

United States Senate

WASHINGTON, DC 20510

August 7, 2019

The Honorable Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Secretary Mnuchin:

We strongly urge against executive action to index capital gains for inflation, and disagree with our 21 Republican colleagues who have urged you to circumvent Congress in a signed letter.¹ This unilateral move would almost exclusively benefit the wealthiest Americans, add to the ballooning federal deficit, further complicate the tax code, and ignore longstanding Justice Department policy.

Indexing capital gains would double down on the 2017 \$1.5 trillion tax giveaway with at least another \$100 billion tax cut.² According to the Penn-Wharton Budget Model, more than 86 percent of the benefit of indexing capital gains would go to the top 1 percent of taxpayers, while just 2.5 percent of the benefit would go to the bottom 90 percent of Americans.³

As the Congressional Budget Office (CBO) projected, the 2017 tax cuts are not paying for themselves through increased revenue. The FY 2019 deficit is projected to be \$896 billion,⁴ up from \$666 billion in FY 2017.⁵ Cutting capital gains taxes for the wealthy by indexing gains would only exacerbate this problem.

While indexing capital gains would unquestionably add to the deficit, the \$100 billion price tag is a conservative estimate because it does not consider the resulting tax sheltering opportunities. If Treasury indexes capital gains for inflation but does not also index capital expenses, like interest and depreciation, taxpayers would only pay taxes on the real portion of their gains while still deducting their full, nominal expenses. Taxpayers could therefore use their losses on paper to offset tax owed. Indexing both gains and expenses for inflation, meanwhile, would increase the tax code's complexity and the compliance burden on taxpayers.

¹ See Republican letter to Secretary Steven T. Mnuchin, July 29, 2019. Accessed July 30, 2019.

https://www.cruz.senate.gov/files/documents/Letters/2019.07.29_FINAL_Gapital_Gains_Letter_to_Mnuchin.pdf

² Ricco, John. "Indexing Capital Gains to Inflation." Penn Wharton Budget Model. March 23, 2018. Accessed July 30, 2019. <http://budgetmodel.wharton.upenn.edu/economic-matters/2018/3/23/indexing-capital-gains-to-inflation>.

³ Ibid.

⁴ "Budget Projections for FY 2019." Congressional Budget Office. May 2, 2019. Accessed July 30, 2019.

<https://www.cbo.gov/topics/budget>.

⁵ "Monthly Budget Review: Summary for Fiscal Year 2017." Congressional Budget Office. November 7, 2017. Accessed July 30, 2019. <https://www.cbo.gov/publication/53286>.

The proposal would do little to nothing to boost the economy as it would provide a windfall for existing capital assets rather than incentivize new investment. The Congressional Research Service notes that “it is unlikely... that a significant, or any, effect on economic growth would occur from a stand-alone indexing proposal.”⁶ This is yet another policy that would fail American workers.

Apart from these serious policy concerns, we do not believe Treasury has the authority to index capital gains through regulation. Such action would defy longstanding Congressional intent and Justice Department policy. The tax code has always assessed capital gains on the difference between the cost a person pays to acquire a security or property, reduced for cost-recovery deductions, (“basis” in tax parlance) and the price for which it was sold.

We agree with legal opinions written by the Treasury and Justice Departments in 1992 under President George H.W. Bush, which concluded that Congress intended the word “cost” to mean the price paid in nominal dollars without adjustment for inflation.⁷ That plain language definition of cost first appeared in the *Revenue Act of 1918* and now appears in Section 1012 of the tax code.

Incomplete legislative action on a policy also does not signal congressional intent. Although Congress has previously considered proposals to index capital gains for inflation, it has never enacted them. The policy preferences of individual members of Congress, even if they happen to comprise majorities of both Houses, have no legal weight until legislation is passed by both Houses and signed into law by the president.⁸

For example, during consideration of the *Revenue Act of 1978*, the House adopted a provision expressly indexing the basis of capital assets for inflation only to have the Senate reject this approach, choosing instead to increase the percentage of (nominal) capital gains that could be excluded. The Senate’s approach was ultimately enacted.

We again urge you to reject unilateral action on this issue. To do otherwise would illegally circumvent Congress to benefit the most fortunate Americans. A major policy change like this one should be considered by Congress through regular order, where it can be weighed against competing priorities, like upgrading our failing national infrastructure, investing in health care or shoring up Social Security.

⁶ Gravelle, Jane G. “Indexing Capital Gains Taxes for Inflation.” Congressional Research Service. July 24, 2018. Accessed July 30, 2019. <https://fas.org/sgp/crs/misc/R45229.pdf>.

⁷ Office of Legal Counsel, Department of Justice. “Memorandum Opinion for the General Counsel, Department of the Treasury: Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation,” September 1, 1992. <https://www.justice.gov/file/20536/download>

⁸ *INS v. Chadha*, 462 U.S. 919, 954-55 (1983).

Sincerely,



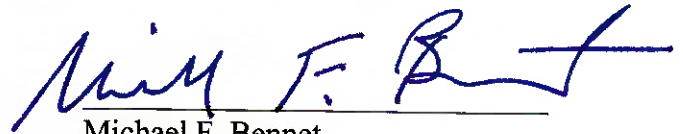
Ron Wyden
United States Senator



Sherrod Brown
United States Senator



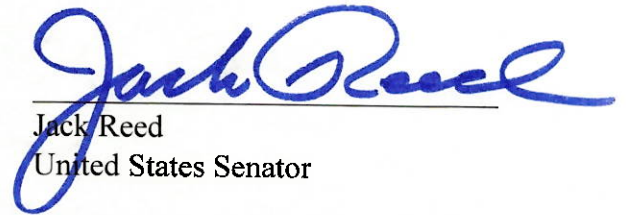
Sheldon Whitehouse
United States Senator



Michael F. Bennet
United States Senator



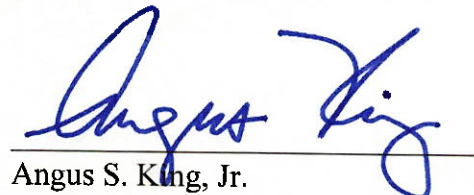
Chris Van Hollen
United States Senator



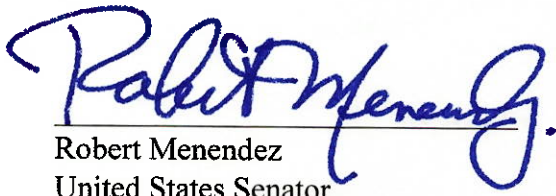
Jack Reed
United States Senator



Tammy Baldwin
United States Senator



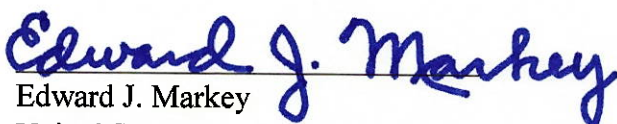
Angus S. King, Jr.
United States Senator



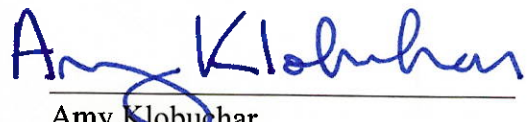
Robert Menendez
United States Senator



Cory A. Booker
United States Senator



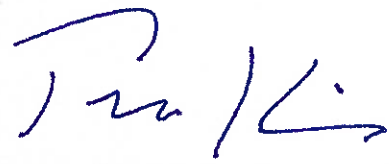
Edward J. Markey
United States Senator



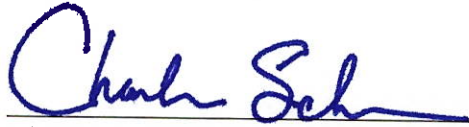
Amy Klobuchar
United States Senator



Robert P. Casey Jr.
United States Senator



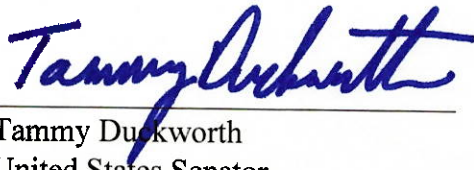
Tim Kaine
United States Senator



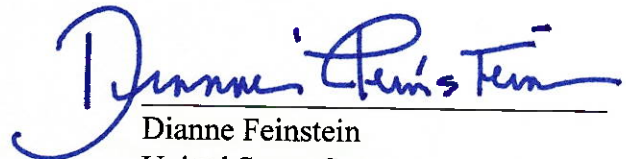
Charles E. Schumer
United States Senator



Thomas R. Carper
United States Senator



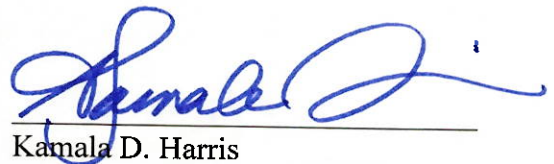
Tammy Duckworth
United States Senator



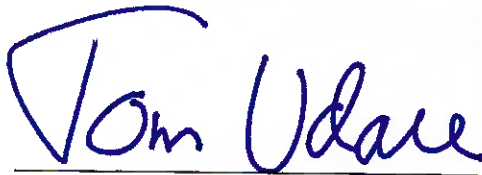
Dianne Feinstein
United States Senator



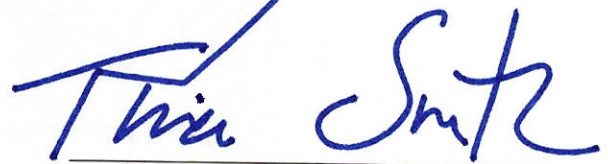
Richard J. Durbin
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Kamala D. Harris
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Tom Udall
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Tina Smith
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Maria Cantwell
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Benjamin L. Cardin
United States Senator



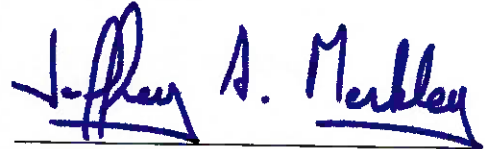
Jeanne Shaheen
United States Senator



Catherine Cortez Masto
United States Senator



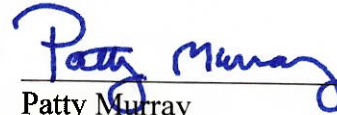
Margaret Wood Hassan
United States Senator



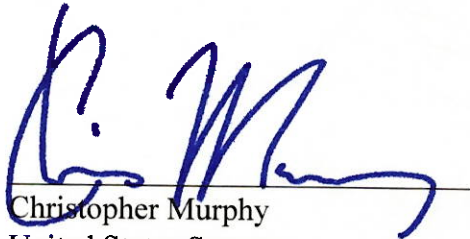
Jeff Merkley
United States Senator



Richard Blumenthal
United States Senator



Patty Murray
United States Senator



Christopher Murphy
United States Senator



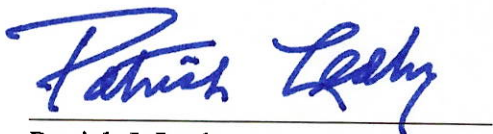
Mazie K. Hirono
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Debbie Stabenow
United States Senator



Bernard Sanders
United States Senator



Patrick J. Leahy
United States Senator



Elizabeth Warren
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Brian Schatz
United States Senator



Kirsten Gillibrand
United States Senator



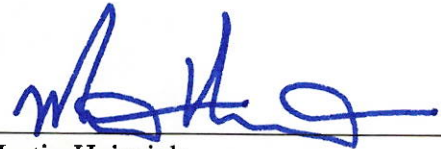
Gary C. Peters
United States Senator



Christopher A. Coons
United States Senator



Mark R. Warner
United States Senator



Martin Heinrich
United States Senator