimulate the economy and aid still-struggling households. Notably, COVIDTRA and the American Rescue Plan were passed immediately before and after the transition to the Joe Biden presidential administration, respectively.

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[17] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 (2001), at Sec. 101(b)(1).

[18] Social Security Administration, Social Security Legislative Bulletin, *President Bush Signs the Economic Growth and Tax Relief Reconciliation Act Of 2001*, No.107–3 (Jun. 8, 2001) [hereinafter *President Bush Signs the Economic Growth and Tax Relief Reconciliation Act Of 2001*].

[19] Economic Stimulus Act of 2008, Pub. L. 110–185, 122 Stat. 613, §101(a) (2008). In addition to tax rebates for individuals, the Act included provisions designed to aid businesses during the recession.

[20] *Id.*

[21] American Recovery and Reinvestment Act of 2009, Pub. L. 111–5, 123 Stat. 115 (2009).

[22] *Id.* § 2201.

The CARES Act was signed into law on March 27, 2020, after the drastic effects of the COVID-19 crisis prompted immediate bipartisan action by Congress.[23] The early impacts of COVID-19 in March 2020 cannot be overstated: global stock markets were plummeting,[24] businesses were shutting down,[25] and the unemployment rate increased rapidly.[26] It became imminently necessary to provide emergency assistance and health care response for individuals, families, and businesses affected by the crisis.[27]

The CARES Act passed as a complex 335-page piece of legislation incorporating numerous tax and non-tax provisions, providing an estimated $2.2 trillion in total financial assistance.[28] The Act set forth three primary goals: keeping payroll checks coming, relieving the financial burdens on Americans, and containing the COVID-19 virus.[29] For the taxable year beginning in 2020, Section 2021 of the CARES Act created a new Section 6428 of the Internal Revenue Code, setting forth a refundable tax credit of $1,200 for individuals ($2,400 for married couples filing a joint return).[30] In addition, individuals with qualifying children[31] received a credit of $500 for each child.[32] For example, married filers received $2,900 in recovery rebates if they had one qualifying child, or $3,400 if they had two qualifying children. Allowed tax credits were phased out (but not below zero) at a rate of 5% of taxpayers' adjusted gross income in excess of $75,000 for individual taxpayers, $112,500 for

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23 *See* CARES Act, *supra* note 10.

24 *See* S&P Dow Jones Indices, *Dow Jones Industrial Average Futures Index* (last visited Jan. 10, 2020); The 2020 stock market crash is mostly attributed to the COVID-19 crisis and oil price drops.

25 *See, e.g., Letter from National Restaurant Association to President Donald Trump* (Mar. 18, 2020), https://restaurant.org/downloads/pdfs/business/natl-rest-association-covid-letter ("anticipating sales to decline by $225 billion during the next three months, which will prompt the loss of between five and seven million jobs"). The National Restaurant Association is the largest foodservice trade association in the world, representing more than 500,000 businesses. *See* National Restaurant Association, *About*, https://restaurant.org/about.

26 Department of Labor, Bureau of Labor Statistics, *News Release: The Employment Situation – March 2020* (Apr. 3, 2020), at 1.

27 *See* CARES Act, *supra* note 10.

28 Congressional Budget Office, *Letter from Director Phillip L. Swagel to Chairman Mike Enzi*, *Preliminary Estimate of the Effects of H.R. 748, the CARES Act, Public Law 116-136, Revised, With Corrections to the Revenue Effect of the Employee Retention Credit and to the Modification of a Limitation on Losses for Taxpayers Other Than Corporations* (Apr. 27, 2020), at 2, 7 [hereinafter *Preliminary Estimate of the Effects of H.R. 748, the CARES Act*].

29 Sen. Cong. Rec. S1897 (Mar. 22, 2020) (statement of Sen. Lamar Alexander).

30 *See* CARES Act § 2201(a).

31 Within the meaning of IRC § 24(c) Qualifying Child; generally defined as children under the age of 17. Note that dependents older than 17, such as college students, were generally ineligible to receive the CARES Act rebates.

32 *See* IRC § 6428(a)(2).

heads of households,[33] and $150,000 for married couples filing a joint return.[34] This means that for every $100 of adjusted gross income over the income threshold, the credit was reduced by $5. The tax credits wholly phased out at $99,000 for individual taxpayers without children, $148,500 for heads of households with one child, and $198,000 for joint filers without children.

Under the CARES Act, eligible individuals for recovery rebates were defined as U.S. citizens, permanent residents, and qualifying resident aliens,[35] who: have a Social Security number, could not be claimed as a dependent of another taxpayer, and had adjusted gross income under certain limits (as detailed above).[36] The Internal Revenue Service (the Service) used taxpayers' 2019 income tax returns to determine adjusted gross income and calculate the advanced credit amounts.[37] Recovery rebates were the most significant tax policy provision and broadest individual relief program of the CARES Act, estimated to cost approximately $292 billion.[38]

In addition to the recovery rebates, Sections 2101 to 2116 of the CARES Act significantly expanded federal unemployment compensation.[39] According to the Congressional Research Service, almost half of U.S. households experienced some loss of income beginning March 2020 – when the effects of the COVID-19 crisis became evident.[40] Loss of employment income was disproportionately apparent in lower-income households and households with children.[41] Since March 2020, 65% of households earning $25,000 with children under 18 reportedly suffered a loss of income, whereas 30% of those earning $200,000 or more lost

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33 For example, a head of household who does not exceed $112,500 of adjusted gross income received a $1,700 rebate with one child or $2,200 with two children.

34 In other words, the credit phases out at a rate of $5 per $100 of additional income in excess of $75,000. *See* IRC §?6428(c).

35 Meeting either the substantial presence test or the "green card test" to determine tax residence status.

36 IRS, *Recovery Rebate Credit* (last updated Jan. 14, 2021), https://www.irs.gov/newsroom/recovery-rebate-credit#:~:text=Generally%2C%20you%20are%20eligible%20to,your%202020%20tax%20return%20.

37 *See* CBO, *supra* note 10, at 12.

38 *Preliminary Estimate of the Effects of H.R. 748, the CARES Act, supra* note 28, at 7; Congress, Joint Committee on Taxation, *Estimated Revenue Effects of The Revenue Provisions Contained in An Amendment in The Nature of a Substitute to H.R. 748, The "Coronavirus Aid, Relief, And Economic Security ('CARES') Act,"* (JCX-11R-20, Apr. 23, 2020), at 1; The CARES Act also included other tax provisions. For example, Section 2104 amends Section 62(a) of the Internal Revenue Code and allows individual taxpayers to claim a partial above-the-line deduction of up to $300 for cash donations made to charity in 2020.

39 CARES Act, §§ 2101–2116.

40 Congressional Research Service, *COVID-19 Pandemic's Impact on Household Employment and Income* (updated Nov. 9, 2020), at 1.

41 *See id.*

income.[42] Thus, expanded unemployment compensation provided immediate aid to those losing employment during the crisis.

Under Section 2102 of the CARES Act, Pandemic Unemployment Assistance (PUA) provided unemployment benefits to individuals not usually eligible for regular unemployment insurance.[43] PUA provided coverage for individuals who are unemployed for COVID-19-related reasons (e.g., contraction of disease, closure of business). Those eligible included the self-employed, independent contractors, and those who have not worked long enough to qualify for other types of unemployment benefits.[44] Under Section 2104 of the CARES Act, Federal Pandemic Unemployment Compensation (FPUC) provided an additional $600 per week in federally subsidized unemployment benefits to those receiving state unemployment benefits.[45] Under Section 2107 of the CARES Act, Pandemic Emergency Unemployment Compensation (PEUC) provided additional unemployment compensation for individuals deemed to have exhausted regular compensation under state law.[46] According to Congressional Budget Office (CBO) estimates, the expansion of unemployment insurance under the CARES Act would cost $268 billion, making it the third-most expensive CARES Act provision.[47] Expanded unemployment compensation complemented recovery rebates by providing immediate relief to individuals, but without utilizing the tax system. Unlike recovery rebates, expanded unemployment compensation explicitly targeted individuals negatively affected by the pandemic who became unemployed, thus accurately responding to a specific and immediate need. Recovery rebates were distributed far more broadly, based on adjusted gross income thresholds, and irrespective of immediate changes in circumstances.

The CARES Act stimulus provisions were largely popular and uncontroversial. They recognized the importance of delivering cash to households for immediate spending needs[48] and injecting liquidity into

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42 *See id.*

43 *See* John Pallasch, *Unemployment Insurance Program Letter No. 16-20.*

44 *See* CARES Act, § 2102(a)(3)(A)(ii).

45 *See* CARES Act, § 2104. The funds were initially available for four months through the week ending July 31, 2020, before being extended. Note that the number of weeks in which a worker is entitled to benefits depends on state law.

46 *See* CARES Act, § 2107.

47 After the Paycheck Protection Program and recovery rebates. *Preliminary Estimate of the Effects of H.R. 748, the CARES Act, supra* note 28, at 7.

48 *See, e.g.,* statement on the Senate floor by Sen. Robert Portman (R-OH): "that [stimulus] check getting out to people will give people some extra dollars to make the difference in being able to pay bills, paying the car payment, paying rent, and being able to put food on the table. It will give people some comfort to know that there is at least a little help coming directly and quickly." Congressional Record – Senate, S1904, Vol. 166, No. 56 (Mar. 22, 2020); *See also* statement on the Senate floor by Sen. Chuck Schumer (D-NY): "Help is on the way—big help, quick help . . . we have shaped a bipartisan agreement on the largest rescue

the U.S. economy.[49] The CARES Act was endorsed by the Republican-controlled Senate and passed in a 96 – 0 vote.

2. The Consolidated Appropriations Act

By December 2020, almost twenty million COVID-19 cases and over 300,000 COVID-19-related deaths were reported to the CDC.[50] Although the economy was gradually recovering, millions struggled to pay for food and housing, while unemployment remained high. A 6.7% unemployment rate and 5.7 million unemployed individuals were nearly double pre-pandemic numbers.[51] Nonfarm payroll employment had also declined by 140,000 from the previous month of November.[52] In October 2020, the Feeding America organization reported that the number of food insecure individuals in the U.S. was expected to rise by 13.2 million up to a total of 50.4 million.[53] In a November 2020 U.S. Census Bureau survey, twenty million people responded that they sometimes had "not enough to eat."[54] The U.S. Census Bureau also reported that almost nine million households were not caught-up on their rent payments.[55] Furthermore, Moody's Analytics provided that nearly twelve million people owed an average of $5,850 in rent and utility payments.[56] Congress faced significant public pressure to pass additional pandemic relief legislation as households continued to struggle and federal CARES Act benefits were set to expire for many Americans.[57]

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package in American history." Congressional Record – Senate, S2025-2026, Vol. 166, No. 59 (Mar. 25, 2020).

49 *See* Sen. John Boozman (R-AR), Congressional Record – Senate, S1990, Vol. 166, No. 58 (Mar. 24, 2020).

50 *See* CDC, *supra* note 1.

51 *See* U.S. Department of Labor, *News Release: Bureau of Labor Statistics*, *The Employment Situation – December 2020* (Jan. 8, 2020), at 1–2.

52 *See id.*

53 *See* Feeding America, *The Impact of the Coronavirus on Food Insecurity in 2020* (Oct. 2020), at tbl. 1. Feeding America is the largest domestic hunger-relief organization in the U.S. *See* Feeding America, *Our Work*, https://www.feedingamerica.org/our-work, for more information.

54 U.S. Census Bureau, *Week 19 Household Pulse Survey: November 11 – November 23: Table 2b. Food Sufficiency for Households, in the Last 7 Days, by Select Characteristics* (Dec. 2, 2020).

55 U.S. Census Bureau, *Week 19 Household Pulse Survey: November 11 – November 23: Table 1b. Last Month's Payment Status for Renter Occupied Housing Units, by Select Characteristics* (Dec. 2, 2020).

56 Heather Long, *Millions of Americans are Heading into the Holidays Unemployed and Over $5,000 Behind on Rent*, WASH. POST (Dec. 7, 2020), https://www.washingtonpost.com/business/2020/12/07/unemployed-debt-rent-utilities/.

57 The prospect of an additional relief bill received extensive media coverage. *See, e.g.*, Jacob Pramuk, *Bipartisan Group Releases Covid Relief Bill as Congress Faces Pressure to Send Help*, CNBC (Dec. 14, 2020), https://www.cnbc.com/2020/12/14/coronavirus-stimulus-updates-bipartisan-relief-bill-will-be-released.html; *see also* Tom Porter, *Congress is Briefly Reconvening Under Pressure from Trump and Biden to Pass a COVID-19 Stimulus Bill After*

On December 21, 2020, Congress responded by passing the Consolidated Appropriations Act of 2021.[58] The Act as amended passed 359 – 53 in the House and 92 – 6 in the Senate.[59] At over 5,500 pages, the Act incorporates approximately $1.4 trillion of omnibus spending for the 2021 fiscal year and $900 billions of COVID-19 relief – creating an unprecedented $2.3 trillion legislation.[60] Section 272 of the COVIDTRA, passed under the Consolidated Appropriations Act, amends Section 6428 of the Internal Revenue Code by creating an additional refundable tax credit for the 2020 year.[61] The COVIDTRA recovery rebates were up to $600 for individuals ($1,200 for married couples filing a joint return) and advanced as refundable tax credits based on 2019 income tax returns to determine adjusted gross income.[62] They phased out similarly to the CARES Act rebates: starting at $75,000 for individual taxpayers; $112,500 for heads of households; and $150,000 for married couples filing a joint return.[63] Individuals with qualifying children received a credit of $600 for each child.[64] The credits wholly phased out at $87,000 for individual taxpayers ($174,000 for joint filers), and $124,500 for heads of households.[65] The bill also extended federal pandemic unemployment compensation provided by the CARES Act through March 14, 2021.[66] Expanded FPUC amounts were reduced from $600 to $300.[67]

Months of Gridlock, BUS. INSIDER (Nov. 30, 2020), https://www.businessinsider.com/congress-pressure-pass-covid-19-stimulus-brief-window-2020-11.

58 Originally introduced in the House on January 3, 2019, the Act passed with a House amendment to the Senate amendment on December 21, 2020.

59 *See* Congress, H.R. 133 - Consolidated Appropriations Act, 2021, Actions Overview H.R.133 — 116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/133/actions [hereinafter Consolidated Appropriations Act, 2021, Actions Overview H.R. 133].

60 *See id.*; *see also* Congressional Budget Office, Estimate for Division N—Additional Coronavirus Response and Relief H.R. 133, Consolidated Appropriations Act, *2021 Public Law 116-260 Enacted on December 27, 2020* (Jan. 14, 2021), at 1; Andrew Ackerman et al., *What's in the $900 Billion Covid-19 Relief Bill*, WALL ST. (Dec. 27, 2020), https://www.wsj.com/articles/what-is-in-the-900-billion-covid-19-aid-bill-11608557531; Caitlin Emma & Marianne Levine, *Breaking Down the $900B Stimulus Package and $1.4T Omnibus Bill*, POLITICO (Dec. 20, 2020), https://www.politico.com/news/2020/12/20/details-stimulus-package-omnibus-bill-449499. Note that before the Consolidated Appropriations Act of 2021, the Health and Economic Recovery Omnibus Emergency Solutions Act (the "HEROES Act") was a proposed $3.4 trillion (later trimmed to $2.2 trillion) relief bill passed by the House on May 15, 2020. The HEROES Act received critique from Senate lawmakers and no Senate vote was held.

61 *See* COVID-related Tax Relief Act of 2020, § 272(a).

62 *See id.*

63 At a rate of 5% (but not below zero). *See id.*

64 Compared to $500 in the CARES Act.

65 Compared to $99,000 and $198,000 in the CARES Act, respectively.

66 The Act amends Section 2104(b) of the CARES Act. *See* Consolidated Appropriations Act of 2021, Division N – Additional Coronavirus Response and Relief, § 203(a).

67 *See id.*

The Consolidated Appropriations Act was a product of ample bipartisan negotiation to extend pandemic relief and prevent a government shutdown.[68] When lawmakers negotiated the bill, however, recovery rebates were not included in the initial bipartisan proposal.[69] Most Republican lawmakers opposed additional recovery rebates, and a compromise was ultimately attained to incorporate the $600 credits. In contrast, Democratic lawmakers strongly pushed for and attempted to pass $2,000 recovery rebates or higher. On the Senate floor, Sen. Bernie Sanders (I-VT) expressed the desire to "provide $2,000 a month. . . To every working-class person in this country. But, unfortunately, given the conservative nature of the Senate, I understand that is not going to happen."[70] Speaker of the House Nancy Pelosi (D-CA) conveyed that "we also have in the legislation direct payments, which were not in the Republican bill, to America's working families. I would like them to have been bigger."[71] The office of then-President-Elect Biden referred to the December bipartisan bill as "a step in the right direction. . . Only a down payment.[72] It fell far short of the resources needed to tackle the immediate crisis."[73]

After Congress passed the Consolidated Appropriations Act with $600 recovery rebates, public pressure mounted to increase credit amounts. The recovery rebates were widely criticized as insufficient, particularly for low-income households – a matter that received widespread media coverage.[74] President Trump, a Republican, did not immediately sign the bill into law and urged lawmakers to increase recovery rebates to $2,000 for individuals. On December 22, 2020, Trump asked Congress to amend the bill and increase the "ridiculously low" $600 payments to

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[68] *See* Mike DeBonis, Jeff Stein & Seung Min Kim, *Stimulus Talks Could Spill into Weekend as Lawmakers Scramble to Complete Deal*, WASH. POST (Dec. 17, 2020), https://www.washingtonpost.com/us-policy/2020/12/17/stimulus-checks-900-billion-relief-package/.

[69] *See Bipartisan Emergency COVID Relief Act of 2020* (Dec. 9, 2020), https://www.politico.com/f/?id=00000176-487c-d3e7-a3ff-dbfcd7ed0000.

[70] Sen. Bernard Sanders (VT), Congressional Record – House of Representatives, S7696, Vol. 166, No. 215 (Dec. 18, 2020).

[71] Rep. Nancy Pelosi (D-CA), Congressional Record – House of Representatives, H7287, Vol. 166, No. 218 (Dec. 21, 2020).

[72] Biden-Harris Transition, *President-elect Biden Announces American Rescue Plan* 1 (Jan. 2021), https://www.littler.com/files/american_rescue_plan.pdf.

[73] *Id.*

[74] *See, e.g.*, coverage in national media outlets: Carly Stern & Nicholas Bogel-Burroughs, *Americans Scraping by Say They Fear a Second Stimulus Won't Be Enough*, N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/12/19/us/congress-stimulus-reactions.html; Tami Luhby & Kelly Mena, *Struggling Americans Blast Stimulus Bill as Too Little, Too Late,* CNN (Dec. 23, 2020), https://www.cnn.com/2020/12/22/politics/stimulus-struggling-congress-relief-bill/index.html.

$2,000,[75] although he ultimately signed the bill into law on December 27.[76]

Efforts to increase recovery rebates continued after the Consolidated Appropriations Act was signed. Democratic lawmakers called for greater recovery rebates for households struggling to pay for essential needs.[77] These efforts resulted in the Caring for Americans with Supplemental Help Act of 2020 (CASH Act), proposed by Rep. Richard E. Neal (D-MA) which passed the House of Representatives on December 28, 2020[78] Senate Republicans, however, blocked the measure, when then-Senate Majority Leader Mitch McConnell (R-KY) dismissed the increased rebates as "nontargeted" and "unnecessary,"[79] expressing that the proposal "has no realistic path to quickly pass the Senate,"[80] which it ultimately did not. Senate Republicans claimed that the rebates were not targeted to individuals who have suffered financial losses[81] and that "future relief must be targeted."[82] Nonetheless, Republican lawmakers did not recommend more targeted relief measures as part of COVIDTRA or subsequent relief bills, and their efforts seemingly attempted to limit program costs.

3. The American Rescue Plan

The transition to a Joe Biden presidential administration promised additional pandemic relief including recovery rebates. On January 14, 2021, six days before assuming presidential office, then-President-Elect Biden unveiled the American Rescue Plan – a $1.9 trillion stimulus package which included $1,400 recovery rebates.[83] President-Elect Biden introduced the $1,400 rebates as complementary to the COVID-

75 *See* Donald Trump, *Stimulus: President Trump Says Stimulus Checks Need to be $2000, Threatens to Veto Stimulus Bill*, YOUTUBE (Dec. 23, 2020), https://www.youtube.com/watch?v=DR6XCs84xTY&ab_channel=YahooFinance.

76 *See* Consolidated Appropriations Act, 2021, Actions Overview H.R. 133, *supra* note 59; The White House, Budget & Spending: *Statement from the President* (Dec. 27, 2020), https://www.whitehouse.gov/briefings-statements/statement-from-the-president-122720/ (among other statements, President Trump indicates signing the pandemic relief package).

77 *See* Statement by Rep. Rashida Tlaib (MI-13) on the need to increase recovery rebates for struggling families, including a proposal for $2,000 cash assistance. Congresswoman Rashida Tlaib, *Reps. Tlaib, Jayapal, Ocasio-Cortez, Omar, & Pressley Introduce Legislation to Provide $2k Survival Checks* (Dec. 24, 2020), https://tlaib.house.gov/media/press-releases/reps-tlaib-jayapal-ocasio-cortez-omar-pressley-introduce-legislation-provide-2k.

78 The CASH Act passed 275 – 134 in the House, narrowly satisfying the required 2/3 majority vote. *See* Congress, H.R. 9051 - CASH Act of 2020, *Actions Overview H.R. 9051 — 116th Congress (2019-2020)*, https://www.congress.gov/bill/116th-congress/house-bill/9051/actions.

79 Sen. Mitch McConnell (R-KY), *supra* note 8.

80 *Id.* at S7971.

81 *See* 116 CONG. REC. S7977 (2020) (statement of Sen. Cornyn).

82 *Id.* at S7978.

83 *See* Biden-Harris Transition, *supra* note 72.

TRA rebates, stating that "we will finish the job of getting in a total of $2,000 in cash relief to people who need it the most."[84] The American Rescue Plan, as introduced on January 14, provided that "more than 20 million Americans have contracted COVID-19, and at least 370,000 have died. . . . Too many Americans are barely scraping by, or not scraping by at all . . . While Congress's bipartisan action in December was a step in the right direction, it was only a down payment."[85] The proposed plan highlighted that more than one in three households, and half of Black and Latino households, were struggling to pay for household expenses during the pandemic.[86]

Recovery rebates in the American Rescue Plan were the most significant to date and estimated to cost over $400 billion.[87] However, Senate Democrats and Republicans were polarized on passing the legislation. Democrats who now controlled the Senate were determined to increase recovery rebates from COVIDTRA. This would also deliver on President Biden's pre-inauguration plan and provide greater pandemic relief to most U.S. households. Democrats largely aimed for significant direct payments with a broad scope.[88] In contrast, Senate Republicans rejected the large spending proposal. Republicans were reluctant to pass additional direct payments which they continued to view as mostly unnecessary and untargeted.[89] The American Rescue Plan narrowly passed 50-49 in the Senate and 220-211 in the House of Representatives, which were both Democratic-held, and signed into law on March 11, 2021.[90]

Section 9601 of the American Rescue Plan amended Section 6428 of the Internal Revenue Code by creating a refundable tax credit for the year 2021.[91] The American Rescue Plan recovery rebates were up to $1,400 for individuals ($2,800 for married couples filing a joint return).[92] They were advanced as refundable tax credits based on adjusted gross

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84 Joe Biden, *President-elect Biden Announces His American Rescue Plan*, YOUTUBE (Jan. 14, 2021), https://www.youtube.com/watch?v=XRa1LbTrPLo.

85 Biden-Harris Transition, *supra* note 72, at 1.

86 *See id.* at 9.

87 *See* Congressional Budget Office, *Estimated Budgetary Effects of H.R. 1319, American Rescue Plan Act of 2021*, Detailed Tables, at Title 9 (Mar. 10, 2021), https://www.cbo.gov/publication/57056 [hereinafter *Estimated Budgetary Effects of H.R. 1319*].

88 *See* 117 Cong. Rec. S1043 (2021) (statement of Sen. Kennedy) Sen. John Kennedy (R-LA), Congressional Record – Senate, S1043, 117th Cong. 1st. Sess., Vol. 167, No. 41 (Mar. 4, 2021).

89 117 Cong. Rec. S1044-5 (2021) (statement of Sen. Peters) Sen. Gary Peters (D-MI), Congressional Record – Senate, S1044-5, 117th Cong. 1st. Sess., Vol. 167, No. 41 (Mar. 4, 2021).

90 *See* American Rescue Plan, *supra* note 12; Congress, H.R.1319 - American Rescue Plan Act of 2021, Actions Overview H.R.1319 — 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/1319/actions.

91 *See* American Rescue Plan, § 9601(a).

92 *See id.*

income from the latest processed income tax returns (2020 or 2019).[93] The credits begin to phase out similarly to the CARES Act and COVID-TRA rebates: at $75,000 for individual taxpayers; $112,500 for heads of households; and $150,000 for joint returns.[94] However, they phase out far more rapidly; phasing out entirely at $80,000 for single filers, $120,000 for heads of households, and $160,000 for joint returns.[95] The quicker phase out largely resulted from an effort by moderate Democrats to target recovery rebates more explicitly to those who needed them.[96] In reference to decreasing the phase out threshold for couples filing a joint return, Sen. Jeanne Shaheen (D-NH) commented that "we could drop it below the $200,000 and still get households that really need it."[97] Under the American Rescue Plan, individuals earning over $80,000 and married couples earning over $160,000 were no longer eligible to receive recovery rebate payments, in contrast with previous legislation. The policy change eliminates some higher-income groups from receiving the benefit. The Institute on Taxation and Economic Policy[98] estimated that approximately 11.8 million fewer adults and 4.6 million fewer children would be eligible for the recovery rebate credits, compared to the previous legislation.[99]

Despite reducing the phase out, the American Rescue Plan incorporated a notable eligibility expansion. Under the Act, every dependent, including adult dependents, were eligible for the full $1,400 refundable credit. This means that both dependent children (under seventeen) and

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93 The CARES Act and COVIDTRA are refundable tax credits for the 2020 tax year and advanced based on 2019 adjusted gross income, or 2018 income if no return was filed in 2019. CARES Act of 2020, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281, 335; Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, § 272(a), 134 Stat. 1182, 1965. The American Rescue Plan is a refundable tax credit for the 2021 tax year and advanced based on the most recently processed income tax return – 2020 adjusted gross income if that return has been processed, or 2019 income gross income. American Rescue Plan, § 9601(a).

94 *See* CARES Act, § 2201(a); Consolidated Appropriations Act, 2021, § 272(a); American Rescue Plan, § 9601(a).

95 *See* Jacob Pramuk, *Biden Agrees to Limit Number of People Who Will Get Checks in Covid Relief Plan*, CNBC (Mar. 3, 2021, 10:43 AM), https://www.cnbc.com/2021/03/03/covid-stimulus-update-biden-backs-lower-income-cap-for-checks.html.

96 *See id.*; Kelsey Snell, *Senate Democrats, White House Agree to Tighter Income Limits for Stimulus Checks*, NPR (Mar. 3, 2021, 2:24 PM), https://www.npr.org/2021/03/03/973367877/senate-democrats-white-house-agree-to-tighter-income-limits-for-stimulus-checks.

97 Erica Werner & Jeff Stein, *Biden Limits Eligibility for Stimulus Payments Under Pressure from Moderate Senate Democrats*, WASH. POST. (Mar. 3, 2021, 6:37 PM), https://www.washingtonpost.com/business/2021/03/03/biden-limits-eligibility-stimulus-payments-under-pressure-moderate-senate-democrats.

98 The Institute on Taxation and Economic Policy is a "non-profit, non-partisan tax policy organization." *See About: Mission & History*, ITEP, https://itep.org/about/ (last visited Apr. 28, 2021).

99 *The Hill: Analysis: Senate Stimulus Check Changes Would Reduce Recipients by Up to 16 million*, ITEP (Mar. 4, 2021), https://itep.org/the-hill-analysis-senate-stimulus-check-changes-would-reduce-recipients-by-up-to-16-million.

adult dependents were eligible for the credit.[100] The policy marks a significant contrast from the CARES Act and COVIDTRA in which rebates were paid only to dependent children, in amounts of $500 and $600 per dependent child, respectively. For example, under the American Rescue Plan, a family of five which includes a married couple filing a joint return, two dependent children, and one dependent adult, could receive up to $7,000 in advanced recovery rebate payments. Other eligibility criteria were mostly like COVIDTRA, in which households with only one work-eligible Social Security number were eligible to receive a recovery rebate. Furthermore, the American Rescue Plan extended FPUC, PUA, and PEUC benefits through September 6, 2021. FPUC payments remained at $300, like the Consolidated Appropriations Act.[101]

The American Rescue Plan incorporated several additional important tax relief provisions. Most notably, the Act substantially expanded the Child Tax Credit (CTC) on an emergency basis.[102] The CTC was expanded from $2,000 to $3,000 per child for children over the age of six, and $3,600 for children under the age of six. The age limit was increased from sixteen to seventeen,[103] and the Act eliminated the $2,500 minimum earning requirement. The expanded CTC was made fully refundable, and the payments were advanced to eligible individuals periodically until the end of 2021. The CTC was previously only partially refundable up to $1,400. Advancing the credit allowed low-income households to receive the child benefits immediately, rather than waiting until the tax filing season to claim them.[104] Adjusted gross income eligibility requirements were akin to initial recovery rebates: $75,000 for individual taxpayers; $112,500 for heads of households; and $150,000 for joint returns, after which the payments phased out.[105] The expanded CTC functioned much like recovery rebates and temporarily provided refundable credits to households with children.

Similarly, the American Rescue Plan expanded the Child and Dependent Care Tax Credit (CDCTC) on an emergency basis for one

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100 American Rescue Plan Act of 2021, Pub. L. No. 117–2, § 9601(a), 135 Stat. 4, 138.

101 American Rescue Plan Act § 9013; Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, § 203(a), 134 Stat. 1182, 1953. Expanded unemployment compensation under the American Rescue Plan is expected to cost $152 billion. CONG. BUDGET OFF., LETTER FROM DIRECTOR PHILLIP L. SWAGEL TO SEN. KYRSTEN SINEMA (D-AZ), RE: COST OF THE EXTENSION OF EXPANDED UNEMPLOYMENT COMPENSATION (July 16, 2021), https://www.cbo.gov/system/files/2021-07/57366-Sinema-UI.pdf.

102 *See* American Rescue Plan, § 9611(a).

103 *See id.*; *American Rescue Plan: Increase the Child Tax Credit, Earned-Income Tax Credit, and Child and Dependent Care Tax Credit*, THE WHITE HOUSE, https://www.whitehouse.gov/american-rescue-plan/ (last visited Mar. 29, 2021) [hereinafter THE WHITE HOUSE, *American Rescue Plan*].

104 *See* American Rescue Plan Act § 9611(a).

105 *See id.*

year.[106] The CDCTC provides a credit for costs of childcare or caring for dependents who are physically or mentally incapable of self-care.[107] Before the expansion, eligible expenses were limited to a maximum amount of $3,000 for one qualifying individual or $6,000 for two or more qualifying individuals. The actual credit amounts were between 20% to 35% of the eligible expenses, depending on adjusted gross income. Under the American Rescue Plan, the CDCTC increased maximum eligible expenses to $8,000 for the care of one qualifying individual, or $16,000 for two or more individuals.[108] Moreover, the American Rescue Plan increased the maximum reimbursement percentage from 35% to 50%. As a result, maximum credit amounts for the year were $4,000 for one qualifying individual or $8,000 for two or more individuals.[109] The credit was also made refundable[110] with the goal of helping families immediately cover the cost of childcare during the pandemic.[111] The credit was fully available to families making less than $125,000 a year, whereas families earning between $125,000 to $400,000 could receive at least a partial credit.[112]

In addition, the American Rescue Plan expanded the Earned Income Tax Credit (EITC) for the 2021 year. For individuals without children, the Act raised the EITC from $543 to $1,502 and raised the income limit from $15,280 to $21,430.[113] According to the CBO, the CTC, CDCTC, and EITC, expansions under the American Rescue Plan were expected to cost over $100 billion.[114]

II. RECOVERY REBATES AS TAX EXPENDITURES

It is important to recognize some key design components of refundable tax credits. First, consider that the primary role of the federal income tax system is to raise revenues. It is not, by intended design, an

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106 *See id.*

107 *Topic No. 602 Child and Dependent Care Credit*, IRS, https://www.irs.gov/taxtopics/tc602 (last visited Mar. 12, 2021).

108 *See* American Rescue Plan, § 9631(a).

109 *See id.*; THE WHITE HOUSE, *American Rescue Plan*, *supra* note 103.

110 For taxpayers with a principal place of abode in the U.S. for more than one-half of the taxable year. *See* American Rescue Plan, § 9631(a).

111 *See President-elect Biden Announces American Rescue Plan*, *supra* note 72, at 14.

112 *See* American Rescue Plan, § 9631(a).

113 *See* American Rescue Plan, § 9621(a); THE WHITE HOUSE, *American Rescue Plan*, *supra* note 103; *Looking Ahead: How the American Rescue Plan affects 2021 Taxes, Part 1*, IRS (June 2, 2021), https://www.irs.gov/newsroom/looking-ahead-how-the-american-rescue-plan-affects-2021-taxes-part-1; *see also* IRS, *Earned Income and Earned Income Tax Credit (EITC) Tables* (Jan. 21, 2022), https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables.

114 *See Estimated Budgetary Effects of H.R. 1319*, *supra* note 87.

instrument for distributing broad monetary assistance.[115] Yet against the income tax's central role, a secondary function has historically emerged—that of "tax expenditures"[116]—a term credited to the late Assistant Secretary of the Treasury for Tax Policy Stanley Surrey in a 1967 speech.[117] Section 3(a)(3) of the Congressional Budget and Impoundment Control Act of 1974 defines tax expenditures as "those REVENUE LOSSES [emphasis added] attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit . . . ."[118] Tax expenditures are therefore any reduction in income tax liabilities that favor particular persons, groups, or activities.[119] Tax expenditures, such as credits, channel government spending through the tax system, thereby deviating from its traditional function. Nevertheless, tax expenditures are a substantial part of the income tax system and have a similar net effect on the federal budget as direct government spending programs.[120] For the 2020 fiscal year, the Joint Committee on Taxation estimated that tax expenditures would represent over $1 trillion in costs to the Treasury – an estimate not yet including the projected costs of COVIDTRA, among other expenditures.[121] The CARES Act recovery rebates represented the costliest tax expenditure for that fiscal year,[122] Recovery rebates have an equal net effect on the budget as other federal spending programs such as the ex-

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115 *See* U.S. DEP'T TREASURY, *Resource Center: Economics of Taxation*, https://www.treasury.gov/resource-center/faqs/Taxes/Pages/economics.aspx (last visited Nov. 17, 2020); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. L. Rev. 225, 228 (1979).

116 *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 310 n.1 (1972).

117 *See* Stanley S. Surrey, *The United States Income Tax System: The Need for a Full Accounting*, 125 J. ACCT. 57, 58 (1968); STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 3—4 (1973); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1155 (1988).

118 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88. Stat. 297, § 3(a)(3) (1974).

119 *See* JOINT COMMITTEE ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024, JCX-23-20, 2 (Nov. 5, 2020), https://www.jct.gov/publications/2020/jcx-23-20/ [hereinafter ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024]; Surrey & McDaniel, *supra* note 115, at 228.

120 *See* U.S. Government Accountability Office, *Tax Expenditures*, https://www.gao.gov/key_issues/tax_expenditures/issue_summary (last accessed Feb. 25, 2022).

121 *See* ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024, *supra* note 119, at 37. Note, however, that the Joint Committee on Taxation has stated that individual tax expenditure items cannot be added to determine the total tax expenditure estimate, because of interactions between different tax expenditures. *See id.* at 17–19 (on tax expenditure calculations).

122 *See id.* at 13, 24–36.

panded unemployment compensation or the Paycheck Protection Program.[123]

Tax expenditures have been scrutinized as government programs "disguised" as tax legislation.[124] Scholars have argued that if tax expenditures were recognized as direct monetary subsidies, many would not garner public support and would be repealed.[125] As written by Walter H. Heller, the late economist and advisor to President Kennedy, "the back door to government subsidies marked 'tax relief' is easier to push open than the front door marked 'expenditures' or the side door marked 'loans, guarantees, and insurance.' "[126] Surrey, who advocated for repealing tax expenditures for such reasons, anticipated that many tax expenditures would be replaced by direct federal subsidies providing more effective assistance, whereas less effective tax expenditures would be wholly terminated.[127] According to Surrey, "tax expenditures were rarely examined. They lay hidden in the tax structure, often worded and looking like any normal structural provision since the technical tax jargon appeared the same. . . . Direct budget programs [they] usually do have to endure more scrutiny. . . . With the advent of the tax expenditure budget. . . The items are still in the tax laws and as such are usually permanent unless changed [or] on the other hand—and equally irrationally. . . Changed, automatically and without discussion."[128] In 1972, President Nixon famously proclaimed that "it is time the American people faced up to the truth. . . Every dollar in taxes that some individual or industry is excused from paying is just as much of a drain on the Treasury, and contributes just as much to Federal deficits, as a dollar appropriated by the Congress and spent directly from the Treasury."[129]

In response to the COVID-19 crisis, Congress provided fiscal aid through the tax system by distributing recovery rebate tax credits as the

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123 The Paycheck Protection Program (PPP), set forth in Sections 1101 to 1114 of the CARES Act, was designed to provide loans to small businesses as an incentive to keep their workers on the payroll.

124 *See* Thuronyi, *supra* note 117, at 1155; *see also* Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 245 (1969).

125 *See* Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 352–70 (1970).

126 Walter W. Heller, *Some Observations on the Role and Reform of the Federal Income Tax*, *in* 1 COMM. ON WAYS & MEANS, TAX REVISION COMPENDIUM 181, 190 (1959).

127 *See generally* Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

128 Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679, 697 (1976).

129 Philip M. Stern, *Uncle Sam's Welfare Program for the Rich*, N.Y. TIMES (Apr. 16, 1972), https://www.nytimes.com/1972/04/16/archives/uncle-sams-welfare-program-for-the-rich-welfare-program-for-the.html.

most significant relief instrument. Congress struggled to concur on the size and scope of these tax expenditures, particularly for COVIDTRA and the American Rescue Plan. The CARES Act was a product of swift bipartisan negotiation, COVIDTRA resulted from bipartisan compromise, and the American Rescue Plan was entirely partisan. Although Congress highlighted the importance of its economic relief package, it neglected to address key tax policy design components of recovery rebate credits. Eligibility criteria for adjusted gross income thresholds (scope) and actual rebate amounts (scale) have remained largely untheorized in this unprecedented legislation. In addition, Congress has not attempted to resolve the tension between the targeting of recovery rebates to lower-income households and targeting to households which ultimately suffered income loss. Instead, recovery rebates have mostly been a product of political circumstances and public popularity. Against these considerations, some lawmakers have rejected recovery rebates, whereas others endorsed them and even promoted recurring measures.

III. TARGETED TRANSFERS

COVID-19 recovery rebates were designed to provide immediate relief for struggling individuals and to stimulate the economy.[130] This section assesses recovery rebates with a focus on targeted transfers. It aims to address two policy questions:

Which income groups should be targeted by recovery rebates?

How can these income groups be targeted better?

A. Equity

Consider that most U.S. households fall within the income eligibility thresholds of the COVID-19 recovery rebates. According to the U.S. Census Bureau, 2019 median household income was $68,703.[131] Individuals who earned less than the minimum federal filing requirement could claim the credits by filing a federal tax return for the relevant year. Individuals were generally not required to file a federal tax return if they earned less than $12,000 in 2019 ($24,000 for married couples filing a joint return), $12,400 in 2020 ($24,800 for married couples filing a joint return), or $12,550 in 2021 ($25,100 for married couples filing a joint return).[132] Approximately 90% of American households were eligible to

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130 Sen. Robert Portman (R-OH), *supra* note 48.

131 *See* U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2019* (Sept. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html [hereinafter *Income, Poverty and Health Insurance Coverage in the United States: 2019*].

132 *See* IRS, *Publication 501: Dependents, Standard Deduction, and Filing Information for Use in Preparing 2019 Returns* (Jan. 13, 2020), at tbl. 1, https://www.irs.gov/pub/irs-prior/

receive the payments, given the U.S. Census Bureau's 2019 income statistics.[133] Congress determined eligibility for crisis relief based on households' adjusted gross income, providing that the greater the income—the lower the credit, and vice versa.[134]

Targeting lower-income households with recovery rebate credits is justifiable on several grounds. The first is distributional justice. Lower-income households are in a worse-off position and, therefore, have greater need, particularly during a crisis. This progressive rationale conforms with the vertical equity principle which differentiates between taxpayers who are not in an equal financial position. This means that taxes paid should increase with the income earned, indicating progressivity. The vertical equity principle is satisfied when the tax burden is proportional or consistent with an individual's ability to pay.[135]

The second rationale is that targeting lower-income households is more effective. Lower-income households are more likely to spend greater portions of their recovery rebates and do so faster than higher-income households.[136] In turn, the spending would stimulate the economy through a fiscal multiplier effect. Congress mostly justified targeting lower-income households based on these two rationales.

The third rationale is targeting lower-income groups because they are more likely to have suffered income loss during the pandemic. COVID-19 had varying economic effects across households, with low-income households affected the most, statistically.[137] According to the U.S. Census Bureau, among households which lost employment income, 50% of those earning less than $25,000 had either "slight" or "no" confidence in their ability to pay their next month's rent or mortgage on time.[138] In comparison, only 8.4% of adults in households earning over

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p501—2019.pdf; IRS, *Publication 501: Dependents, Standard Deduction, and Filing Information for Use in Preparing 2020 Returns* (Jan. 26, 2021), at tbl. 1, https://www.irs.gov/pub/irs-prior/p501—2020.pdf; IRS, Publication 501: *Dependents, Standard Deduction, and Filing Information for Use in Preparing 2021 Returns* (Jan. 28, 2022), at tbl. 1, https://www.irs.gov/pub/irs-prior/p501—2021.pdf.

[133] *See* Kyle Pomerleau, *The CARES Act: Who Will Get a Rebate and How Much?*, AM. ENTERPRISE INST. (Mar. 30, 2020), https://www.aei.org/economics/the-care-act-who-will-get-a-rebate-and-how-much/; Penn Wharton, *Recovery Rebates in the American Rescue Plan Act of 2021 (Senate Version)*, U. PENN. (Mar. 4, 2021), https://budgetmodel.wharton.upenn.edu/estimates/2021/3/4/recovery-rebates-in-the-american-rescue-plan-senate.

[134] *See id.*

[135] *See* Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 L. POL'Y INT'L BUS. 145, 164–65 (1998); *see also* Michael J. Graetz, *The David R. Tillinghast Lecture Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 295 (2001).

[136] *See id.*

[137] *See id.*

[138] Brian Mendez-Smith & Mark Klee, *Census Bureau's New Household Pulse Survey Shows Who Is Hardest Hit During COVID-19 Pandemic*, U.S. CENSUS BUREAU (June 19,

$100,000 shared such sentiments.[139] A Princeton University study showed that low-income households witnessed a profound increase in the frequency of labor market, financial, and food insecurity during the onset of the pandemic.[140] Black and Latinx respondents fared consistently worse than non-Hispanic whites across several financial indicators, magnifying the economic disparities pre-dating COVID-19.[141] According to a Pew Research Center survey,[142] 47% of lower-income adults suffered employment loss or pay cuts because of COVID-19, compared to 42% of middle-income, and 32% of upper-income adults.[143]

Consider that under this framing, lower-income *status* is not the targeted element. Rather, it is *loss* of income that is targeted and the potential for lower-income individuals to lose income during a crisis. Distributing payments to low-income households irrespective of changes in income could be accomplished at any time and is not genuine crisis aid. Targeting income loss is more reflective of adverse changes which occurred due to the crisis. Accordingly, lower-income *status* is used as an imperfect proxy to determine pandemic-related *losses*.

Congress wanted to advance credits before the filing season in anticipation of a financial loss from the crisis. A proxy would not be necessary under end-of-year credits, because the income loss would already be known. But recovery rebates were advanced as current year payments, and it would then be necessary to guesstimate which taxpayers would likely suffer income loss. Congress did so by advancing current year payments based on previous-year income as a proxy for the current year. Income for the current year was unknown, but last year's income, based on the most recently available tax return, serves as the best available (yet imperfect) proxy to guesstimate this year's income. And once the current year's income ultimately became known, Congress directed the Service to make only limited adjustments to the credit payments at the end of the year.

2020), https://www.census.gov/library/stories/2020/06/low-income-and-younger-adults-hardest-hit-by-loss-of-income-during-covid-19.html.

139 *See id.*

140 *See* Diana Enriquez & Adam Goldstein, *COVID-19's Socioeconomic Impact on Low-Income Benefit Recipients: Early Evidence from Tracking Surveys*, 6 SOCIUS: SOC. RES. DYNAMIC WORLD 1, 2 (2020).

141 *See id.*

142 *See About Pew Research Center*, PEW RSCH. CTR. https://www.pewresearch.org/about/.

143 *See* Kim Parker et al., *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

Senate lawmakers justified recovery rebates as measures to "help those who have been hit hardest by this disease";[144] "get immediate economic support to all those folks across the country";[145] and "so our hard-working families would have money in their pockets to recover from this pandemic."[146] Distributing the payments to struggling families was the underlying objective in Congress. Democrats expressed that legislation should help "middle-class and working-class and low-income families",[147] whereas Republicans conveyed that Congress should "try and get that relief flowing as quickly as possible. . . to the individuals who need it."[148] Nevertheless, targeting the aid explicitly to those who suffered *income loss* was not the primary function of recovery rebates. Moreover, the CARES Act and COVIDTRA were scrutinized for not targeting *lower-income* households, because their phase out thresholds were too high.[149]

Targeting lower-income households became more strongly prioritized under the American Rescue Plan following backlash from the previous less targeted rounds.[150] Credits phased out faster under the American Rescue Plan, with individuals earning over $80,000 and married couples earning over $160,000 no longer eligible.[151] The change was implemented to target the aid to a smaller income group, decreasing total eligibility by almost twelve million adults.[152] But if recovery rebates targeted lower-income households even more explicitly, crisis relief could be more substantial, equitable, and economically effective. Such targeted framing could be achieved by decreasing the phase out thresholds while increasing recovery rebate credits for low-income households. A May 2020 report by the Organisation for Economic Co-

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[144] 166 Cong. Rec. S2025 (daily ed. Mar. 25, 2020) (statement of Sen. Maria Cantwell).

[145] 166 Cong. Rec. S2032 (daily ed. Mar. 25, 2020) (statement of Sen. James Lankford).

[146] 166 Cong. Rec. S2045 (daily ed. Mar. 25, 2020) (statement of Sen. Cortez Masto).

[147] 167 Cong. Rec. S1414 (daily ed. Dec. 18, 2020) (statement of Sen. Sherrod Brown).

[148] 166 Cong. Rec. S7698 (daily ed. Dec. 18, 2020) (statement of Sen. Ron Johnson).

[149] *See* Chuck Marr et al., *Aggressive State Outreach Can Help Reach the 12 Million Non-Filers Eligible for Stimulus Payments*, CTR. BUDGET & POLICY PRIORITIES (Oct. 14, 2020), https://www.cbpp.org/sites/default/files/atoms/files/6-11-20tax.pdf.

[150] *See* Ayelet Sheffey et al., *A Bipartisan Group of Senators is Pushing to Exclude Higher-Income Families from Receiving a $1,400 Stimulus Check*, INSIDER (Feb. 4, 2021, 4:27 PM), https://www.businessinsider.com/bipartisan-group-senators-push-exclude-higher-income-families-stimulus-checks-2021-2?utm_source=markets&utm_medium=ingest

[151] *See* Ken Tysiac et al., *Senate Passes Amended $1.9 Trillion COVID-19 Stimulus Bill,* J. ACCOUNTANCY (Mar. 6, 2021), https://www.journalofaccountancy.com/news/2021/mar/senate-passes-coronavirus-stimulus-bill-recovery-rebates.html.

[152] *See* Megan Leonhardt, *Senate Democrats' Plan to Curb Eligibility for Third Stimulus Check Cuts Off 12 Million Adults,* CNBC (Mar. 3, 2021, 2:32 PM), https://www.cnbc.com/2021/03/03/stimulus-checks-plan-to-curb-eligibility-cuts-off-12-million.html. *See* U.S. Census Bureau, *Historical Income Tables: Income Inequality: Table A-4a. Selected Measures of Household Income Dispersion: 1967 to 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020) [hereinafter *Historical Income Tables: Income Inequality: Table A-4*].

operation and Development (OECD)[153] titled *Supporting livelihoods during the COVID-19 crisis* (the "May 2020 OECD Report") has largely supported this position and expressed that "by restricting the [untargeted] payment to poorer groups the benefit level can be increased."[154] This argument is expanded further in Section IV.B.2 below.

The American Rescue Plan improved targeting, slightly, in favor of lower-income households. However, rapid phase outs also created undesired high marginal tax rates. High marginal tax rates occur for individuals falling within or just beyond the "rate bubble" created by the phase out. To further demonstrate this issue, consider the following examples:

- *Individual A* is a single taxpayer, earning an adjusted gross income of $75,000 for the 2021 tax year. Before any credits are applied,[155] *Individual A* would have a federal income tax liability of $9,487. Under the American Rescue Plan, *Individual A* would be entitled to the full $1,400 recovery rebate, reducing their federal income tax liability to $8,087. *Individual A*'s income post-tax would be $66,913[156]
- Assume, instead, that *Individual A* was offered a raise and could earn an adjusted gross income of $80,000 for the 2021 tax year. Before any credits are applied, *Individual A* would have a federal income tax liability of $10,587. However, under the American Rescue Plan, *Individual A* is beyond the phase out range, and not entitled to any recovery rebate credit. *Individual A*'s income post-tax would be $69,412.

Because of the high marginal tax rates created by the quick phase out, the post-tax difference between *Individual A's* two circumstances is reduced to only $2,500. *Individual A*'s work is devalued if they earn within or slightly beyond the rate bubble that has been created by the phase out. *Individual A* would also be disincentivized from earning more and entering the phase out range because the American Rescue Plan's high-marginal tax rate would reduce their earnings post-tax.

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153 *See About the OECD*, OECD (last accessed May 21, 2021), https://www.oecd.org/about/.

154 *Supporting Livelihoods During the COVID-19 Crisis: Closing the Gaps in Safety*, OECD (May 20, 2020), netshttps://www.oecd.org/coronavirus/policy-responses/supporting-livelihoods-during-the-covid-19-crisis-closing-the-gaps-in-safety-nets-17cbb92d/ [hereinafter *Supporting Livelihoods During the COVID-19 Crisis*].

155 Note that *Individual A* would claim the $12,550 standard deduction for the 2021 taxable year.

156 For simplicity, the calculations do not consider liabilities under the Federal Insurance Contributions Act tax (FICA), possible 401(k) contributions, and state and local taxes (SALT).

In certain cases, albeit uncommon, the American Rescue Plan rate bubble can even create marginal tax rates of over 100%. These circumstances leave taxpayers worse-off post-tax than lower-income taxpayers who receive the credit and are taxed at a lower rate. Consider that the American Rescue Plan provided a profound benefit with a $1,400 fully refundable advanced tax credit. The credit is provided in full to individuals earning up to $75,000 ($150,000 for married couples filing a joint return), but no benefit is provided to those earning over $80,000 ($160,000 for married couples filing a joint return) due to the quicker phase out. The following example demonstrates the potential high marginal tax rate (over 100%) created by American Rescue Plan rebates:

- *Household A* is a married couple filing a joint return, earning an adjusted gross income of $150,000 for the 2021 tax year. Before any credits are applied, *Household A* would have a federal income tax liability of $18,975. Also, assume that *Household A* has four eligible dependents. Under the American Rescue Plan, *Household A* would be entitled to six full recovery rebate credits of $8,400 – reducing their federal income tax liability to $10,575. *Household A*'s income post-tax would be $139,425.[157]
- *Household B* is a married couple filing a joint return, earning an adjusted gross income of $160,000 for the 2021 tax year. Before any credits are applied, *Household B* would have a federal income tax liability of $21,175. Likewise, assume that *Household B* has four dependents. Under the American Rescue Plan, *Household B* is beyond the phase out range, and not entitled to any recovery rebate credit. *Household B*'s income post-tax would be $138,825.

The $10,000 of additional income for *Household B* means losing the entire $8,400 recovery rebate credit: a marginal tax rate of 84%. Under 26 U.S.C. § 1, *Household B* would also be taxed at the marginal tax rate of 22% on its last dollar of income, creating a total marginal tax rate of 106%. Thus, *Household B* is left in a worse-off position post-tax than *Household A* because of the higher income and quicker phase out. The quick phase out in the American Rescue Plan can thereby create marginal tax rates of over 100% for certain taxpayers under atypical circumstances.[158] Some households would therefore be incentivized to earn less

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157 For simplicity, the calculations do not consider liabilities under the Federal Insurance Contributions Act tax (FICA), possible 401(k) contributions, and state and local taxes (SALT).

158 Note, however, that other numerical examples are possible which create an effective marginal tax rate above 100%.

income and receive the full recovery rebate. This is in contrast with the CARES Act and COVIDTRA rebates, which phase out more gradually at a rate of 5% per dollar of qualified income. The quicker phase out of the American Rescue Plan slightly improves targeting to lower-income households, yet creates unwanted high marginal tax rates.

Targeting lower-income households could be accomplished by decreasing (narrowing) the income eligibility (phase out) thresholds, while phasing out the benefit gradually enough to prevent high marginal tax rates. This would satisfy the vertical equity principle and permit raising credit amounts without increasing the overall program costs.

B. *Response to Stimulus*

1. Effectiveness

Targeting lower-income households with advanced refundable credits is shown to stimulate economic recovery.[159] This is accomplished through a fiscal multiplier effect, where increased household consumption leads to higher employment and growth.[160] During the 2008-9 recession, the CBO stated that "the most effective types of fiscal stimulus (delivered either through tax cuts or increased spending on transfer payments) are those that direct money to people who are most likely to quickly spend the bulk of any additional funds provided to them."[161] The goal of fiscal stimulus is to promote economic activity by increasing short-term aggregate demand.[162] Stimulus is generally considered effective when consumers are willing to spend rather than save. According to the CBO, households that are credit constrained or earn a lower income are particularly likely to spend stimulus payments.[163] Households with higher income and greater access to credit are unlikely to significantly alter their consumption patterns in response to temporary changes in income because "it has a relatively small effect on lifetime wealth."[164]

Several econometric studies have assessed spending patterns and outcomes following recovery rebate distribution. This includes studies examining individual spending patterns before and after receiving recov-

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159 *See COVID-19 and Direct Payments to Individuals: Considerations on Using Advanced Refundable Credits as Economic Stimulus*, CONGRESSIONAL RES. SERVICE (Mar. 17, 2020), https://crsreports.congress.gov/product/pdf/IN/IN11247.

160 *See* Scott R. Baker et al., *Income, Liquidity, and the Consumption Response to the 2020 Economic Stimulus Payments*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Sept. 2020), https://www.nber.org/papers/w27097 [hereinafter *Income, Liquidity, and the Consumption Response to the 2020 Economic Stimulus Payments*].

161 *Options for Responding to Short-Term Economic Weakness*, CONGRESSIONAL BUDGET OFFICE (Jan. 2008), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/01-15-econ_stimulus.pdf.

162 *See id.* at 4.

163 *See id.* at 6–7.

164 *Id.* at 10.

ery rebates in 2001, 2008, and 2020.[165] These studies have mostly supported the U.S. government's position that fiscal stimulus is most effective when distributed to lower-income individuals.[166]

A widely cited 2006 study by Johnson, Parker, and Souleles found that under EGTRRA in 2001,[167] households spent approximately two-thirds of their rebates during the first cumulative six-month period of receiving them.[168] Average households spent approximately 20% to 40% of their rebates on non-durable goods within three months.[169] Households with low-liquidity or low-income spent considerably higher portions of their recovery rebates and spent most of them promptly after receipt.[170] In a subsequent 2013 study, Johnson, Parker, and Souleles determined that following the recovery rebates under the Economic Stimulus Act of 2008, average households spent approximately 12% to 30% of their credits on non-durable consumption within three months of receipt.[171] Overall spending patterns were largely similar between 2001 and 2008.[172] In 2008, low-income households consumed significantly greater portions of their rebates relative to average households.[173]

A 2007 study by Agarwal, Liu, and Souleles on consumer credit data for the 2001 recovery rebates found that consumers initially saved some of their rebates, but spending increased soon thereafter.[174] This was particularly notable for households that faced liquidity constraints.[175] In

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165 *See* Claudia Sahm, *Direct Stimulus Payments to Individuals*, BROOKINGS (May 16, 2019), https://www.brookings.edu/research/direct-stimulus-payments-to-individuals/.

166 Chad Stone, *Fiscal Stimulus Needed to Fight Recessions*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 16, 2020), https://www.cbpp.org/research/economy/fiscal-stimulus-needed-to-fight-recessions.

167 Recall that under EGTRRA, $300 rebates were provided to individuals ($600 for couples filing a joint return), and $500 for heads of households. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §115 Stat. 38, 101(b)(1) (2001), *supra* note 17; *President Bush Signs the Economic Growth and Tax Relief Reconciliation Act Of 2001*, *supra* note 18.

168 *See* David S. Johnson, Jonathan A. Parker & Nicholas S. Souleles, *Household Expenditure and the Income Tax Rebates of 2001*, 96 AM. ECON. REV. 1589, 1604–06 (2006). The study found that tax rebates "provided a substantial stimulus to the national economy in 2001, helping to end the recession." *See id.* at 1606. Nevertheless, the study acknowledges that future tax rebates may not have the same quantitative effects.

169 *See id.* at 1590.

170 *See id.* at 1604.

171 Under the Economic Stimulus Act of 2008, rebates were generally $600 for individuals. *See* Economic Stimulus Act of 2008, *supra* note 19.

172 *See* Parker et al., *Consumer Spending and the Economic Stimulus Payments of 2008*, 103 AM. ECON. REV. 2530, 2531 (2013); the study found that durable goods (such as vehicles) were purchased with an average of approximately 50 to 90 percent of the payments in the first three months of rebate receipt. *See id.*

173 *See id.* at 2547.

174 *See* Sumit Agarwal, Chunlin Liu, & Nicholas S. Souleles, *The Reaction of Consumer Spending and Debt to Tax Rebates—Evidence from Consumer Credit Data*, 115 J. POL. ECON. 986, 986–89 (2007).

175 *See id.*

a 2014 study, Huntley and Michelangeli designed a "life-cycle model" with idiosyncratic shocks and borrowing constraints to thoroughly evaluate the response to the 2001 recovery rebates.[176] The study found that liquidity-constrained and lower-income households consumed a higher portion of their recovery rebates. Transfers targeting these households would yield a higher marginal propensity to consume.[177]

Early studies performed on the COVID-19 recovery rebates have largely highlighted similar findings. A study by Scott Baker et al. indicates that spending increased by $0.25 to $0.40 per stimulus dollar in the first weeks following receipt of the CARES Act recovery rebates.[178] The study also found that households spent over twenty cents of every dollar within the first ten days of receiving their payments. The highest upturns in consumption were on non-durables, household items, rent, mortgage, and loan payments.[179] Households with lower-income, lower-liquidity, and whose income decreased significantly during the crisis, spent greater portions of their credits.[180] The study found that individuals with less than $100 in their accounts spent over 40% of their recovery rebates in the first month, whereas individuals with over $4,000 in their accounts spent an insignificant portion of their rebates.[181] Lower-income households were also less likely to save a substantial portion of their payments.[182] According to the study, households with lower-income and lower-liquidity were associated with higher fiscal multipliers than higher-income households.[183] However, the CARES Act recovery rebates may have been less effective than previous rebate programs due to the unprecedented universal scope (eligibility) of the payments. The study indicates that designing recovery rebates to target households with lower-income and lower-liquidity during a crisis will have the greatest effect on fiscal multipliers.[184]

Other studies on the COVID-19 recovery rebates echoed these determinations. A study by Coibion, Gorodnichenko, and Weber found that

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176 *See* Jonathan Huntley & Valentina Michelangeli, *Can Tax Rebates Stimulate Consumption Spending in a Life-Cycle Model?*, 6 AM. ECON. J.: MACROECONOMICS 162, 162–89 (2011).

177 *See id.* at 162, 187.

178 *See Income, Liquidity, and the Consumption Response to the 2020 Economic Stimulus Payments, supra* note 160, at 1.

179 *See id.*

180 *See id.*

181 *See id.* at 3.

182 *See* Kim Parker et al., *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19,* PEW RSCH. CTR. (Apr. 21, 2020), https://www.pewresearch.org/social-trends/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/

183 *See id.*

184 *See Income, Liquidity, and the Consumption Response to the 2020 Economic Stimulus Payments, supra* note 160, at 3.

among recovery rebate recipients, 52% paid debts; 33% saved, and only 15% spent them.[185] However, households with lower-income and lower-liquidity were much more likely to spend their tax rebates than other households.[186] Individuals less likely to save their payments included those with mortgages, the unemployed, individuals who lost earnings due to the crisis, and those with lower levels of education.[187] Most of the spending went towards food and other non-durable consumer products.[188] According to a U.S. Census Bureau survey, households with higher-income (between $75,000 to $99,000) were more likely to save their recovery rebates or use them to pay owed debts, compared to average-income households.[189] In contrast, most lower-income earners planned to use their credits to pay for household expenses.[190]

An April 2020 Pew Research Center survey showed that among lower-income households, 71% were likely to spend their credits on essential needs; 11% would save them; 11% would pay off debt, and 6% would use them for something else.[191] Among upper-income households, 34% would spend them on essentials; 21% would save them; 14% would pay off debt, and 10% would use them for something else.[192] A study by the Federal Reserve Bank of New York showed similar patterns. Among households earning less than $40,000, 31.2% saved; 22.3% spent on essentials, and 39.8% paid down debt.[193] In comparison, among households earning between $40,000 and $75,000, 35.8% saved; 18.5% spent on essentials, and 34.5% paid down debt.[194] Among households earning over $75,000, 40.8% saved; 14.7% spent on essentials, and 30.2% paid down debt.[195]

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185 *See* Olivier Coibion et al., *How Did U.S. Consumers Use Their Stimulus Payments?*, NAT'L BUREAU OF ECON. RSCH. (Aug. 2020), https://www.nber.org/papers/w27693.

186 *See id.*

187 *See id.*

188 *See id.*

189 *See* Corresponding also to the phase out range prescribed in the CARES Act; Daniel Perez-Lopez et al., *Majority Who Received Stimulus Payments Spending Most of It on Household Expenses,* U.S. CENSUS BUREAU (June 24, 2020), https://www.census.gov/library/stories/2020/06/how-are-americans-using-their-stimulus-payments.html [hereinafter *Majority Who Received Stimulus Payments Spending Most of It on Household Expenses*].

190 *See id.*

191 Kim Parker, Juliana Menasce Horowitz & Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, PEW. RSCH. CTR. (Apr. 21, 2020), https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/ [hereinafter: *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*].

192 *See id.*

193 *See* Olivier Armantier et al., *How Have Households Used Their Stimulus Payments and How Would They Spend the Next?*, LIBERTY ST. ECON. (Oct. 13, 2020), https://libertystreeteconomics.newyorkfed.org/2020/10/how-have-households-used-their-stimulus-payments-and-how-would-they-spend-the-next.html.

194 *See id.*

195 Other criteria include spending on non-essentials and donations. *See id.*

Against these findings, a few studies have determined that lower-income households do not necessarily have a greater propensity to spend and may consume less of their recovery rebates than higher-income households. Most notably, studies on the 2001 and 2008 recovery rebates conducted by economists Shapiro and Slemrod have shown that few households overall responded that they are likely to increase their spending.[196] In a survey performed following the 2008 rebates, Shapiro and Slemrod found that 52% of respondents planned to pay off debt; 28% planned to save, and only 20% planned to spend their rebates.[197] The survey found that households with higher-income were generally (though not significantly) more likely to spend their rebates in comparison to lower-income households.[198] For example, the percentage responding that they would mostly spend was 20% in the group earning $20,000 and under, and 26% in the group earning over $75,000 and over.[199]

The CBO has addressed these conflicting findings in a policy brief on the 2008 recovery rebates.[200] The CBO explained that studies based on detailed data on household spending are generally more accurate because they are based on quantitative measurement of household spending behavior.[201] These studies are also able to use households that have not received recovery rebates as a control group.[202] The CBO notes Johnson, Parker, and Souleles, and Agarwal, Liu, and Souleles, among these types of studies.[203] In contrast, the CBO conveyed that studies relying on responses to survey questions about spending are subject to greater error due to incorrect answers and erroneous reporting by respondents.[204] Because money is fungible, individuals may be challenged in identifying what they had planned to spend or in determining what they ultimately spent their payments on. The CBO mentions Shapiro and Slemrod in this category of studies.[205] Econometric studies, with a few exceptions, have largely shown that lower-income households respond more positively to recovery rebate credits. Studies have consistently found that targeting lower-income households with recovery rebate credits would stimulate

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196 *See* Matthew D. Shapiro & Joel Slemrod, *Did the 2001 Tax Rebate Stimulate Spending?*, 17 TAX POL'Y & ECON. 83, 84 (2003) (on the 2001 rebates).

197 *See* Claudia R. Sahm, Matthew D. Shapiro & Joel Slemrod, *Household Response to the 2008 Tax Rebate: Survey Evidence and Aggregate Implications*, 24 TAX POL'Y & ECON. 69, 73 (2010) [hereinafter *Household Response to the 2008 Tax Rebate: Survey Evidence and Aggregate Implications*].

198 *See id.* at 38.

199 *See id.*

200 Congressional Budget Office, ECONOMIC AND BUDGET ISSUE BRIEF: DID THE 2008 TAX REBATES STIMULATE SHORT-TERM GROWTH? 1–2 (June 10, 2009).

201 *See id.* at 2.

202 *See id.*

203 *See id.*

204 *See id.* at 2–3.

205 *See id.* at 3.

the economy through a fiscal multiplier effect because lower-income households are more likely to spend greater portions of their rebates faster than higher-income groups.

2. Improved Targeting of Lower-Income Households

Lawmakers have justified targeting lower-income households with recovery rebates because lower-income households have a greater need and respond more effectively to economic stimulus. Thus, targeting lower-income households is more equitable and effective. But recovery rebates could target lower-income households more distinctly. This framing should be implemented even before any end-of-year adjustments due to income gain or loss. A narrower scope would also allow increasing credit amounts for eligible lower-income households while maintaining overall program costs.

Under most econometric studies, recovery rebates were most effective with households generally earning below $25,000.[206] Even under the Shapiro and Slemrod study, spending in the $0 to $35,000 household groups was generally strong; then declining in the middle-income group and peaking thereafter in the above $75,000 household group.[207] According to the Federal Register, the 2019 poverty line was $12,490 for single-person households and $16,910 for two-person households.[208] According to the U.S. Census Bureau, 2019 median personal income for individuals was $35,977,[209] and median household income was $68,703.[210] Hence, income eligibility thresholds could be reduced while still including these income groups. Modified income eligibility could correspond to the approximate 50th percentile limit for median personal and household incomes,[211] rather than the approximate 90th percentile set forth in the CARES Act.[212] The adjusted gross income eligibility threshold could therefore be set at $35,000 for individuals and $70,000 for married couples filing a joint return. Under the CARES Act model, maximum recovery rebate credit amounts could be increased by approximately 40%, before the phase out range, without significantly increasing total

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206 *See e.g., Majority Who Received Stimulus Payments Spending Most of It on Household Expenses*, *supra* note 189;

207 *See Household Response to the 2008 Tax Rebate: Survey Evidence and Aggregate Implications, supra* note 197, at 38.

208 *See* U.S. Department of Health and Human Services, *Office of the Assistant Secretary for Planning and Evaluation, 2019 Poverty Guidelines* (last accessed June 27, 2021), https://aspe.hhs.gov/2019-poverty-guidelines.

209 *See* U.S. Census Bureau, *Real Median Personal Income in the United States* (May 28, 2021), https://fred.stlouisfed.org/series/MEPAINUSA672N.

210 *See Income, Poverty and Health Insurance Coverage in the United States: 2019, supra* note 132.

211 *See Historical Income Tables: Income Inequality: Table A-4, supra* note 154.

212 Reduced to the approximate 85th percentile under the American Rescue Plan.

program costs. In other words, eligibility before the phase out would decrease by 40%, but credit amounts could increase by 40%. For example, under the CARES Act model, recovery rebates targeting low-income households could be as high as $1,700 ($3,400 for married couples filing a joint return) while maintaining similar program costs. This analysis is similar for the other credit rounds and such a framing could be adopted for recovery rebates in future crises.

If this design is adopted, the phase out rate should remain 5% for every dollar, or $5 for every $100, akin to the CARES Act and COVID-TRA credit models. The gradual phase out will prevent undesired high marginal tax rates. For example, $1,700 credits could begin to phase out at $35,000 for individuals ($70,000 for married couples filing a joint return) and wholly phase out at $69,000 for individuals ($138,000 for married couples filing a joint return). This credit structure would encompass all households under the 50th percentile limit within the pre-phase out range, who would be eligible for a full credit. Most upper-middle-income households would be within the phase out range, which phases out entirely under the 80th percentile limit. Under a different framing, the phase out rate could be increased to 10% for every dollar. $1,700 credits would wholly phase out at $52,000 for individuals ($104,000 for married couples filing a joint return). Marginal tax rates would be increased, but program costs would be reduced.

This proposal considers total program costs as a given and therefore recommends increasing credit amounts for low-income households by limiting eligibility. Alternatively, suppose that total program costs were unspecified, or negotiable, and that only maximum credit amounts were a given. In that case, decreasing the income eligibility threshold would do nothing to help lower-income households, but would harm middle-income households. Under this framing, a lower phase out threshold with low marginal tax rates on high-income groups would be regressive compared to a high phase out threshold with high marginal tax rates on high-income groups.[213] Such an outcome would be undesirable.

Assume, instead, a scenario where all elements of the recovery rebate program were "up-for-grabs", including overall program costs. Under these circumstances, credit amounts could increase more substantially and meet the $2,000 maximum amount promoted by progressive lawmakers as well as many in the American public.[214] Following the

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213 Under the former framing, middle-income taxpayers do not receive the benefit and higher-income taxpayers do not have to pay for it. Under the latter framing, middle-income taxpayers receive the benefit and higher-income taxpayers pay for it through higher marginal tax rates.

214 *See, e.g.,* Sen. Bernard Sanders (VT), Congressional Record – House of Representatives, S7696, Vol. 166, No. 215 (Dec. 18, 2020); Kelly Anne Smith, *Survey: Americans Say $2,000 Stimulus Checks Needed to Help Their Own Finances, Economy Endure Pandemic*,

initial economic shock of the COVID-19 crisis, the economy gradually began to recover and showed significant promise after government stimulus. According to the OECD, U.S. government stimulus boosted economic recovery twice as fast as originally anticipated and even created beneficial spillovers for other economies and trading partners.[215] In comparison, major European economies were projected to recover more gradually following their limited fiscal support.[216] Given the immediate economic shock caused by the crisis, Congress could have provided more significant aid (e.g., $2,000 credits) at the onset of COVID-19. This would have helped struggling households during the most difficult time while also contributing to greater fiscal stimulus.

Consider, however, that any decision to modify recovery rebate credit design carries significant political and public policy ramifications. The three rounds of recovery rebate payments were a subject of national debate and created divisions among policymakers across the political spectrum. In some cases, the substantial government stimulus was blamed for increased inflation during the pandemic, although its impact remains disputed.[217] On the one hand, increasing credit amounts while decreasing phase out thresholds could be endorsed: the American public has widely supported increased direct payments during the pandemic.[218]

FORBES (Mar. 29, 2021), https://www.forbes.com/advisor/personal-finance/americans-think-stimulus-checks-best-for-finances-economy-yougov-survey/.

215 OECD, Economic Outlook, Interim Report, *Strengthening the Recovery: The Need for Speed* (March 2021), at 4, 12–13 [hereinafter *Strengthening the Recovery: The Need for Speed*].

216 *See id.* at 12.

217 The consumer price index over the year ending in January 2022. *See* U.S. Bureau of Labor Statistics, *TED: The Economics Daily Image*: *Consumer Prices Up 7.5 Percent Over Year Ended January 2022* (Feb. 16, 2022), https://www.bls.gov/opub/ted/2022/consumer-prices-up-7-5-percent-over-year-ended-january-2022.htm. Government institutions have debated whether the federal government stimulus has contributed to inflation, but the analysis is not wholly conclusive. *See* Regis Barnichon, Luiz E. Oliveira & Adam H. Shapiro, *Economic Letter: Is the American Rescue Plan Taking Us Back to the '60s?*, FRBSF (Oct. 18, 2021), https://www.frbsf.org/economic-research/publications/economic-letter/2021/october/is-american-rescue-plan-taking-us-back-to-1960s/; Sen. Mike Lee, *U.S. Congress Joint Economic Committee, The Economics of Inflation and the Risks of Ballooning Government Spending* (Oct. 6, 2021), https://www.jec.senate.gov/public/index.cfm/republicans/2021/10/the-economics-of-inflation-and-the-risks-of-ballooning-government-spending.

218 According to a survey by personal finance company Bankrate, 61% of respondents stated that the addition of the American Rescue Act stimulus checks will sustain their financial well-being for less than three months (21% less than one month, 14% will not at all). Only 13% responded that the checks will sustain them for at least five months. *See* Sarah Foster, *Survey: More Than 6 in 10 Americans Say $1,400 Stimulus Checks Won't Last Three Full Months* (Apr. 14, 2021), https://www.bankrate.com/surveys/stimulus-check-survey-april-2021/; *see also* Anita Sharpe et al., *Americans Agonize Over Coronavirus Stimulus Payments, Worried That $1,200 Isn't Enough*, TIME (Apr. 17, 2020), https://time.com/5823508/coronavirus-stimulus-checks/; *Families Worry That $600 Stimulus Check is Not Enough*, FOX19NOW (Dec. 22, 2020), https://www.fox19.com/video/2020/12/22/families-worry-that-stimulus-check-is-not-enough/ (Cincinnati, Ohio area); Kelly Anne Smith, *We Now Know What's In*

Many have claimed that payments are insufficient to pay for essentials, rent, and income loss during the crisis.[219] Generally absent were claims calling for expanding the scope of credits to target higher-income earners. The primary concern was that payments were too little and untargeted, rather than too narrow and substantial. Income eligibility thresholds could likely be decreased without public uproar, together with increasing the transfer amount for lower-income earners.

On the other hand, recovery rebates could be perceived as a "welfare program" if they exclusively target lower-income groups. This label may cause a negative stigma even among eligible beneficiaries. Recovery rebates would be viewed as a "policy for the poor" and therefore a "poor policy", rather than a "policy for all Americans." More notably, decreasing the income eligibility thresholds would disgruntle higher-income earners, including some in the upper-middle class, who would no longer be eligible for the benefit. This reform would face a significant challenge: higher-income groups historically have a greater influence on public policy outcomes than other interest groups, including on tax policy.

According to political scientists Brady, Schlozman, and Verba, individuals with higher education and income participate more actively in the U.S. political system.[220] They are more likely to have their needs and interests represented by lobbyists and have their opinions considered for policy outcomes.[221] Higher-income groups are therefore in a better position to influence the government's tax and expenditure policies based on their interests.[222] Excluding high-income groups from recovery rebate benefits would be difficult due to their inherent influence on the political system.

Similarly, a study by political scientist Larry Bartels[223] found that U.S. Senators are more responsive to the ideological views of their high-

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The Second Stimulus Package. It's Not Enough., KENOSHA NEWS (Dec. 21, 2020), https://www.kenoshanews.com/business/investment/personal-finance/we-now-know-what-s-in-the-second-stimulus-package-it-s-not-enough/article_a54eb520-c8d9-58d9-afd4-2acca73a09e6.html (Kenosha, Wisconsin area); *see also* Jayne Chacko, *COVID Stimulus Package Direct Payments Not Enough for Some*, ABC 13 WHAM (Dec. 28, 2020), https://13wham.com/news/local/covid-stimulus-package-direct-payments-not-enough-for-some (Rochester, New York area).

219 *Id; see* Sarah Foster, Bankrate, *Survey: More than 6 in 10 Americans say $1,400 Stimulus Checks Won't Last Three Full Months* (Apr. 14, 2021), https://www.bankrate.com/surveys/stimulus-check-survey-april-2021.

220 Henry E. Brady, Kay Lehman Schlozman & Sidney Verba, *Political Mobility and Political Reproduction from Generation to Generation*, 657 ANNALS AM. ACAD. POL. & SOC. SCI. 149–50 (2015).

221 *See id.* at 150.

222 *See id.*

223 Larry Bartels is an American political scientist and the Co-Director of the Center for the Study of Democratic Institutions at Vanderbilt University.

income constituents than their middle-income constituents. U.S. Senators were found not at all responsive to the opinions of their low-income constituents.[224] Bartels also discovered partisan differences in responsiveness: whereas both Democrat and Republican representatives were more responsive to high-income groups, the pattern of responsiveness was particularly noticeable in Republican Senators.[225]

A study by political scientist Martin Gilens[226] echoed similar findings. Gilens noted that when preferences of the middle-and high-income classes align, responsiveness is strong for these two groups and nonexistent for the low-income group.[227] However, when the interests of middle-income align with the low-income groups, responsiveness is weak, even as responsiveness remains strong for the high-income group.[228] An article by James R. Repetti[229] observed these findings[230] and concluded that the analysis suggests that a progressive tax system is important for decreasing income and wealth inequality.[231]

Reducing income eligibility thresholds and increasing recovery rebate credit amounts would be more equitable and effective. However, this framing would likely face considerable challenges in Congress. Lawmakers are more responsive to the interests of high-income groups who would be excluded from the benefit in this proposal. Under the present recovery rebate design, many higher-income taxpayers were eligible for the credits, and their interests aligned with those of low and middle-income groups. A credit structure designed to target only low-and middle-income taxpayers is unlikely to yield a similar response pattern. This proposed tax policy reform aims to "walk the line" by promoting equity and effectiveness but acknowledging the existing political environment.

C. Targeting Households Which Lost Income

1. Policy Considerations

Congress justified targeting lower-income households based on need and stimulus incentives. But lawmakers mostly failed to distinguish between two rationales for targeting lower-income households: targeting

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224 *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 245 (2008).

225 *See id.* at 252.

226 Martin Gilens is Professor of Public Policy at the UCLA Luskin School of Public Affairs.

227 *See* MARTIN GILENS, AFFLUENCE AND INFLUENCE 56–57 (2012).

228 *See id.* at 57.

229 James R. Repetti is a Professor of Law at Boston College Law School.

230 *See* James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 FLA. TAX. REV. 522, 550–54 (2020) (exploring the mentioned studies of Brady, Schlozman, and Verba, Martin Gilens, Larry Bartels, and additional relevant studies).

231 *See id.* at 556.

those who are in worse-overall position (lower-income), and those negatively affected by the crisis (lost income). The vague objective of lawmakers was to provide relief to struggling middle-and lower-income households – "people who need it the most."[232] Current recovery rebate design is mostly concerned with targeting on the grounds of overall position, and bases credit eligibility on whether a taxpayer is in a lower-income group before or after the crisis. However, it does not consider the actual income loss of the taxpayer.

Distributing payments to lower-and middle-income households is not necessarily equivalent to providing "crisis aid" to households which lost income. The former could be achieved at any time and is not limited to the COVID-19 pandemic. The latter is concerned with those most affected by the crisis. Under federally expanded unemployment compensation, for example, Congress explicitly targeted income loss which is known in the current year.[233] But with tax credits, information on income loss is unknown when credits are advanced yet becomes clear at the end of the tax year. This is done by comparing current year income to the income from the previous year (pre-pandemic), which was used as the proxy to provide the credit. Under the CARES Act, for example, an individual whose 2019 income was above the phase out threshold (e.g., $120,000) but decreased in the 2020 taxable year (e.g., to $30,000) would be able the claim the credit on their 2020 tax returns. Similarly, eligible individuals whose credits were not deposited in time would be eligible to receive the full amount by filing a 2020 tax return. The same policies apply for the COVIDTRA and the American Rescue Plan rebates for the relevant tax years. This framing reflects an ability to adjust the credit when the proxy was incorrect. However, the design is not concerned with *loss* of income. Rather, it is concerned with the taxpayer ultimately being present in the preferred lower-income group, using a fixed income threshold as the standalone metric. It does not recognize income loss in which the taxpayer loses income but remains above or below the phase out threshold.

More notably, the design does not recognize any positive changes in income (increases), where the proxy was inaccurate, and a taxpayer's situation improved. Recovery rebates provide a substantial benefit to some taxpayers. Those who ultimately earned higher incomes than the prior-year proxy will have any previously overpaid tax credit forgiven and will not be required to repay their credit.[234] When the current year income becomes known, it is possible to reconcile the credit at the end of

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232 *President-elect Biden Announces His American Rescue Plan*, *supra* note 72.

233 *See id.*

234 CARES Act, §2201(a); H.R. 133, DIVISION-BY-DIVISION SUMMARY OF COVID-19 RELIEF PROVISIONS, at Secs. 272-73.

the tax year by either distributing additional credits (if income is lost) or requiring taxpayer repayment (if income increases). Congress, however, decided to reconcile credits only when taxpayer income decreased under the specified threshold. Accordingly, "plus-up" payments were provided due to loss of income, for the benefit of the taxpayer, but repayment was not required if a credit was overpaid.

The vertical equity standard is satisfied, *prima facie*, by establishing the adjusted gross income eligibility thresholds. For example, an individual whose adjusted gross income is $30,000 was eligible for a full credit; $77,000 a partial credit, and $102,000 no credit, under all three acts. However, determining eligibility solely based on previous-year income tax returns, as a proxy, does not indicate whether and to what extent individuals were affected by the crisis. Recovery rebates are intended to provide immediate pandemic relief for struggling households, but their distribution does not distinguish between individuals in different positions as a result of the crisis. Some individuals who received advanced credits have not been adversely affected by the pandemic and are in similar or even better-off positions than before.[235] The May 2020 OECD Report echoes these concerns, expressing that: "While temporary universal transfers are appealing in the current context to ensure that no-one falls through the cracks they are by design poorly targeted. In the context of COVID-19, many households receiving such support may thus not have experienced a drop in income nor be in the greatest need. In order for such unconditional payments to ensure that vulnerable households can make ends meet, they must be sufficiently high."[236] If adjusted gross income is used as the instrument to measure the economic position resulting from the crisis, both negative and positive income fluctuations ought to be represented. Consider the following examples which demonstrate the shortcomings of unconditional advanced payments:

- Example 1: *Taxpayer A* works in the retail industry earning an income of $40,000 for the 2019 tax year. Due to the COVID-19 crisis, *Taxpayer A* suffered income loss and earned an income of only $25,000 during the 2020 tax year.
- Example 2: *Taxpayer B* works for a state government earning an income of $40,000 for the 2019 tax year. *Taxpayer B's* work was largely unchanged during the COVID-19 crisis and continued earning an income of $40,000 during the 2020 tax year.

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235 *See id.*
236 OECD, *supra* note 156, at 14.

- Example 3: *Taxpayer C* works for a digital platform earning an income of $40,000 for the 2019 tax year. *Taxpayer C's* earnings significantly increased during the COVID-19 pandemic and earned an income of $120,000 during the 2020 tax year.

Taxpayers in all three circumstances would be eligible for the COVID-19 recovery rebates under present law. However, only *Taxpayer A* suffered income loss and was worse-off due to the crisis. *Taxpayer C's* situation improved, but they would not be required to repay the credit even if their 2020 taxable income far surpasses the phase out range.[237] This demonstrates a flaw in the current recovery rebate policy design. The vertical equity standard is not satisfied because the tax system does not distinguish between individuals in different positions.[238] It is also inconsistent with the goal of providing pandemic relief to those directly affected by the crisis. Targeted and accurate crisis relief ought to reflect both negative (becoming worse-off), and positive (becoming better-off) changes in circumstances. Otherwise, the policy yields unworthy winners and losers. This is particularly concerning when income inequality has increased during the COVID-19 crisis, broadening racial wealth gaps, and deepening the divide between rich and poor.[239]

Curing this flaw could be achieved by adjusting advanced payments at the end of the tax year and after gain or loss of income is known; hereinafter referred to as "*ex-post*" targeting (targeting "after the event"). *Ex-post* targeting refers to targeting in retrospect – after the benefit has already been distributed. At the end of the tax year, it is known whether the guesstimate (proxy) was inaccurate, and adjustments to the credit could be made accordingly. Under this framing, payments would first be distributed to a relatively broad base, but targeted (narrowed) thereafter. The OECD and several economists have recommended the *ex-post* targeting approach to delivering crisis relief.[240]

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237 *See* CARES Act, § 2201(a).

238 *See* Kaufman, *supra* note 136, at 164–65; Graetz, *supra* note 136, at 295.

239 *See* Zia Qureshi, *Tackling the Inequality Pandemic: Is There a Cure?*, BROOKINGS (Nov. 17, 2020), https://www.brookings.edu/research/tackling-the-inequality-pandemic-is-there-a-cure/; *see also* Hillary Hoffower, *The Pandemic is Deepening a Wealth Divide Among Young People: the 'Millennial Rich' and the 'Millennial Poor'*, BUS. INSIDER (Jan. 8, 2021), https://www.businessinsider.com/pandemic-widened-millennial-wealth-gap-economic-inequality-rich-poor-henry-2021-1; Patricia Cohen, *Beyond Pandemic's Upheaval, a Racial Wealth Gap Endures*, N.Y. TIMES (Apr. 12, 2021), https://www.nytimes.com/2021/04/09/business/economy/racial-wealth-gap.html.

240 *See* OECD, *supra* note 156, at 12; Greg Mankiw, *A Proposal for Social Insurance During the Pandemic*, GREG MANKIW'S BLOG (Mar. 23, 2020), https://gregmankiw.blogspot.com/2020/03/a-proposal-for-social-insurance-during.html; *see also* Quentin Stoeffler et al., *Reaching the Poor: Cash Transfer Program Targeting in Cameroon*, 83 WORLD DEV. 244, 244 (2016) (describing that "effective and efficient poverty alleviation programs require accurate identification and targeting of poor households").

The flaw demonstrated in example three above could be cured by recognizing the overpayment for taxpayers whose income increased. This would require taxpayers to repay their advanced credits when they file taxes at the end of the year. Just as some taxpayers were entitled to receive "plus-up" payments if their income decreased, overpaid taxpayers would owe back taxes if their income increased. This would function as a reconciliation mechanism, ensuring that accurate targeting is accomplished *ex-post*.

Reconciliation of advanced tax credits has legal precedent in U.S. tax policy. For example, Section 36B of the Patient Protection and Affordable Care Act (Affordable Care Act)[241] provides a refundable tax credit known as "Premium Tax Credit" to taxpayers enrolling in coverage and requesting special assistance.[242] The Health Insurance Marketplace[243] estimates the amount of the Premium Tax Credit allowable, based on factors such as family composition and household income. Taxpayers can then choose to have none, some, or all of their estimated credits paid in advance to their insurance company, which in turn decreases their out-of-pocket payments for monthly premiums.[244] This advanced credit was created as an incentive for individuals to purchase insurance, even if they do not have sufficient funds to do so in the present. Taxpayers who received the advanced payments of the Premium Tax Credit must complete a specified tax form[245] and attach it to the federal tax return to reconcile their advanced payments. The reconciliation allows for a possible increase or decrease in the amount of taxes owed. Thus, taxpayers are requested to report changes in their life circumstances (e.g., income). If their household income has increased, they may owe back taxes.[246]

More recently, under the American Rescue Plan, certain overpayments of the significantly expanded CTC would also need to be repaid.[247] According to the Congressional Research Service, if a taxpayer

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241 *See* The Patient Protection and Affordable Care Act, commonly known as the "Affordable Care Act" or "Obamacare", was signed in 2010 during the Obama Administration to expand healthcare coverage. *See* United States Department of Health and Human Services, *About the Affordable Care Act* (last updated Mar. 23, 2021), https://www.hhs.gov/healthcare/about-the-aca/index.html.

242 Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, §1401 (2010).

243 The Health Insurance Marketplace is a health insurance exchange set up by the Affordable Care Act.

244 *Premium Tax Credit: Claiming the Credit and Reconciling Advance Credit Payments*, IRS (May 7, 2021), https://www.irs.gov/affordable-care-act/individuals-and-families/premium-tax-credit-claiming-the-credit-and-reconciling-advance-credit-payments#Advance.

245 Form 8962. *See About Form 8962, Premium Tax Credit*, IRS, https://www.irs.gov/forms-pubs/about-form-8962.

246 *See* Affordable Care Act, *supra* note 241, at §36B(f).

247 *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9611(a), 135 Stat. 4, 144 (2021).

is advanced more payments than the total credit for which they are eligible, they will need to repay the excess credit.[248] Excess credits can occur "due to changes in income, marital status, or number of qualifying children between the year used to estimate the advance (2020 or 2019) and their actual circumstances in 2021."[249] However, excess payments caused by changes in the number of qualifying children generally do not need to be repaid for lower-and middle-income taxpayers who are protected by a "safe harbor."[250] The safe harbor shields a certain amount from repayment.[251] For example, for taxpayers earning under $44,000, the safe harbor is set at $2,000 per child and is the protected amount from repayment. Any amount overpaid in excess of $2,000 would need to be repaid. As the taxpayer's income increases, the safe harbor amount—the excess payments protected from repayment—decreases, accordingly.[252] *Ex-post* targeting of recovery rebates could require similar reconciliation if life circumstances changed, and taxpayer income has increased.

In example three above, *Taxpayer C* highlights a rudimentary scenario of a taxpayer far out-earning their projected income proxy. But there are more complicated tensions between taxpayers ultimately gaining or losing income. Under the examples above, it is reasonable that *Taxpayer C* should be targeted *ex-post* by requiring recapture (repayment) at the end of the tax year, in contrast with current law. But what about *Taxpayer B?* Unlike *Taxpayer A* who suffered income loss, *Taxpayer B* ultimately did not suffer income loss during the crisis. Congress was content with providing the credit to *Taxpayer B* on the grounds of their pre-pandemic income and because of their overall position as a middle-income taxpayer.

This outcome, however, can be contentious. To further illustrate, consider the following modifications to the examples above:

- Example 4: *Taxpayer X* works as a manager in a large retail store, earning an income of $105,000 for the 2019 tax year. Due to the COVID-19 crisis, *Taxpayer X* suffered income loss and only earned an income of $45,000 during the 2020 tax year.
- Example 5: *Taxpayer Y* works for a state government earning an income of $40,000 for the 2019 tax year. *Taxpayer Y's* work was largely unchanged during the

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248 *See* CONG. RES. SERV., THE CHILD TAX CREDIT: TEMPORARY EXPANSION FOR 2021 UNDER THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; P.L. 117-2*)* 5 (May 12, 2021).

249 *Id.*

250 *Id.*

251 *See id.*

252 *See id*. at 6–7.

COVID-19 crisis but received a scheduled raise and earned an income of $41,000 during the 2020 tax year.

- Example 6: *Taxpayer Z* is an independent contractor, earning an income of $800,000 for the 2019 tax year. *Taxpayer Z's* earnings significantly decreased during the COVID-19 pandemic, and they earned an income of $200,000 during the 2020 tax year.

Under the modified scenarios, *Taxpayer X*'s 2019 income was $105,000 but decreased to $45,000 in 2020 during the crisis. *Taxpayer X*, therefore, suffers greater income loss than *Taxpayer Y* who suffers no loss at all. Nevertheless, *Taxpayer X* remains in a better overall position than *Taxpayer Y*, because their income is $45,000 in 2020, versus $41,000 for *Taxpayer Y*. *Taxpayer Y*'s income even increased in 2020 due to a scheduled raise. Their overall position improved during the COVID-19 crisis, but their absolute position is still worse-off than *Taxpayer X,* who lost income. *Taxpayer Z*, in comparison, lost the most during the crisis, both by gross amounts and by income percent. However, their overall position remains substantially better than the other two taxpayers. These examples are non-exhaustive but demonstrate the importance of clearly defining the appropriate targets for tax relief. Congress' rhetoric implied that *Taxpayer A* in example 1 should be the ideal target of the credit: a struggling taxpayer with demonstrated need.

The 2019 proxy was inaccurate for *Taxpayer X*, but in 2020 the Service recognizes that *Taxpayer X* was in a lower-income group, so *Taxpayer X* receives the full credit. However, *Taxpayer X* was more substantially affected by the crisis than *Taxpayer Y* who was not affected at all and even enjoyed some income increase. It can be debated whether the two taxpayers ought to receive an equal credit amount and whether *Taxpayer Y* should be targeted at all because only *Taxpayer X* was ultimately affected by the crisis. Moreover, *Taxpayer Z* also lost significant income during the crisis, yet remained in a higher-income group. The question arises how recovery rebates should target taxpayers who have suffered income loss, compared to taxpayers who are in the lower-income groups.

First, consider that the federal income tax system may not be the ideal instrument to resolve this tension and target those in the *worst-off* position. Because recovery rebates are distributed through the tax expenditure mechanism as tax credits, they are provided only to tax-filers: those filing a tax return. Non-filers – persons not traditionally required to file federal income tax returns – were not automatically advanced the payments. Recall that the income limit for filing a tax return was $12,000 ($24,000 for married couples filing a joint return) in 2019, $12,400

($24,800 for married couples filing a joint return) in 2020, and $12,550 ($25,100 for married couples filing a joint return) in 2021.[253] In comparison, the poverty line in 2020 was $12,490 for single persons.[254] Non-filers were, however, still eligible to claim the credit benefits by filing a tax return.[255] For the CARES Act, the Service also created an online tool for non-filers to register and receive the payment even in the current year.[256] Both options were utilized by millions of traditional non-filers.[257]According to the Service, these options were also available to those experiencing homelessness and the rural poor, who may not have received their recovery rebate directly through the Service.[258]

But despite being eligible for the credits, those in the worst-off economic position were not automatically advanced payments by the Service—payments that would immediately alleviate current year pandemic struggles. Instead, they had to proactively claim their benefit by registering online (only under the CARES Act) or filing a federal income tax return and receiving their benefit at the end of the tax year. It is unlikely that homeless individuals, for example, could receive the benefit on an equal-footed level as other eligible taxpayers.

To illustrate, assume that *Taxpayer D*'s income was $11,800 for both 2019 and 2020. Under these circumstances, *Taxpayer D* would be eligible for the credits, but they would not be advanced if *Taxpayer D* did not file a federal income tax return for those years. Instead, *Taxpayer D* could receive the full credit in the current year either by registering online (under the CARES Act) or at the end of the tax year by filing a federal tax return for the relevant year (under all acts). Thus, the credits would largely be a subsidy for *Taxpayer D* because of their lower income

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253 *See* I.R.C. § 63 (2018); *IRS provides tax inflation adjustments for tax year 2020*, IRS (last accessed Dec. 8, 2020). https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2020.

254 *See 2019 Poverty Guidelines*, *supra* note 208.

255 *See* IRS, *Use IRS Non-Filers: Enter Payment Info Here tool to get Economic Impact Payment; Many Low-Income, Homeless Qualify* (IR-2020-83, Apr. 28, 2020), https://www.irs.gov/newsroom/use-irs-non-filers-enter-payment-info-here-tool-to-get-economic-impact-payment-many-low-income-homeless-qualify.

256 *See Non-Filers: Enter Payment Info Here Tool Is Closed*, IRS (June 4, 2021), https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here; IRS, *Use IRS Non-Filers: Enter Payment Info Here tool to get Economic Impact Payment; many low-income, homeless qualify* (IR-2020-83, Apr. 28, 2020), https://www.irs.gov/newsroom/use-irs-non-filers-enter-payment-info-here-tool-to-get-economic-impact-payment-many-low-income-homeless-qualify.

257 *See IRS Releases State-by-State Breakdown of Nearly 9 Million Non-Filers Who Will be Mailed Letters About Economic Impact Payments*, IRS (Sept. 17, 2020), https://www.irs.gov/newsroom/irs-releases-state-by-state-breakdown-of-nearly-9-million-non-filers-who-will-be-mailed-letters-about-economic-impact-payments.

258 *See More than 1.8 Million Additional Economic Impact Payments Disbursed Under the American Rescue Plan; Total Payments Reach Nearly 167 Million*, IRS (May 26, 2021), https://www.irs.gov/newsroom/more-than-1-point-8-million-additional-economic-impact-payments-disbursed-under-the-american-rescue-plan-total-payments-reach-nearly-167-million.

position, but would not be immediate crisis relief. Those in the worst-off positions earning less than the minimum filing requirement were not targeted by the current year advanced payments because they mostly received their payments at the end of the tax year. The argument for using the tax system to target middle-income *Taxpayer Y* in example five is therefore weakened, when they did not lose income. This is because many individuals in worse-off positions than *Taxpayer Y,* such as *Taxpayer D*, were arguably not targeted in the first place with the current year payments.

In addition, consider that Congress targeted individuals who lost income with substantial current year payments, but without utilizing the tax system. This was accomplished through federally expanded unemployment compensation—namely PUA, FPUC, and PEUC.[259] Congress expanded payments for individuals already receiving unemployment, including with $600 payments (under the CARES Act)[260] and $300 payments (under COVIDTRA and the American Rescue Plan).[261] In so doing, Congress was able to aid those suffering from income loss with recurring current year payments and without the need for a proxy. Being unemployed this year is also a more accurate test for income loss than using the previous-year proxy. Federally expanded unemployment benefits are inherently more accurate than recovery rebates or any other tax expenditures for providing current year payments to those losing income. Recovery rebates, however, could address income loss more broadly. Expanded unemployment compensation targets income loss in the form of unemployment, and eligibility varies widely by state. During the pandemic, many households suffered from income loss without unemployment, devaluation of their assets and investments, high medical expenses, increased inflation, and other financial hardships. Recovery rebates can complement expanded unemployment compensation by targeting households which lost income through end-of-year adjustments to current year payments. Nevertheless, the difference in framing demonstrates a justifiable critique of tax expenditures.[262] Expanded unemployment compensation, provided outside the tax system, is accurate and highly targeted. In contrast, recovery rebates, distributed through the tax expenditure system, are broad, untargeted, and often inaccurate.

An argument could be made for targeting exclusively *Taxpayer X* under the examples above. *Taxpayer X* is the only one negatively affected by the crisis, and crisis relief would help restore them to their pre-

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259 *See* Pallasch, *supra* note 43; CARES Act § 2104; CARES Act § 2107

260 *See* CARES Act § 2012.

261 *See* Consolidated Appropriations Act, *supra* note 11, at § 203(a); *American Rescue Plan*, *supra* note 12, at § 9013.

262 *See, e.g.,* Heller, *supra* note 127; *see also* Surrey & McDaniel, *supra* note 129.

pandemic position. Whereas *Taxpayer Y* may be in an absolute worse-off position than *Taxpayer X*, their income was not adversely impacted by the crisis. If income loss would be the standalone metric for determining credit eligibility, *Taxpayer X* and even *Taxpayer Z* should be targeted by the credits. But such a policy would not be reasonable because it ignores key vertical equity and effectiveness considerations. These can help justify targeting lower-income households based on their worse-off status.

Taxpayer Z's income declined from $800,000 to $200,000. *Taxpayer Z* lost the most income by absolute terms and by income percent yet remains in high-income status. *Taxpayer Z* reasonably expected to earn $800,000, and likely arranged their expenses based on these expectations (e.g., mortgage, insurance, tuition payments, discretionary spending). *Taxpayer Z's* significant income loss could leave them in considerable debt and distress. Nevertheless, *Taxpayer Z*'s need remains less substantial than lower-income groups who were more likely to struggle with basic grocery or rent payments during the crisis. *Taxpayer Z* remains in a much better overall position than *Taxpayer X* and *Taxpayer Y* at the end of the year. It would be unreasonable to prioritize targeting higher-income *Taxpayer Z* with recovery rebates, despite their greater income loss.

Meanwhile, wholly eliminating *Taxpayer B* and *Taxpayer Y* from credit eligibility would also be unreasonable. It would require a stringent policy that only provides recovery rebate credits to households losing income as the standalone metric. Distributional justice and effectiveness criteria justify forgiving overpayments to *Taxpayer B* and *Taxpayer Y*. The pre-pandemic income proxy was fairly accurate for predicting the current year income of *Taxpayer B* and *Taxpayer Y*. It would also be undesirable to exclude *Taxpayer Y* due to a minor income increase. Even if the intention was to guesstimate income loss, an insignificant error in the proxy can be overlooked considering neither taxpayer exceeded the phase out range indicated by the proxy. Under these circumstances, taxpayers should not be penalized for minor changes in income. Note that a minor income gain is largely offset by inflation, which greatly increased during the crisis. Moreover, middle-income *Taxpayer B* and *Taxpayer Y* could have struggled at a particular *time* during the crisis, not reflected in the end-of-year income, for which the advanced credits were useful. Also consider that *Taxpayer B* and *Taxpayer Y* could have suffered financial hardships not demonstrated by loss of income. As noted above, these could be heavy medical expenses, loss of stock value, devaluation of assets, greater consumption burdens, and weaker purchasing power at the height of the pandemic. In April 2020, the index for meats, poultry, and fish increased by 4.3% and the cereal and bakery index increased by

2.9%.[263] The latter accounts for the greatest monthly increase ever recorded by the Bureau of Labor statistics for that index.[264] Requiring repayment from *Taxpayer B* and *Taxpayer Y* would be extremely burdensome on both the taxpayers and the Service.

It would also be immensely challenging and politically unpopular to subsidize *exclusively* those who suffered income loss from the crisis. Uncompromised targeting of income loss would mean that significant amounts would have to be recovered from lower-income taxpayers who did not lose income. Meanwhile, some middle-and upper-income taxpayers would still receive the benefit if their income declined. This would violate distributional justice norms and function as a subsidy for the rich whenever poor households did not "lose enough" to benefit from the credit compared to wealthier taxpayers.

Eliminating *Taxpayer B* and *Taxpayer Y* from eligibility through a repayment obligation could also entail broader public policy obstacles. Requiring repayment from such taxpayers may be publicly unpopular, particularly because many Americans would be required to return payments that were perceived as grants during a time of crisis (even if the policy is disclosed in advance). The recovery provision under the Affordable Care Act was by itself controversial and even suspended for the 2020 tax year due to the COVID-19 pandemic.[265] Requiring repayment of crisis relief payments while the crisis is ongoing could therefore be viewed as particularly draconian. Furthermore, individuals who have received large, advanced payments, and spent them, may find it difficult to repay some or all their payments. The repayment would be problematic if the dollar amounts at stake – which the government aims to recapture – do not justify the seeming ill-will, administrative burden, and negative public perception of the requirement. Recapturing the benefit from *Taxpayer B* and *Taxpayer Y* would be administratively impractical considering the significant burden it would impose. Most notably, it is unlikely that lower-income households would be able or willing to repay overpaid credits. A recapture requirement may also incentivize some households to save rather than spend, even if they do not necessarily anticipate reconciliation — which could hinder the stimulus objective of the policy.

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[263] *See* Robert Johansson, *Another Look at Availability and Prices of Food Amid the COVID-19 Pandemic*, USDA (July 29, 2021), https://www.usda.gov/media/blog/2020/05/28/another-look-availability-and-prices-food-amid-covid-19-pandemic.

[264] *See id.*

[265] *See* IRS, *IRS Suspends Requirement to Repay Excess Advance Payments of the 2020 Premium Tax Credit; Those Claiming Net Premium Tax Credit Must File Form 8962* (IR-2021-84, Apr. 9, 2021), https://www.irs.gov/newsroom/irs-suspends-requirement-to-repay-excess-advance-payments-of-the-2020-premium-tax-credit-those-claiming-net-premium-tax-credit-must-file-form-8962.

A conceptually strict policy would require repayment from any taxpayer who ultimately did not lose income at the end of the tax year. This means that adjustments would be made to the credits of *TaxpayerB* and *TaxpayerY* when filing their tax returns. *TaxpayerB* and *TaxpayerY* would then be required to repay their credit payments, in whole or in part. Implementing such a targeted income loss policy with an ordinary end-of-year credit could be more defensible and administrable. But targeting income loss entails significant drawbacks with current year payments. A recapture requirement *ex-post* greatly improves the accuracy of the transfers, but should be limited to the case of *Taxpayer C* in example three whose income increased beyond the original eligibility thresholds.

2. Proposed Design

Taxpayer C is clearly not the target of the recovery rebate credit and should not receive the benefit. Recall than in the example, *Taxpayer C* earned $40,000 in 2019, but their income increased to $120,000 in 2020. Under current law, they would have received the full recovery rebate, but the overpayment would be entirely forgiven. This outcome is unreasonable given that the pre-pandemic proxy was wrong in forecasting *Taxpayer C*'s far-improved situation during the crisis.

Balancing better targeting with public policy considerations can be achieved through a simplified convention that promotes equity while acknowledging the need to reconcile income gain. First, the proposed recapture policy would exempt *Taxpayer B* and *Taxpayer Y* from reconciling their recovery rebates if their income remained unchanged or if it increased but not into the phase out range. Second, in the case of *Taxpayer C,* whose income increased into or beyond the phase out range, a recapture policy similar to the expanded CTC repayment should be adopted. Recall that under the expanded CTC, taxpayers were required to repay overpaid credits due to changes in income, marital status, or qualifying children. The latter incorporates a safe harbor generally excluding some amount from repayment. There is no obvious justification why ineligible households are required to repay the overpaid CTC but not recovery rebate credits. Recovery rebates were mostly designed much like CTCs but distributed more broadly.

A simplified safe harbor convention could also be applied to overpaid recovery rebate tax credits. This would enable recapturing overpaid amounts without imposing an excessive burden on the Service that would need to collect the repayment. It would also alleviate the burden on certain taxpayers who may have spent some or all their credit payments. The safe harbor could be a fixed 50% of the full recovery rebate credit amount (e.g. $600 under the CARES Act, $300 under COVIDTRA, and $700 under the American Rescue Plan), in close similarity to the maximum safe harbor under the expanded CTC, in certain circumstances.[266] This means that under the CARES Act, for example, overpaid credits would require repayment but 50% of the full payment ($600) would be forgiven, and the taxpayer would only need to repay any overpayment in excess of $600. Under example three above, *Taxpayer C* was advanced a full recovery rebate of $1,200 because their 2019 income was $40,000 but was ultimately overpaid because their 2020 income was $120,000 and exceeded the phase out range. This means that *Taxpayer C*'s recovery rebate should have been $0, and they were overpaid by $1,200. Under this proposal, *Taxpayer C* would repay $600 because the first $600 (50% of the full credit) is protected from repayment by the safe harbor. If, however, *Taxpayer C*'s 2020 income turned out to be $80,000, their income would have fallen within the phase out range. This means that *Taxpayer C*'s recovery rebate should have only been $950, and they were overpaid by $250. Under this proposal, *Taxpayer C* would be protected by the safe harbor and would not be required to repay any of the overpayment.

This proposal is offered as a compromise between nontargeted payments and targeted payments which exclusively target income loss. It balances the need to maintain vertical equity and control program costs while eliminating excessive burdens on taxpayers and the Service. Furthermore, it would ensure that the payments distributed are truly *crisis aid* that targets lower-income households as well as households whose income did not substantially increase during the crisis. Imposing a recapture policy is justifiable when a taxpayer's income gain was significant. Such taxpayers should not be entitled to a credit intended for poorer, struggling households. This design would thereby ensure that taxpayers who became much wealthier during the crisis would not benefit from crisis aid. Also consider that taxpayers who earned high incomes were more likely to have saved rather than spent their payments.[267] This means that: (1) they were less likely to spend considerable portions of their payments and stimulate the economy, and (2) because they saved greater portions of their payments, and likely have greater overall wealth, recovering the payments would be more feasible. Thus, the Article recommends that this framing should be implemented for recovery rebates distributed in future crises.

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266 Under the expanded CTC, the maximum safe harbor allows for an approximate 55.5% exemption from repayment.

267 *See* Perez-Lopez & Bee, *supra* note 189; *see also* Parker et al., *supra* note 191; Coibion et al., *supra* note 185.

IV. UNIVERSAL PAYMENTS

Targeting lower-income households with recovery rebate credits can be accomplished by several means. In addition to the current recovery rebate design, targeting could be achieved by distributing recovery rebates universally—to every taxpayer—and without a phase out. This means that both low- and high-income taxpayers would be eligible for the benefit. Subsequently, or in conjunction, the marginal income tax rate schedule for high-income taxpayers, as set forth in 26 U.S.C. § 1, could be adjusted to "tax-away" the benefit from higher-income groups. Increasing the marginal tax rates on higher-income individuals, coupled with a universal distribution of the benefit, yields an equivalent budgetary outcome for the recovery rebate program. Hence, lower-income groups would essentially be targeted through a universal distribution of the credit and by taxing-away the credit from the higher-income group. Such a policy could be implemented irrespective of whether the credit is advanced or claimed at the end of the tax year.

In a 1997 article, Daniel Shaviro[268] argued that the phase out range in income-tested transfer programs is unnecessary.[269] According to Shaviro, it is wrong to assume that "it is impossible simultaneously to provide generous benefits, to keep program costs low by paying benefits only to the poor, and to keep benefit reduction rates low. . . . [Thus], [t]he only way to reduce marginal tax rates [in the phaseout range] without expanding the pool of eligible recipients [to other, richer taxpayers] is to reduce benefits."[270] Shaviro explains that the mistake lies in considering the phase out range—the income eligibility threshold—a question of program costs. Instead, it ought to be perceived as part of an overall rate structure and in light of all tax and transfer instruments.[271]

Gross phase outs of recovery rebates essentially increase the marginal tax rate for those over the phaseout threshold.[272] Conventional wisdom provides that phasing out recovery rebate credits is necessary to ensure that wealthy taxpayers are ineligible to receive the benefit.[273] However, there is nothing necessarily objectionable about distributing crisis aid universally, without a phase out, if that benefit could be taxed-away from the wealthy.[274] In other words, there is nothing wrong with

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269 Shaviro's argument refers to the EITC but is not conceptually different from recovery rebates.

270 Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 463 (1997).

271 *See id.*

272 *See* Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 326–27 (2004)].

273 *See id.*

274 *See id.* at 327; Shaviro, *supra* note 270, at 463.

distributing universal crisis aid as a current year payment to all Americans. Such a policy could be administratively simple and uncontroversial if the vertical equity benchmark could somehow still be satisfied. This position equates pandemic relief with other positive rights such as public education and healthcare. In that sense, the argument for distributing pandemic relief universally, and during the current year, may be similar to the argument for universal healthcare, which can be justifiable irrespective of one's income. Thus, in theory, recovery rebates could be distributed to every American, including the very rich, but the benefit would be taxed away from wealthier individuals. This means, specifically, adjusting the marginal income tax rate schedule to reflect heaver taxation on higher-income groups (i.e., increasing tax rates on the last dollars of the higher-income brackets).[275] This form of crisis relief distribution does not make the tax relief measure more expensive or less equitable.[276] It produces the same result as targeting with current year payments based on income eligibility thresholds and a phase out range as the method for distributing crisis relief.

Consider, however, that recovery rebate credits were designed as temporary measures during a crisis, rather than long-term positive rights. Higher-income groups do not require immediate aid as much as low-income groups, nor were they as adversely affected. Taxing-away the benefit may produce similar results as current year payment targeting with a phase out, but it does not reflect changes in circumstances that occurred due to the crisis. Universal payments would ignore the tensions between income gain and loss, highlighted in this Article, which would be difficult to reflect when the benefit is ultimately taxed-away. Furthermore, such a comprehensive change to crisis relief would face political challenges. It assumes that the marginal income tax rate schedule is "up for grabs", although changing the tax brackets is a significant political decision. It also assumes that changes to the tax rates could be accomplished in conjunction with the recovery rebate policy. Yet considering that recovery rebates are temporary crisis relief measures, it is unlikely that increasing the marginal tax rates could be done simultaneously. Additionally, adjusting the marginal tax rate schedules is unlikely to be supported by wealthy taxpayers and lawmakers who are more responsive to their higher-income constituents.[277] Increasing tax rates may be unpopular and impractical in general, because the broader public may oppose changes to the marginal tax rate schedule in the wake of the crisis. In any event, taxing-away the benefit entails the challenge of relying on the po-

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275 *See* Zelenak, *supra* note 272, at 327.

276 *See* Shaviro*, supra* note 270, at 463.

277 *See* LARRY BARTELS, *supra* note 223; MARTIN GILENS, *supra* note 226, at 81226.

litical environment rather than a tax-purist calculation for targeting the appropriate group and applying the given program costs.

V. RECURRING PAYMENTS

The COVID-19 crisis prompted a debate on whether direct payments should be universal, unconditional, and permanent, for all taxpayers. According to the OECD, no member-state has planned to introduce a Universal Basic Income (UBI) scheme that is genuinely unconditional and universal.[278] Such a program would certainly incur immense costs and could face public opposition on distributional justice and vertical equity grounds.[279] Universal recovery rebates have not been thoroughly considered in the U.S., but some lawmakers have argued that recovery rebates should be recurring.[280] Progressive Democrats have called for recurring payments to lower-income households coupled with enhanced unemployment compensation, even in the wake of the crisis.[281] A letter by Sen. Ron Wyden (D-OR), signed by several Democratic Senators,[282] conveyed that recurring payments for low-income households would help keep families out of poverty and stimulate the economy by increasing spending.[283] In addition, an open letter to policymakers endorsed by over 150 economists has called for automatic triggers to cash stimulus payments as economic "stabilizers."[284] According to the letter, regular, lasting, direct stimulus payments will promote economic recovery on all levels and boost consumer spending. Economists have specifically encouraged greater and faster spending relative to the relief provided for the 2008 recession, which has been viewed as too small and brief.[285]

Despite support from progressive Democrats and some renowned economists, recurring recovery rebates have not materialized. This is likely attributable to the recovery of the U.S. economy from the early

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[278] *See Supporting Livelihoods During the COVID-19 Crisis: Closing the Gaps in Safety Nets, supra* note 154, at 14.

[279] Notwithstanding the argument in Chapter V above for taxing-away the benefit, under which program costs would ultimately remain the same.

[280] *See Letter from Sen. Ron Wyden (D-OR) to President Joe Biden* (Mar. 2021), https://www.finance.senate.gov/imo/media/doc/030121%20Automatic%20Stabilizers%20Letter%20PDF%20for%20press%20release.pdf.

[281] *See id.*

[282] Including Bernie Sanders (I-VT); Elizabeth Warren (D-MA); and Cory Booker (D-NJ); Recall that Sen. Sanders expressed that he had pushed for $2,000 monthly payments for every working-class American. *See* Sen. Bernard Sanders (VT), Congressional Record – House of Representatives, S7696, Vol. 166, No. 215 (Dec. 18, 2020).

[283] *See* BARTELS, *supra* note 277.

[284] Open Letter from Economists on Automatic Triggers for Cash Stimulus Payments (July 2020), https://www.economicsecurityproject.org/wp-content/uploads/2020/07/emp_economists_letter.pdf.

[285] *See id.*

pandemic waves,[286] and the already unprecedented program costs of existing recovery rebate credits. Moreover, previous pandemic relief legislation encountered significant challenges in Congress, and the legislative path for recurring recovery rebates would be improbable.

Nevertheless, recall that the U.S. provided recurring payments to most U.S. families by significantly expanding CTC payments under the American Rescue Plan.[287] For the first time, CTC payments were advanced monthly, starting July 2021.[288] Families began receiving fully refundable monthly CTC payments of up to $250 for each child ages six to seventeen and $300 for each child under age six.[289] According to the Service, approximately 90% of households (including 90% of U.S. children) would automatically receive the expanded CTC payments under the American Rescue Plan.[290] This policy closely resembles a UBI that is distributed through the tax system. The payments were advanced through the end of 2021, with the second half of the CTC eligible to be claimed in 2022 as part of the income tax return.

Consider that advancing recurring and relatively universal CTCs provides a challenging task for the Service, requiring both precise current-year targeting and end-of-year adjustments. It demands effective current-year targeting by utilizing information on taxpayer income and eligible dependents. It requires effective end-of-year adjustments when applying the recapture mechanism for overpaid CTCs. Considering that the program costs of the expanded CTC were under $110 billion[291]—markedly lower than any of the recovery rebate credit programs—it is reasonable to expect that recovery rebates should apply similar targeting mechanisms.

Although the expanded CTC was in effect for only 2021, President Biden has proposed extending the CTC's expansion through 2025 and making the CTC permanently fully refundable.[292] This proposal was outlined under President Biden's American Families Plan (later Build Back Better Act), proposed in April 2021.[293] The plan would provide recurring direct payments through the tax system to lower-and middle-class fami-

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286 *See Strengthening the Recovery: The Need for Speed, supra* note 215, at 4, 12–13.

287 *See* American Rescue Plan, § 9611(a).

288 *See id.*

289 *See id.*

290 *See id.* In addition, eligible families who did not file federal tax returns for the previous years could register to receive their CTCs.

291 *See* Joint Committee on Taxation, *Estimated Revenue Effects of H.R. 1319, The "American Rescue Plan Act of 2021," as Amended by the Senate, Scheduled for Consideration by the House of Representatives* (JCX-14-21, Mar. 09, 2021), at 1.

292 *See* The White House, *Fact Sheet: The American Families Plan* (Apr. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/.

293 *See id.*

lies akin to a UBI scheme.[294] But such expansion would incur tremendous program costs. The Build Back Better Act ultimately passed the House of Representatives in November 2021.[295] However, after Sen. Joe Manchin (D-WV) retracted support for the bill, legislation was effectively stalled and there are no further negotiations to restore it.[296]

VI. SUMMARY OF RECOMMENDATIONS

This Article has examined ways that tax policy could be improved in future crises based on the U.S. response to the COVID-19 pandemic, focusing on recovery rebate tax credits. In summation, that Article recommends that:

- Recovery rebates should target lower-income households.
- Targeting lower-income households should be accomplished by decreasing phase out thresholds and increasing credit amounts.
- Recovery rebates should target taxpayers who lost income.
- These goals can be achieved through an end-of-year recapture (repayment) requirement subject to a safe harbor. The recapture should be limited to taxpayers whose income increased into or beyond the phase out threshold.
- Arguments can be made for recurring payments and universal payments in which the benefit is taxed-away.

CONCLUSION

It is difficult to predict the nature, scope, and timing of a future crisis in which the recommendations in this Article would be implemented. The COVID-19 pandemic created a shocking global economic downturn not seen since World War II,[297] and fiscal response to the crisis has been unprecedented. Nevertheless, recent history has indicated that global financial crises are relatively common. The 21st century has already seen the 2001 recession, 2008-09 recession, and the ongoing COVID-19 pandemic. It can be reasonably predicted that the COVID-19

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294 According to the White House, the American Families Plan includes $1.8 trillion in investments and tax credits for families and children over ten years. *See id.*

295 *See* Build Back Better Act H.R. 5376, 117th Cong. (2021-2022).

296 *See* Joe Manchin, *Manchin Statement on Build Back Better Act* (Dec. 19, 2021), https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-build-back-better-act.

297 *See Global Economic Prospects: January 2021*, *supra* note 4, at 122.

pandemic is not the last global crisis of this century and may not even be the worst. Given these patterns, the foundation for a tax policy response to a financial crisis is vital, particularly for aiding struggling households and promoting economic recovery. The goal of this Article has been to propose practical tax policies that could contribute to this foundation while acknowledging some of their underlying challenges and limitations. As the U.S. gradually recovers from the effects of COVID-19, it is time to rethink outdated conceptions and plan for the next crisis.