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Spending Money To Make Money: CBO Scoring of Secondary Effects

ABSTRACT. Increased funding for federal enforcement and program integrity often pays for itself through what are called “secondary effects.” In some cases, the funding allows agencies to collect more revenue; in others, it enables agencies to reduce the amount of money lost to waste, fraud, and abuse. But despite these benefits, Congress regularly underfunds agency enforcement and program integrity. This Note argues that the problem of underfunding arises out of a little-discussed feature of the congressional budget process: the scorekeeping guidelines. As a general matter, the scorekeeping guidelines tell the Congressional Budget Office (CBO) how to estimate or “score” the cost of legislation. This Note, however, focuses on two guidelines that direct the CBO not to score the secondary effects of increased funding for enforcement and program integrity. As a result of these guidelines, Congress only considers the costs of increased funding and not the resulting benefits. This Note argues that Congress should repeal these two guidelines and allow the CBO to score secondary effects that are justified by substantial evidence. In addition to generating savings, this proposal would eliminate distortions in the legislative process, improve agency enforcement, and reduce the arbitrary and regressive subsidies created by underenforcement.

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INTRODUCTION

Nearly everyone—from former IRS commissioners[1] to taxpayer advocates[2] to comedians[3]—agrees that the IRS is severely underfunded. But between 2010 and 2016, Congress cut the IRS's budget by fifteen percent,[4] and there is little sign that it will increase the agency's funding in the near future.[5] Congress made these cuts despite robust evidence that increasing the IRS's funding would produce net savings.[6] Indeed, some have estimated that the return on investment for certain IRS enforcement initiatives could be up to nine dollars saved for each additional dollar spent.[7]

Significantly, the IRS is not alone. Congress often underfunds fraud enforcement and program integrity activities in other agencies that bring in more than they cost. For example, the Social Security Administration (SSA) saves three dollars for every additional one spent on "continuing disability reviews."[8] Yet, SSA had a backlog of 900,000 reviews in 2014.[9] Likewise, the Department of Health and Human Services saves $1.50 for every additional dollar spent on the

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1. Letter from Seven Former IRS Commissioners to Congressional Leaders (Nov. 9, 2015), http://www.scribd.com/doc/289461317/IRS-Letter-Re-Funding [http://perma.cc/8V9U-6MRP] (opposing proposed cuts to IRS appropriations).
2. Taxpayer Advocate Serv., *2016 Annual Report To Congress, Volume One*, INTERNAL REVENUE SERV. 6-11 (2016), http://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf [http://perma.cc/P5F5-VVQK].
3. *The IRS, Last Week Tonight with John Oliver* (HBO television broadcast Apr. 12, 2015), http://www.youtube.com/watch?v=Nn_Zln_4pA8.
4. *See* Janet Holtzblatt, *Estimating the Revenue Effects of Proposals to Increase Funding for Tax Enforcement*, CONG. BUDGET OFF. 4 (June 23, 2016), http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/presentation/51699-presentation.pdf [http://perma.cc/9Q4J-FZGZ] (in real dollar values).
5. Max Ehrenfreund, *Trump's Budget Plan Slices $239 Million from IRS, but Treasury Overall Is Spared Severe Cuts*, WASH. POST (Mar. 16, 2017), http://www.washingtonpost.com/business/economy/trumps-budget-plan-slices-239-million-from-irs-but-treasury-overall-is-spared-severe-cuts/2017/03/15/d646be30-09ac-11e7-b77c-0047d15a24e0_story.html [http://perma.cc/QFS2-FUYC].
6. *See* Holtzblatt, *supra* note 4, at 28.
7. *Id.*
8. *See* CONG. BUDGET OFFICE, ANALYSIS OF AUGUST 1 BUDGET CONTROL ACT OF 2011, at 4, 10 tbl.2 (2011) (estimating that a $4 billion increase in appropriations for continuing disability reviews will yield $12 billion in savings). Continuing disability reviews are statutorily mandated reviews that determine whether an enrollee in Social Security Disability Insurance or Supplemental Security Income is still eligible for the pertinent program.
9. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-250, SOCIAL SECURITY DISABILITY: SSA COULD INCREASE SAVINGS BY REFINING ITS SELECTION OF CASES FOR DISABILITY REVIEW 1 (2016).

Health Care Fraud and Abuse Control Program,[10] yet it has continued to be inadequately funded.[11] Congress has also underfunded—among other programs—the administration of unemployment insurance[12] and offices of inspectors general.[13] Some policy analysts may quibble with the exact figures, but there is no debate: increased funding in these areas would produce net savings.[14]

Although scholars and policymakers have recognized the problem of underfunding, few have acknowledged the budget scorekeeping guidelines as a key source of this problem. The budget scorekeeping guidelines direct the Congressional Budget Office (CBO)—the nonpartisan agency that estimates the budgetary impact of pending bills—and the other scorekeepers, such as the Office of Management and Budget (OMB) and the House and Senate Budget Committees, on how to estimate or "score" the budgetary impact of pending bills. The guidelines are meant to help the CBO and the other scorekeepers apply consistent methods and reach accurate results, but they actually force the CBO to reach inaccurate results when scoring enforcement and program integrity activities. The problem is that the CBO cannot treat funding cuts to enforcement and program integrity as deficit-*increasing*; instead, it must paradoxically treat them as deficit-*reducing*. The CBO must likewise treat increased funding for enforcement programs as deficit-increasing rather than deficit-reducing.[15]

10. CONG. BUDGET OFFICE, HOW INITIATIVES TO REDUCE FRAUD IN FEDERAL HEALTH CARE PROGRAMS AFFECT THE BUDGET 8 (2014).

11. *See* David Reich, *Social Security's Backlog Rooted in Underfunding, Not Incompetence*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 30, 2014, 2:26 PM), http://www.cbpp.org/blog/social-securitys-backlog-rooted-in-underfunding-not-incompetence [http://perma.cc/SUT8-B69L] ("For the past three years, the Senate Appropriations Committee approved the full additional funding allowed under the BCA but *all* of it was eliminated during final negotiations with the House.").

12. *See* CONG. BUDGET OFFICE, ANALYSIS OF JULY 29 BUDGET CONTROL ACT OF 2011, at 5-7 (2011) (estimating that in-person reemployment and eligibility assessments and improper payment reviews for the unemployment insurance program would result in approximately two dollars in savings for every dollar spent on the program).

13. *See* John Hudak & Grace Wallack, *Sometimes Cutting Budgets Raise Deficits: The Curious Case of Inspectors' General Return on Investment*, BROOKINGS INST. (Apr. 2015), http://www.brookings.edu/wp-content/uploads/2016/06/CEPMHudakWallackOIG.pdf [http://perma.cc/33E8-2KUG] (arguing that funding for offices of inspectors general results in net savings by reducing government waste and inefficiency).

14. *See, e.g.*, *infra* notes 216-219 and accompanying text.

15. *See infra* Section I.C (explaining the scoring rules).

The CBO knows that additional funding for these programs would reduce the deficit.[16] But when scoring legislation, the CBO follows a longstanding practice of not considering the secondary effects of funding enforcement and program integrity activities.[17] In other words, the CBO will score the "primary effect" of such programs—the direct effect of spending more or less money in the budget—but it will not score the "secondary effect"—the increase in revenue indirectly resulting from the funding change.[18] In the 1990s, Congress formalized this practice of not scoring secondary effects for agency enforcement and program integrity in Scorekeeping Guidelines #3 and #14.[19] As a result of those guidelines, the CBO does not account for any indirect savings or costs that result from increasing or decreasing funding for these programs. To be clear, the scorekeeping guidelines are largely the product of the congressional Budget Committees. The CBO itself has no position on the merits of scoring the secondary effects of changes in program administration spending.[20]

Scorekeeping Guidelines #3 and #14—when combined with the zero-sum nature of the budget process—have created numerous problems. Most obviously, the guidelines encourage Congress to underfund program integrity and, thus, cause the government to lose billions of dollars to fraud and waste each year. But the guidelines have also distorted congressional decision making in subtler ways. For example, because the CBO recognizes savings from the creation of new enforcement authorities but not the funding of existing enforcement programs, Congress has a strong incentive to grant underfunded agencies additional statutory authority rather than additional funding. In the long run, agencies end up with broad enforcement authority but with few resources for implementing their authority—a state of affairs that leaves them less effective and vulnerable to criticism.[21] Put more broadly, the scorekeeping guidelines skew

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16. *See, e.g.*, *infra* notes 216-219 and accompanying text.

17. *See infra* Part II (describing the history of not scoring secondary effects).

18. *See infra* Section I.C (explaining the distinction between primary and secondary effects).

19. Scorekeeping Guideline #3 covers several issues, but for the purposes of this Note, Guideline #3 refers only to its first sentence: "Revenues, entitlements and other mandatory programs (including offsetting receipts) will be scored at current law levels, as defined in section 257 of GRH, unless congressional action modifies the authorizing legislation." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET app. A at 1 (2016) [hereinafter Scorekeeping Guidelines]. Scorekeeping Guideline #14 states: "No increase in receipts or decrease in direct spending will be scored as a result of provisions of a law that provides direct spending for administrative or program management activities." *Id.* at 4.

20. Interview with Congressional Budget Office Staffers (Oct. 24, 2017).

21. *See infra* Sections V.A.2 and V.B.1.

congressional deliberations in such a way that important policy considerations, like efficiency and equity, fall by the wayside.[22]

For the past twenty-five years, Congress has tried to correct the problems caused by the scorekeeping guidelines by creating "program integrity cap adjustments." Cap adjustments incentivize Congress to fund enforcement programs by providing additional funding that is only available for enforcement. That is, if Congress does not spend the money on enforcement, it loses the extra funding. Unfortunately, though, despite success in the 1990s, cap adjustments have failed to resolve the problems created by the guidelines. Over the years, the adjustments have produced inconsistent spending increases and, just as importantly, have done little to discourage cuts to enforcement.

To solve the problems created by the guidelines, this Note argues that Congress should repeal Scorekeeping Guidelines #3 and #14. Under this proposal, the CBO would account for well documented and significant secondary effects when scoring changes in funding. Cuts to IRS enforcement programs, for instance, would show up as costing money; increased funding for health care fraud enforcement would reflect its cost savings.

Both big-government Democrats and tax-cutting Republicans would (as well as budget hawks in both parties) have good reasons to support this proposal. Once the savings are generated, Congress can use them in service of any policy agenda—these savings could be used to pay for a new anti-poverty program, finance new tax cuts, or reduce the deficit. Perhaps due to this flexibility, the bipartisan National Commission on Fiscal Responsibility and Reform recommended in 2010 that Congress revisit the program integrity scorekeeping practices to address whether CBO scores should reflect savings from program integrity.[23]

While the Commission's recommendation reflects nascent political support to rethink the congressional scoring process, this Note is the first piece of scholarship to comprehensively evaluate the scoring of secondary effects. But it adds to a rich literature identifying and analyzing the pathologies created by the congressional budget process. For example, past scholarship has criticized budget

22. *See generally* Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555 (2007) (discussing ways in which the budget process distorts lawmaking).

23. *See* NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, WHITE HOUSE, THE MOMENT OF TRUTH 58 (2010), http://momentoftruthproject.org/sites/default/files/TheMomentofTruth12_1_2010.pdf [http://perma.cc/5ERR-L6MD].

scorekeeping and accounting concepts,[24] congressional budget procedures,[25] and legislative budget structures.[26] Some scholars have argued that the budget process undermines fiscal discipline, encourages inefficient policy, reduces democratic accountability, encourages short-term thinking, and leads to poor distributive outcomes.[27] In contrast, others have claimed that the budget process encourages fiscal discipline, provides valuable information about tax expenditures, and encourages congressional review of tax policy.[28]

But amidst this literature, scholars have given little attention to the scoring of secondary effects. A few policy analysts have observed that Congress has un-

24. *See, e.g.*, Timothy J. Muris, *The Uses and Abuses of Budget Baselines*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING 41 (John F. Cogan et al. eds., 1994) (arguing that scorekeepers should use the previous year's nominal spending level as the baseline); Cheryl D. Block, *Congress and Accounting Scandals: Is the Pot Calling the Kettle Black?*, 82 NEB. L. REV. 365 (2003) (surveying federal budget accounting gimmicks and proposing incremental reforms); Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863 (2002) (similar); David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143 (2015) (proposing changes to the official federal budget baseline to more accurately estimate the cost of tax legislation).

25. David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181 (2015) (arguing for a default rule in order to prevent government shutdowns); Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck*,*"* 35 HARV. J. ON LEGIS. 589 (1998) (arguing that the budget reconciliation process has limited capacity to facilitate significant budgetary reforms).

26. Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998) [hereinafter Garrett, *Harnessing Politics*] (describing the incentives created by the structure of Pay-As-You-Go (PAYGO) requirements and the effects on tax legislative processes); Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998) [hereinafter Garrett, *Rethinking*] (considering a functional approach to budgeting built around policy categories instead of types of spending).

27. *See* Westmoreland, *supra* note 22, at 1590-1602 (arguing that the congressional budget process discourages long-term investment, places no value on non-federal savings, and distorts the legislative process and policy outcomes in several other ways); *see also* Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 612, 672-77 (1995) (arguing that PAYGO has caused Congress to value budget estimates over "policymaking concerns for improving equity and economic efficiency").

28. *See, e.g.*, Garrett, *Harnessing Politics*, *supra* note 26, at 506-07 (describing how PAYGO "restrain[s] new spending," "increase[s] the amount of information about tax expenditures," and helps members of Congress "understand and use relevant information more appropriately").

derfunded enforcement and program integrity, allowing for potentially preventable fraud and waste.[29] But their solutions have been narrow. Some analysts have treated the scoring of secondary effects as a problem solely for the IRS and have therefore only argued that congressional scorekeepers should recognize secondary effects for tax enforcement.[30] John Hudak and Grace Wallack are the notable exception.[31] They propose that Congress create revolving funds to finance revenue-generating programs, while exempting these programs from the annual appropriations process and sequestration.[32] But Hudak and Wallack overlook the simpler solution of changing the scorekeeping guidelines.

Beyond its policy and political appeal, this Note's proposal has broader implications for our system of lawmaking and enforcement. Repealing Guidelines #3 and #14 would, among other things, discourage the privatization of public services[33] and prevent arbitrary public subsidies.[34] Moreover, the proposal provides a new method for increasing agency independence. Scholars have increasingly focused on the relationship between funding and agency independence,[35]

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29. *See, e.g.*, Harry Stein & Hilary Gelfond, *How Shortsighted Spending Cuts Increase Waste, Fraud, and Abuse*, CTR. FOR AM. PROGRESS (Oct. 1, 2014), http://cdn.americanprogress.org/wp-content/uploads/2014/10/Stein-ShortSightedCuts-brief.pdf [http://perma.cc/V4JQ-UKLT].

30. *See* Patrick Driessen, Commentary, *Scoring Rules Double-Stacked Against IRS Funding*, 146 TAX NOTES 1661, 1662-63 (2015) (arguing that CBO and Joint Committee on Taxation should consider the secondary effects for IRS funding, but not addressing the problems that the scorekeeping guidelines create for many other agencies); Taxpayer Advocate Serv., *2006 Annual Report to Congress*, INTERNAL REVENUE SERV. 449 (2006), http://www.irs.gov/pub/tas/2006_arc_section2_v2.pdf [http://perma.cc/XRF4-YXA7] (proposing the creation of a separate appropriations bill for the IRS with total available funding set by the House and Senate Budget Committees).

31. *See generally* Hudak & Wallack, *supra* note 13. While not focusing on the scorekeeping guidelines per se, Hudak and Wallack are addressing the problem of Congress underfunding deficit-reducing agencies. *Id.* at 2-3.

32. *See id.* at 13-17.

33. *See infra* Section V.A.3.

34. *See infra* Section V.C.1.

35. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 44-45 (2010) (arguing that overlooked features of agency design must be considered to avoid capture); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 633-34 (2010) (noting that even agencies with independent sources of funding may be reliant on the President for additional funding); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 592 (2000) (arguing that agency funding is one of the most important factors that influences the independence of financial market regulators); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822 (2012) (arguing that providing self-funded agencies with removal and have proposed various methods to insulate agencies from the annual appropriations process.[36] But past proposals have struggled with the consequences of restraining congressional influence over funding; increased agency independence comes at the expense of democratic accountability.[37] By contrast, my proposal would strike a balance between independence and accountability. If the CBO scored secondary effects, then interest groups would have an incentive to advocate for funding increases and against funding decreases for enforcement programs in order to bring in more revenue to fund their own programs.[38] Legislators, in turn, would find funding increases for enforcement not only tolerable but desirable. In this way, scoring secondary effects would protect agency independence without removing agencies from regular congressional review.

Finally, this Note draws upon firsthand interviews with budget staffers to document the creation and development of the scorekeeping guidelines and program integrity cap adjustments. Because negotiations about the scorekeeping guidelines and cap adjustments take place behind closed doors and among only a handful of staffers, there are limited primary and secondary source materials on the evolution of these important components of the budget process. In the course of my research, I interviewed thirteen current or former budget staffers.[39] Each of these staffers had worked at the CBO, OMB, or one of the congressional Budget Committees, Appropriations Committees, or tax-writing committees, and many of my interviewees had worked at more than one of these offices. In addition to these thirteen staffers, I also spoke with current staffers from the CBO. Collectively, these interviews provide insights into specific policy

protection leads to increased agency autonomy, greater presidential influence relative to Congress, and increased potential for gridlock over appointments).

36. *See, e.g.*, Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 240 (2004) (describing a proposal whereby the Securities and Exchange Commission would be self-funded through user fees in order to reduce the imbalance between the Commission's resources and statutory functions); Hudak & Wallack, *supra* note 13, at 16-17 (arguing for a revolving fund for offices of inspector general).

37. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1378-81 (1988) (arguing that revolving funds may be inconsistent with Congress's duty to exercise control over the size and duration of appropriations); *see also* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1164 ("The most plausible purpose of the appropriations clause is to encourage efficiency in the production of public goods by the federal government and to impose fiscal accountability on both Congress and the President.").

38. *See infra* Section V.A.1.

39. Of the thirteen staff interviewed, five were Democrats, four were Republicans, and four were politically unaffiliated. I entered each interview with five to seven questions that I planned to ask as well as an additional set of questions if time permitted. I took notes during each meeting and typed them up afterwards. *See* Robert L. Peabody et al., *Interviewing Political Elites*, 23 PS: POL. SCI. & POL. 451, 453-54 (1990) (describing the pros and cons of tape recording and note taking when interviewing political elites).

changes—such as the creation of Scorekeeping Guideline #14 in 1997—as well as into the key political dynamics that have driven broader policy outcomes—such as the politics underlying the lackluster performance of the cap adjustments.

This Note proceeds in five Parts. Part I provides a brief overview of the congressional budget process and illustrates the problems caused by the bar on the CBO scoring secondary effects. Part II then examines the origins and development of the scorekeeping guidelines. Part III evaluates program integrity cap adjustments—Congress's existing solution to the problems created by the scorekeeping guidelines—and argues that cap adjustments have largely failed to promote funding for agency enforcement and program integrity in recent years. Part IV then turns to my own proposal—the repeal of Guidelines #3 and #14—and explains how the CBO should score the secondary effects of government funding. Finally, Part V argues that the proposed changes would address the problems created by the existing scorekeeping guidelines.

I. BUDGET BASICS

Scoring Guidelines #3 and #14 lead Congress to consistently underfund agency enforcement and program integrity because of how they interact with the existing budgetary processes. This Part explains three key elements of the budget process: (1) the difference between discretionary and direct spending; (2) the role of budget limits; and (3) the concept of secondary effects.

The Part begins by distinguishing between discretionary spending—funding that Congress must revisit each year—and direct spending—funding provided in laws other than appropriations acts. It then turns to the different budget rules that Congress has adopted to limit discretionary and direct spending. These budget limits have created a zero-sum dynamic in which spending more on one program requires spending less on another (or raising taxes). And this zero-sum dynamic has produced political incentives for Congress to fund popular programs and to underfund enforcement.

Finally, the Part concludes by examining secondary effects—the indirect budgetary consequences of funding or defunding government programs. Secondary effects explain why agency enforcement and program administration save more money than they cost: the initial expenditure allows the government in the long run to collect more revenue or lose less money to waste and fraud. But because the scorekeeping guidelines bar the CBO from scoring secondary effects from program administration, Congress only views these activities as a cost. As a result, the bar on the CBO scoring these secondary effects has had broader consequences on the legislative process, agency administration, and the distribution of government resources. Repealing Scorekeeping Guidelines #3 and #14 would end the anomalous treatment of these secondary effects and beget greater coherence and rationality in the budget process.

A. Discretionary and Direct Spending

There are two types of federal spending: discretionary spending and direct spending. The simple difference between the two types of spending is that if Congress wishes to appropriate discretionary funds, it must enact them each year; direct spending, by contrast, is spending not controlled by the annual appropriations process.[40]

To pass discretionary spending, Congress must first enact authorizing legislation.[41] Authorizing legislation creates, modifies, or continues an agency or program and authorizes Congress to subsequently appropriate funds for the agency or program. A number of different authorizing committees—organized around specific subject matters—control the drafting of such legislation. Once it has passed authorizing legislation, Congress can enact an appropriations bill that actually provides discretionary funds. But this funding only lasts for a single year. For example, if the House and Senate Appropriations Committees—who have sole jurisdiction over allocating discretionary spending—do not appropriate funds for a program in a given year, the program will cease to operate. Discretionary spending funds many public services, almost all defense spending, and most program administration.[42]

To pass direct spending, by contrast, Congress need not pass separate authorization and appropriations bills; instead, direct spending is passed in a single process. In addition, unlike discretionary spending, direct spending is not appropriated anew each year. Most direct spending consists of entitlement programs, such as Medicare, Medicaid, Social Security, Social Security Disability Insurance, Supplemental Security Income, and Unemployment Insurance. These programs represent a promise to provide a specific benefit, and direct

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40. *See* Westmoreland, *supra* note 22, at 1564-67 (discussing differences between two types of spending).

41. The next few sentences borrow heavily from BILL HENIFF JR., CONG. RESEARCH SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 2 (2012). Despite these rules, over time Congress has blurred the sharp divide between authorizations and appropriations to various degrees. *See, e.g.*, ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 192-93, Box 8-1 (3d ed. 2007).

42. While most program administration is funded through discretionary spending, Congress can fund agency operations through direct spending. *See, e.g.*, Improving Medicare Post-Acute Care Transformation Act of 2014, Pub. L. No. 113-185, § 3(a), 128 Stat. 1952, 1968-69 (using direct spending to fund inspections of hospice programs).

spending "is money that the law has promised will be provided when needed."[43] A number of different authorizing committees—such as the Senate Finance Committee, the House Ways and Means Committee, and the House Energy and Commerce Committee—control direct spending programs. Unlike the Appropriations Committees, these committees have formal jurisdiction over substantive changes to the programs they administer. For example, if the House Ways and Means Committee passed a bill that increased Medicare payments to hospitals and if Congress enacted the bill, then direct spending on Medicare payments to hospitals would increase.

Note that a direct spending program may be administered by an agency that is funded through discretionary spending. For example, the Appropriations Committees fund the Centers for Medicare & Medicaid Services (CMS) through discretionary spending in the form of annual appropriations. CMS uses these funds to pay employees and contractors to administer Medicare. By contrast, when CMS makes Medicare payments to providers, the payments are automatically funded through direct spending; they are not paid from appropriations to CMS.

B. Budget Limits

To maintain fiscal discipline, Congress has passed spending caps and Pay-As-You-Go (PAYGO) rules to limit discretionary and direct spending, respectively.[44] These rules have each created a zero-sum dynamic in the budget process where different interest groups compete for limited funding.

Spending caps set a hard limit on the discretionary spending available to the Appropriations Committees and Congress.[45] If discretionary spending in a year exceeds the cap, an across-the-board cut to discretionary spending or "sequester"—equal in size to the amount in which the spending exceeds the cap—would automatically occur. For example, if Congress exceeded the spending cap by one billion dollars, an across-the-board cut to discretionary spending of one billion dollars would take place.

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43. Westmoreland, *supra* note 22, at 1565.

44. Congress first created discretionary spending caps and PAYGO procedures in 1990 as part of a large budget deal focused on controlling the deficit. *See* Dale P. Oak, *An Overview of Adjustments to the Budget Enforcement Act Discretionary Spending Caps*, 15 PUB. BUDGETING & FIN. 35, 44 (1995); *see also infra* text accompanying notes 117-118 (describing the budget deal).

45. Congress has actually created separate caps for security and non-security spending. This component of the budget process, however, is not important for the purposes of this Note. Consequently, this Note will treat discretionary spending as if there is only one cap.

In some cases, however, Congress has created limited exceptions to the spending caps, such as with the program integrity "cap adjustments."[46] As discussed in Part III, these adjustments provide Congress with extra funding above the spending caps. However, Congress can only appropriate these extra funds for a specified agency or program.[47] The primary purpose of cap adjustments is to bolster funding for program integrity. In theory, cap adjustments give Congress an incentive to adequately fund agency enforcement and program integrity because the adjustments offer extra funding. In practice, though, the adjustments have had mixed results.[48]

As with spending caps to curb discretionary spending, Congress has relied on PAYGO rules to limit the growth of direct spending. Although Congress has modified, eliminated, and restored these rules at various times, they remain an important part of the legislative process.[49] PAYGO requires legislation that increases direct spending or decreases revenue to be offset by equivalent increases in revenue, decreases in spending, or some combination of the two.[50] Under the Senate's internal PAYGO rule, legislation must be budget neutral over both the next five years and the next decade.[51] If legislation does not comply with PAYGO, a Senator may raise a point of order against the legislation.[52] Additionally, if at the end of a congressional session the OMB determines that the legislative changes for the year, in aggregate, are deficit increasing over the following five- or ten-year period, the President must issue a sequestration order to offset the deficit increase.[53]

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46. Budget Control Act of 2011, § 101, 2 U.S.C. § 901(b)(2)(B)-(C) (2012) (amending section 251(b)(2)(B)-(C) of the Balanced Budget and Emergency Deficit Control Act of 1985).

47. *See infra* Section III.A.

48. *See infra* Section III.B.

49. *See Policy Basics: The "Pay-As-You-Go" Budget Rule*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 20, 2016), http://www.cbpp.org/sites/default/files/atoms/files/policybasics-paygo.pdf [http://perma.cc/NB6E-ZCF5] (describing the history and impact of PAYGO).

50. In contrast, non-legislative changes that affect direct spending or revenue do not need to be offset. For example, direct spending on Medicare is projected to increase as more baby boomers retire. But PAYGO does not require Congress to offset this spending growth.

51. S. Con. Res. 21, 110th Cong. § 201(a) (2007) (enacted); *see also* S. Con. Res. 11, 114th Cong. § 3201(b)(1) (2015) (enacted) (eliminating sunset clause of Senate PAYGO Rule). In 2011, the House of Representatives repealed its internal PAYGO rule. H. Res. 5, 112th Cong., § 2(d) (2011) (passed the House).

52. *See* BILL HENIFF JR., CONG. RESEARCH SERV., RL31943, BUDGET ENFORCEMENT PROCEDURES: THE SENATE PAY-AS-YOU-GO (PAYGO) RULE 10-11 (2015).

53. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, §§ 4(d)-5, 124 Stat. 8, 13-16. A sequester order under PAYGO makes an across the board cut to spending; however, several direct spending programs are exempt from sequestration and cuts to Medicare are limited to

Because of PAYGO's strict budget-neutrality requirements, the CBO's budget estimates have a major impact on legislation; a bad score from the CBO can kill a bill. For example, many people involved in President Clinton's 1993 health plan attributed a large part of its failure to the CBO's estimate that the bill would be extremely expensive.[54] As I have argued elsewhere, the importance of scoring has resulted in the CBO playing a major role in determining the feasibility, design, and drafting of legislative proposals.[55]

The spending cap and PAYGO rules have each created a zero-sum dynamic in the budget process in which outside groups compete for a limited pool of money. Recall that spending caps set a hard limit on the total funds available to the Appropriations Committees. Because the Appropriations Committees distribute their funds among their twelve subcommittees, each chamber's subcommittees compete for the available discretionary spending. Then, within each subcommittee, the relevant agencies, interest groups, and members of Congress compete for their share of the subcommittee's smaller pool of federal dollars.

PAYGO likewise creates a zero-sum dynamic for direct spending, as Congress must offset every spending increase or tax cut with a spending cut or tax increase. Increased benefits (or reduced tax burdens) for one party entail decreased benefits (or increased burdens) for another. As a result, congressional offices and interest groups constantly look for policies to offset the cost of their preferred spending increase or tax cut.[56] These policies are often referred to simply as "offsets." Interest groups also have incentives to identify offsets that can be used to avoid cuts that harm their own members.[57]

In summary, under the current budget limit rules, every dollar spent on one program means that one dollar must be taken from another program. Because

four percent. *Id.* § 6. Nevertheless, Congress can waive PAYGO for individual bills. For example, Congress waived PAYGO for the 2009 stimulus. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5(b), 123 Stat. 115, 116 (designating "[a]ll applicable provisions" in the act as "an emergency for purposes of pay-as-you-go principles").

54. *See, e.g.*, PHILIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING 172-76 (2011).

55. *See* Scott Levy, *Drafting the Law: Players, Power, and Processes*, *in* PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS 19, 27-28 (Jacob R. Straus & Matthew E. Glassman eds., 2d ed. 2017); *see also* Westmoreland, *supra* note 22 (arguing that CBO scoring, the budget process, and scorekeeping rules have had a dramatic impact on the shape of the American health care system); Abbe Gluck, *The "CBO Canon" and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012, 8:55 PM) http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html [http://perma.cc/PJ2G-7XZW] (arguing that the CBO has so much influence over the legislative drafting that courts should construe ambiguities in legislation "in the way most consistent with the assumptions underlying the congressional budget score on which the initial legislation was based").

56. *See* Garrett, *Harnessing Politics*, *supra* note 26, at 516-17.

57. *Id.* at 523-24.

the scorekeeping guidelines do not recognize secondary savings from appropriations or direct spending, the zero-sum dynamic means that every dollar spent on program integrity is a dollar that must be taken away from a more politically advantageous use. This dynamic means that Congress and interest groups have a greater incentive to defund agency enforcement and program integrity even though defunding these programs shrinks federal revenue in the long run.

C. *Budgetary Secondary Effects*

At the heart of Congress's neglect of enforcement and program integrity is the distinction between primary and secondary effects of appropriations. This Section begins by explaining the difference between primary and secondary budget effects. It then demonstrates that—per the scorekeeping guidelines—the CBO scores secondary effects inconsistently. Finally, the Section concludes by introducing my core proposal: the CBO should score all microeconomic secondary effects resulting from changes in spending on program administration.

Policies can have either a primary effect alone or primary and secondary effects on the budget.[58] A primary effect is a policy's direct effect on the budget. For example, the primary effect of providing the IRS with an additional one hundred million dollars for tax audits is to increase the deficit by one hundred million dollars. A secondary effect, by contrast, accounts for how a policy's impact on consumers, firms, government agencies, or the macroeconomy may, in turn, affect the federal budget. For example, the secondary effect of providing the IRS with an additional one hundred million dollars is some amount of savings resulting from the policy's impact on government (i.e., increased tax recoveries). In theory, the total budgetary effect should be the sum of the primary and secondary effects.

Secondary effects can be further grouped into four categories, divided along two dimensions. The first dimension assesses whether the effect arises from a new authorization or new spending.[59] An authorization refers to a policy giving,

58. In cases in which the CBO scores primary and secondary microeconomic effects, the CBO does not generally model the effects separately. But because this Note focuses on cases in which the CBO does not score secondary microeconomic effects, I distinguish primary and secondary effects for conceptual clarity.

59. Microeconomic and macroeconomic secondary effects can also arise from changes in taxation, though such discussion is outside the scope of this Note. *See Frequently Asked Questions*, JOINT COMMITTEE ON TAXATION, http://www.jct.gov/other-questions.html [http://perma.cc/6SXK-DGRM] ("[F]or more than a quarter of a century, Joint Committee Staff revenue estimates have taken into account taxpayers' likely behavioral responses to proposed changes in tax law."); *see, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE: TAX RELIEF EXTENSION ACT OF 2015 (Aug. 4, 2015) (including the macroeconomic effects of large changes to tax policy).

withdrawing, or modifying an agency's legal authority to do something. By contrast, spending refers to a change in either discretionary or direct spending. This distinction between a new authorization and new spending roughly approximates the distinction between an authorization bill and an appropriations bill.[60]

The second dimension classifies a secondary effect based upon whether the policy impacts the broader economy (macroeconomic effects) or the behavior of individual actors (microeconomic effects). Macrodynamic scoring – more commonly referred to as "dynamic scoring" – estimates a policy's effects on macroeconomic variables, such as economic growth, interest rates, and unemployment, and then estimates the impact of those effects on the federal budget.[61] Similarly, microdynamic scoring estimates the policy's effects on individual actors, such as consumers, taxpayers, firms, government agencies, and then estimates the impact of these effects on the federal budget.[62]

The scoring of the Affordable Care Act's (ACA) commercial health insurance reforms demonstrates the distinction between microdynamic and macrodynamic scoring. The CBO estimated the ACA's microeconomic secondary effects – such as whether the law would lead consumers, employers, and insurers to change their behavior in response to its commercial insurance reforms.[63] But the CBO did not calculate the ACA's macroeconomic secondary effects – such as whether the law would lead to economic growth (or decline) and thus a growth (or reduction) in tax revenue.[64]

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60. *See supra* notes 41-42 and accompanying text. Direct spending complicates the distinction between authorizations and spending. Legislative changes to direct spending programs change statutory authorities and federal spending. Nevertheless, because the CBO scores the secondary effects of program administration funds accompanying the creation of a new authority, I treat such changes as changes in authority. *See* CONG. BUDGET OFFICE, *supra* note 10, at 3. By contrast, direct spending on program administration unaccompanied by new authority is treated as new funding.

61. *See Frequently Asked Questions (FAQs)*, CONG. BUDGET OFFICE, http://www.cbo.gov/faqs [http://perma.cc/J6HE-BKET].

62. *See* John L. Mikesell, *Revenue Estimating/Scoring by States: An Overview of Experience and Current Practices with Particular Attention to the Role of Dynamic Methods*, 32 PUB. BUDGETING & FIN. 1, 9-10 (2012).

63. *See, e.g.*, CONG. BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS (2008) (describing the CBO's methods for scoring major health insurance legislation).

64. *See* CONG. BUDGET OFFICE, H.R. 4872, RECONCILIATION ACT OF 2010 (FINAL HEALTH CARE LEGISLATION) 2-3 (2010) [hereinafter CONG. BUDGET OFFICE, RECONCILIATION ACT]. The CBO has, however, dynamically scored the macroeconomic effects of repealing the ACA. CONG. BUDGET OFFICE, BUDGETARY AND ECONOMIC EFFECTS OF REPEALING THE AFFORDABLE CARE ACT 1, 4 (2015).

TABLE 1.
TYPES OF SECONDARY EFFECTS

	Macrodynamic	**Microdynamic**
Authority	I Immigration Reform	III Changes in Medicare Cost-Sharing
Spending	II Public Investments in Infrastructure	IV Funding for the IRS

The CBO scores the secondary effects of certain policies from each of these four categories, but it does not score the secondary effects of all policies. Specifically, the scorekeeping guidelines prohibit the CBO from scoring the secondary effects of increased spending on program administration (an example of microdynamic spending or "Type IV" effects).

Despite longstanding controversy over macrodynamic scoring,[65] Congress has recently directed the CBO to score the macroeconomic effects of changes in statutory authority ("Type I" effects) and spending ("Type II" effects).[66] And even before this congressional directive, in a few instances, the CBO has included

65. *See* Alan J. Auerbach, *Dynamic Scoring: An Introduction to the Issues*, 95 AMER. ECON. REV. 421 (2005). This Note's proposal does not address the longstanding debate over the dynamic scoring of macroeconomic effects.

66. *See* S. Con. Res. 11, 114th Cong. § 3112 (2015) (enacted) (directing the CBO and JCT to, "to the greatest extent practicable," macrodynamically score "major legislation"); H.R. Res. 5, 114th Cong. § 2(c) (2015) (enacted) (amending House Rule XIII to direct the CBO to do the same); *see also* Douglas W. Elmendorf, *"Dynamic Scoring": Why and How To Include Macroeconomic Effects in Budget Estimates for Legislative Proposals*, 2015 BROOKINGS PAPERS ON ECON. ACTIVITY 91, 96-97 (explaining Congress's fluctuating preferences around macrodynamic scoring). In 2015, House Republicans passed a resolution amending House Rule XIII and directing the CBO to score secondary macroeconomic effects for legislation with significant economic effects or at the direction of one of the chairmen of the Budget Committees. H.R. Res. 5, 114th Cong., § 2(c). Democrats have historically opposed scoring such effects. *See* Jonathan Weisman, *House Republicans Change Rules on Calculating Economic Impact of Bills*, N.Y. TIMES (Jan. 6, 2015), http://www.nytimes.com/2015/01/07/business/house-republicans-change-rules-on-calculating-economic-impact-of-bills.html [http://perma.cc/7GWD-YVRB] (quoting criticism from Obama OMB director Shaun Donovan).

macrodynamic effects in its budget score.[67] The CBO does not score the macrodynamic effects of all policies. For example, although it scores the macrodynamic effects of increases in direct spending, it does not do so for increases in discretionary spending,[68] an inconsistency that commentators have criticized.[69] It is inconsistent for Congress to direct CBO to score these macrodynamic effects while simultaneously directing the Office to exclude microdynamic effects resulting from changes in spending.[70]

CBO most often scores the microeconomic effects resulting from changes in legislative authority ("Type III" effects). Scoring these kinds of effects is widely accepted and uncontroversial.[71] For example, if the CBO scores a bill that will increase cost-sharing for Medicare beneficiaries, it accounts for beneficiaries likely having fewer doctors' visits.[72]

Significantly, though, Scorekeeping Guidelines #3 and #14 prohibit the CBO from scoring certain Type IV secondary effects. Guideline #14 prevents the CBO from scoring secondary effects arising out of direct spending on program administration, but it does not apply to secondary effects arising out of other direct spending.[73] By contrast, Guideline #3 prevents the CBO from scoring secondary effects arising out of *any* discretionary spending. In other words, Guideline #3 applies broadly to both discretionary spending on program administration—

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67. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE: S. 744, BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT 2 (2013) (accounting for the substantial increase in the size of the labor force that would result from an immigration reform package).

68. *See* Elmendorf, *supra* note 66, at 121-22.

69. *See id.* at 122; Donald B. Marron, *Thoughts on Dynamic Scoring of Fiscal Policies*, TAX POL'Y CTR. 2 (2016), http://www.urban.org/sites/default/files/publication/81681/2000829-Thoughts-on-Dynamic-Scoring-of-Fiscal-Policies.pdf [http://perma.cc/Z4X2-2SV2].

70. To reiterate, this Note does not take a position on the merits of the dynamic scoring of macroeconomic effects. Although this Note does highlight the inconsistency of scoring macrodynamic effects but not certain microdynamic effects, its proposal is valid whether one supports or opposes macroeconomic dynamic scoring.

71. *See* Mikesell, *supra* note 62, at 10 ("The underlying logic of the microdynamic protocol is universally accepted."); *see also Frequently Asked Questions*, *supra* note 59 (stating that the JCT accounts for the taxpayers' expected behavioral responses).

72. *Understanding Dynamic Scoring*, COMM. FOR RESPONSIBLE FED. BUDGET 3 (2012), http://www.crfb.org/sites/default/files/Understanding_Dynamic_Scoring.pdf [http://perma.cc/ZTJ3-RRWT]; *see also Frequently Asked Questions*, *supra* note 59 (accounting for the likely reduction in demand for cigars and likely increase in demand for cigarettes when scoring an excise tax on cigars).

73. Guideline #14, as written, applies only to secondary effects that *decrease* the deficit by reducing spending or raising revenue. It does not apply to secondary effects that *increase* the deficit by increasing spending or decreasing revenue. By contrast, Guideline #3 applies to deficit increasing and deficit decreasing secondary effects.

e.g., funding for IRS audits—and discretionary spending on other programs, such as nutrition funding.[74]

This Note proposes that Congress repeal Scorekeeping Guidelines #3 and #14 and, thus, permit the CBO to score all Type IV effects.[75] The CBO already accounts for the secondary effects arising out of many other types of legislation. Consequently, this proposal does not require scorekeepers to perform a new kind of scoring so much as end the anomalous scoring treatment for changes in funding. Indeed, in some instances, the CBO already estimates the Type IV effects of bills; it simply must omit these estimates from its official budget score.[76] The CBO also estimates these effects when scoring the President's Budget,[77] but these scores do not count for Congress's various budget rules. Finally, the CBO estimates the effects of funding for program administration when the funding accompanies a new statutory authority,[78] creating a perverse incentive for Congress to provide agencies with multiple years of funding at once.[79] It is not clear why

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74. *See, e.g.*, RANDY ALISON AUSSENBERG & JULIA E. KORTREY, CONG. RESEARCH SERV., R44115, A PRIMER ON WIC: THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN 2-3 (2015); *see also infra* note 82 (highlighting the Obama Administration's claim that spending on this nutrition program reduces Medicaid spending).

75. *See infra* Part IV.

76. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE FOR H.R. 4872, THE RECONCILIATION ACT OF 2010 (2010), http://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf [http://perma.cc/4H8H-BKN3]; CONG. BUDGET OFFICE, RECONCILIATION ACT, *supra* note 64, at 33.

77. *See, e.g.*, CONG. BUDGET OFFICE, CBO'S REESTIMATE OF THE PRESIDENT'S BUDGET FOR FISCAL YEAR 2014: SSA PROGRAM-INTEGRITY PROPOSAL (2013) (estimating net savings for increased funding to the SSA for continuing disability reviews and redeterminations); *Additional Information on the Program Integrity Initiative for the Internal Revenue Service in the President's Budgetary Proposals for Fiscal Year 2012*, CONG. BUDGET OFFICE & JOINT COMMITTEE ON TAX'N (June 23, 2011), http://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/06-23-additional_info_program_integrity.pdf [http://perma.cc/XCB4-QWHH].

78. *See* CONG. BUDGET OFFICE, *supra* note 10, at 3 tbl.1.

79. Suppose, for example, that Congress gives the IRS the formal legal authority to conduct a new kind of audit and provides it with one hundred million dollars to exercise that authority over the next two years. The CBO will estimate secondary effects on the basis of that one hundred million dollars. By contrast, suppose that Congress instead grants the IRS a new audit authority with sixty million dollars to exercise that authority next year. Then the following year it provides another forty million dollars for the IRS to exercise that same authority for another year. The CBO estimates the secondary effects of the first sixty million dollars in funding, but not the next forty million dollars. As a result, Congress has an incentive to provide all one hundred million dollars in one bill instead of multiple bills.

the CBO scores the secondary effects of funding accompanying a new authority, but the result is larger delegations of authority to the executive branch.[80]

This increased delegation is only one of the many problems created by Scorekeeping Guidelines #3 and #14. These guidelines also distort the legislative process, undermine the autonomy and structure of the federal bureaucracy, and create arbitrary public subsidies.[81] While I focus on the problems caused by not scoring the secondary effects of funding agency enforcement and program integrity, the guidelines also prohibit the CBO from accounting for other Type IV secondary effects.[82] A discussion of these effects is beyond the scope of this Note, but my proposal could allow the CBO to score all Type IV secondary effects.

II. THE DEVELOPMENT OF A SCOREKEEPING PRACTICE

The prohibition on CBO scoring secondary effects pre-dates the scorekeeping guidelines and even the creation of the modern congressional budget process. Despite major changes in the budget process since the 1970s, this scorekeeping practice has remained largely the same. This Part examines the origins and evolution of the scorekeeping practice as well as its relationship to the modern budget process.

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80. *See* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 728 (2012) ("An appropriations provision is simply a delegation of spending authority. A long-term or indefinite appropriation significantly increases executive power.").

81. *See infra* Part V.

82. For example, the Obama Administration has argued for supplementing program integrity cap adjustments with cap adjustments for other deficit-reducing programs. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2017: ANALYTICAL PERSPECTIVES 136 (2016); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013: ANALYTICAL PERSPECTIVES 170 (2012). As an example, the Obama Administration stated that "research shows investments in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) reduce Medicaid costs for the mother and child" and could "reduce Federal costs." *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016: ANALYTICAL PERSPECTIVES 130 (2015) [hereinafter OMB, FISCAL YEAR 2016]. Because WIC is funded by discretionary spending, the secondary effects on Medicaid (a direct spending program) are not scorable under Scorekeeping Guideline #3. *See* AUSSENBERG & KORTREY, *supra* note 74, at 2-3. Yet despite the repeated proposals, no meaningful change has happened in the intervening years. Congress has not adopted any new cap adjustments. For example, Dennis P. Culhane et al., *Future Opportunities for Leveraging IDS and Evidence-Based Policy Making*, *in* ACTIONABLE INTELLIGENCE 207, 210 (John Fantuzzo & Dennis P. Culhane eds., 2015), suggest that housing-voucher allocations to the Department of Housing and Urban Development would generate offsetting Medicaid savings due to reduced homelessness and in turn medical spending.

At first glance, the scorekeeping guidelines may seem like the product of an ideological effort to constrain the growth of government, but in reality, they are simply the product of historical contingency and technocratic decision making. The story of the scorekeeping guidelines thus complicates popular narratives about the fight between Democrats and Republicans over the size of the federal government. Instead, the size and scope of the government's enforcement authority is driven in no small part by technocrats and budget norms, not only party ideology. Regardless of its origin, though, the scorekeeping practice no longer has a sound justification. Rather, it hinders the ability of Congress to fund program integrity and enforcement activities.

A. The Origins of Congressional Scorekeeping

Prior to the Congressional Budget Control Act of 1974, which created the modern budget process, Congress did not have a cohesive method for setting fiscal priorities. Taxes, appropriations, and entitlements were all raised or lowered without any formal coordination. No committee or group in Congress was responsible for developing a budget or maintaining fiscal discipline.[83] Instead, Congress typically relied on the President's budget proposal as a starting point and made primarily incremental changes to it.[84] In addition, Congress did not have neutral cost estimates when considering spending bills.

Starting around 1968, however, the Joint Committee on Reduction of Federal Expenditures began providing Congress with periodic (and then monthly) scorekeeping reports.[85] First created in 1941 to bolster congressional oversight over federal spending, the Joint Committee issued these scorekeeping reports "to show 'how various actions of the President and the Congress have affected the President's budget estimates.'"[86] Most importantly for our purposes, the Joint

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83. *See* ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING, AND TAXING 30-31 (1980) (describing Congress' unsuccessful efforts to coordinate taxing and spending levels). *But see* Louis Fisher, *Presidential Fiscal Accountability Following the Budget Act of 1974*, 67 ME. L. REV. 286, 296-97 (2015) (arguing that the Congressional Budget Act has made Congress less responsible and undermined the accountability of Congress and the President).

84. For a summary of the period of "presidential dominance," see SCHICK, *supra* note 41, at 14-18.

85. JAMES L. BLUM, A PROFILE OF THE CONGRESSIONAL BUDGET OFFICE, CONG. BUDGET OFFICE 9 (1990).

86. MICHAEL L. KOEMPEL, JUSTIN MURRAY, & BRIAN P.J. TABIT, CONG. RESEARCH SERV., R41465, HISTORY OF THE JOINT COMMITTEE ON REDUCTION OF NON-ESSENTIAL FEDERAL EXPENDITURES (1941-1974), WITH OBSERVATIONS ON OVERSIGHT TODAY 8 (2010) (quoting 116 CONG. REC. 22,671 (1970) (statement of Rep. George H. Mahon, Chairman, Joint Comm. on Reduction of Non-Essential Fed. Expenditures)). The Joint Committee's scorekeeping reports were

Committee tallied appropriations without estimating their secondary effects. The Joint Committee's decision not to account for secondary effects is in many ways understandable; it likely lacked the staff, data, and resources to estimate secondary effects.[87] For example, the Joint Committee had difficulty scoring (or even obtaining scores from third parties) mandatory spending legislation:

> Accurate estimates of the cost impact of congressional actions on mandatory spending legislation are frequently difficult to obtain—especially for outlays. Cost estimates are obtained from various sources, including committee reports[,] floor debates, Government agencies and informal staff contacts. Sometimes cost estimates on new legislation are not available. What is reflected . . . is the best that the staff has been able to put together.[88]

Even today, despite greater resources, data, and sophistication, the CBO still discusses the challenges of estimating secondary effects.[89] Nevertheless, as previously discussed, the CBO routinely estimates the secondary effects of funding increases for program administration (though these savings do not count for the bill's official score) as well as other legislative changes.[90]

In 1974, the Congressional Budget Act eliminated the Joint Committee on the Reduction of Federal Expenditures and transferred its "duties, functions, and personnel" to the newly created CBO.[91] The Joint Committee's staff became the core of the CBO's scorekeeping staff for the annual appropriations process and continued the practice of not scoring the secondary effects of appropriations.[92]

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primarily retrospective, evaluating the effects of previous policy changes. By contrast, the CBO primarily produces cost estimates for pending legislation.

87. *See* JOYCE, *supra* note 54, at 108 (noting that the Joint Committee had only a four-person staff when it was transferred to the CBO in 1974).

88. H.R. REP. NO. 91-595, at 9 tbl.1 n.1 (1969).

89. *See, e.g.*, Janet Holtzblatt & Jamie McGuire, *Factors Affecting Revenue Estimates of Tax Compliance Proposals* (CBO Working Paper 2016-05, JCX-90-16, 2016) 22-23, http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/52199-wp-taxcompliance.pdf [http://perma.cc/QNA2-L87T].

90. *See supra* Section I.C.

91. S. REP. NO. 93-688, at 36 (1974).

92. *CBO Testimony on the Congressional Budget Process Before the Nat'l Comm'n on Restructuring the Internal Revenue Serv.*, 105th Cong. 8 (1997) (statement of Rosemary D. Marcuss, Assistant Director for Tax Analysis, Congressional Budget Office) [hereinafter *CBO Testimony on the IRS*] ("Even before the passage of the Congressional Budget Act and the creation of CBO, Congressional scorekeeping employed the principle that changes in discretionary appropriations for administrative activities do not produce scorable savings or costs in direct spending programs or tax receipts.").

In other words, the Joint Committee effectively created the scorekeeping practice that would become Guidelines #3 and #14.[93]

B. *Shifting Budget Frameworks*

CBO continued its practice of not scoring the secondary effects of program administration until it began to make an exception for the IRS in the mid-1980s.[94] When the funding did not produce the CBO's anticipated savings, the scorekeepers (i.e., the OMB, CBO, and House and Senate Budget Committees) returned to the long-standing scorekeeping practice, even more resistant to scoring the secondary effects of program administration. This experience played a significant role in the eventual creation of Guideline #3.

In 1985, Congress passed the Balanced Budget and Emergency Deficit Control Act—more commonly referred to as Gramm-Rudman-Hollings (GRH).[95] GRH transformed the congressional budget process by focusing on deficit-reduction.[96] For each year between 1986 and 1990, GRH set increasingly large deficit reduction targets.[97] To enforce these targets, Congress created sequestration, an automatic and uniform across-the-board cut to government outlays.[98] If the following year's projected deficit would exceed the GRH deficit target by more than ten billion dollars, sequestration would reduce the government spending until the budget had been brought into compliance with the deficit target.[99]

To close the tremendous shortfall between the projected deficit and GRH's deficit target, Congress passed the Omnibus Budget Reconciliation Act of 1986.[100] Among other things, the Omnibus Budget Reconciliation Act set the

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93. Interview with Budget Staffer #5 (July 15, 2016).

94. *Id.*

95. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037.

96. *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 634-39 (1988).

97. Balanced Budget and Emergency Deficit Control Act of 1985 § 201.

98. *Id.* § 251-57, 99 Stat. at 1063-93. Congress exempted seventy-four percent of the federal budget, excluding many of the most politically sensitive programs from sequestration. Christopher D. Dodge, Note, *Doomed To Repeat: Why Sequestration and the Budget Control Act of 2011 Are Unlikely To Solve Our Solvency Woes*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 835, 847 (2012).

99. *See* LANCE T. LELOUP, PARTIES, RULES, AND THE EVOLUTION OF CONGRESSIONAL BUDGETING 82-110 (2005) (providing an overview of GRH I & GRH II).

100. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874.

IRS's appropriation at four billion dollars.[101] Given the magnitude of the increase in IRS funding contemplated by this provision, the CBO (and OMB) deviated from the normal practice of excluding the secondary effects of appropriations from its official budget estimate.[102] Instead, it estimated that the provision would increase revenue by over $2.3 billion in fiscal year 1987 alone.[103]

Unfortunately, the estimated short-run savings never materialized.[104] The Government Accountability Office (GAO) would later attribute the error to the CBO's reliance on inflated savings projections from the IRS.[105] The GAO carefully documented several methodological problems with the IRS's optimistic revenue estimates.[106] Having relied on these estimates, the CBO overestimated the savings. GAO also argued that it was "unreasonable to expect much additional revenue in the first year of a major staff increase" given the time and effort required to hire and train new staff.[107] It therefore concluded that increased funding for IRS staff should not be used as "a vehicle for generating short-term revenue, but rather as one that will bear fruit over a longer period."[108] In later hearings, the CBO also acknowledged it had become skeptical of scoring secondary effects for the IRS "because of the IRS's inability to document that such initiatives had resulted in net increases in revenues so quickly after being put in place."[109]

This experience heightened the scorekeeper's resistance to scoring secondary effects for deficit-reducing appropriations.[110] Like the GAO, CBO staff evaluated

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101. *Id.* § 8051, 100 Stat. at 1963. Technically, the law specified that IRS's appropriation would be four billion dollars in the appropriations law for fiscal year 1987. The appropriations law ultimately included the specified sums. Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341, 3341-312 to 3341-313.

102. Interview with Budget Staffer #6 (Nov. 18, 2017).

103. *See* 132 CONG. REC. 33,256 (1986) (CBO score of conference report as published in the Congressional Record) (estimating $2.855 billion in increased revenue from FY1987 to FY1989).

104. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-16, TAX ADMINISTRATION: IRS' IMPLEMENTATION OF THE 1987 REVENUE INITIATIVE (1987). The GAO was the General Accounting Office until 2004.

105. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-119, TAX ADMINISTRATION: DIFFICULTIES IN ACCURATELY ESTIMATING TAX EXAMINATION YIELD (1988).

106. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-85, TAX ADMINISTRATION: IRS NEEDS MORE RELIABLE INFORMATION ON ENFORCEMENT REVENUES (1990); U.S. GEN. ACCOUNTING OFFICE, *supra* note 105.

107. U.S. GEN. ACCOUNTING OFFICE, *supra* note 105, at 3.

108. *Id.*

109. *CBO Testimony on the IRS*, *supra* note 92, at 8.

110. Interview with Budget Staffer #6 (Dec. 22, 2016); *cf.* Driessen, *supra* note 30, at 1663 & n.13 (arguing that budget gimmicks involving the reallocation of IRS staff in the 1980s and 1990s

the IRS's use of the appropriations and could not identify the promised increases in recovered revenue.[111] Subsequent CBO estimates were more conservative. For example, for the President's fiscal year 1991 budget, the CBO estimated that additional enforcement staff would generate net savings of three hundred million dollars, not the five hundred million dollars the IRS estimated.[112]

Over the next three years, Congress failed to hit a single one of GRH's deficit targets and yet avoided triggering sequestration.[113] Because GRH tied the sequestration triggers to the projected deficit and not the actual deficit, Congress often used budget gimmicks to avoid sequestration.[114] At the same time, the OMB's deficit projection models included implausibly optimistic assumptions.[115] Congress attacked the maneuvers but, given the serious consequences of a large sequestration, grudgingly used them in its own budget resolution.[116]

By 1990, with a projected deficit over a hundred billion dollars larger than GRH's target deficit and after fierce negotiations with President George H.W. Bush, Congress enacted the Omnibus Budget Reconciliation Act of 1990.[117] In addition to containing large spending cuts and tax increases, the Act contained the Budget Enforcement Act of 1990 (BEA), which restructured the budget process. The BEA eliminated GRH's deficit reduction targets and created separate budgetary procedures for discretionary spending and direct spending.[118] Cuts to discretionary spending could no longer be used to offset tax cuts or increases in

present a "historical reason to be leery of the overstatement of the indirect revenue effects of IRS budget changes," though arguing that the scorekeeping guidelines were an overreaction).

111. *CBO Testimony on the IRS*, *supra* note 92, at 7 ("Rules of thumb were applied to funding increases to calculate potential revenue increases . . . . Over time, the rules of thumb were subject to increasing skepticism because of the IRS's inability to document that such initiatives had resulted in net increases in revenues so quickly after being put in place.").

112. U.S. GEN. ACCOUNTING OFFICE, *supra* note 106, at 49.

113. In 1986, the Supreme Court struck down GRH's use of the Comptroller General to determine whether the deficit had been triggered. *See* Bowsher v. Synar, 478 U.S. 714 (1986). Congress subsequently passed the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (also known as GRH II) reassigning the role to OMB. *See* Pub. L. No. 100-119, 101 Stat. 754.

114. *See, e.g.*, *Major Provisions of the Fiscal 1987 Reconciliation Bill*, 44 CONG. Q. WEEKLY REP. 2790, 2790 (1986) ("HR5300 depended heavily on a package of one-shot asset sales and accounting gimmicks to reach its deficit-reduction goals . . . .").

115. *See* Fisher, *supra* note 83, at 301.

116. *Id.*

117. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat 1388.

118. *See supra* Section I.B (describing budget limits for discretionary and direct spending).

direct spending. Likewise, tax increases and cuts to mandatory spending could no longer be used to finance discretionary spending.

The BEA also created the official scorekeeping guidelines. After the OMB's increasingly politicized estimates in the 1980s,[119] congressional budgeteers wanted to limit the OMB's scorekeeping discretion.[120] They also wanted to ensure that the CBO and OMB applied the same rules when scoring legislation.[121] But the guidelines were also intended to close loopholes and other means of Congress "gaming" the scorekeepers.[122] To this end, the BEA directed the OMB and CBO to follow a list of thirteen scorekeeping guidelines that were included in the statute's conference report.[123] Guideline #3 formalized the practice of not scoring any effect that a change in discretionary spending might have on direct spending or revenue.[124]

The BEA created a structure for the scorekeepers to modify the guidelines. The scorekeepers are directed to review the guidelines each year, but can only change the guidelines by unanimous consent. During the 1990s and much of the 2000s, the annual scorekeeper meetings were productive, but more recently, they have been hindered by partisanship.[125] One budgeteer noted that "politics used to come into these meetings on the back end. Now they're the starting point."[126] The scorekeepers have had multi-year periods during which they did not hold a formal meeting.[127] But during the earlier period of more productive relations among scorekeepers, they made important changes to the guidelines, most notably Guideline #14 as discussed in the next Section.

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119. *See* SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 95-104 (1998).

120. H.R. REP. NO. 101-964, at 1172 (1990).

121. Interview with Budget Staffer #6, *supra* note 102.

122. Interview with Budget Staffer #5, *supra* note 93.

123. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 251(a)(7), 104 Stat 1388 ("OMB and CBO shall prepare estimates under this paragraph in conformance with scorekeeping guidelines determined after consultation among the House and Senate Committees on the Budget, CBO, and OMB."); *see also* H.R. REP. NO. 101-964, at 1172-75.

124. Scorekeeping Guidelines, *supra* note 19, app. A at 1 ("Revenues, entitlements and other mandatory programs (including offsetting receipts) will be scored at current law levels, as defined in section 257 of GRH, unless congressional action modifies the authorizing legislation.").

125. Interview with Budget Staffer #2 (July 12, 2016); Interview with Budget Staffer #3 (July 19, 2016).

126. Interview with Budget Staffer #2, *supra* note 125.

127. Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #6, *supra* note 110.

C. The Balanced Budget Act of 1997: Fixing an Asymmetry

Scorekeeping Guideline #3 inadvertently created an asymmetry between discretionary spending and direct spending. Guideline #3 barred the scorekeepers from estimating the secondary effects of discretionary spending; it did not, however, address whether the scorekeepers should account for the secondary effects of direct spending on program administration. As a result, the CBO could not score the secondary effects of funding program administration provided through discretionary spending, but could score the secondary effects of the same funding if it was provided through direct spending.

As already discussed, because of the zero-sum dynamics of the budget process, Congress constantly searches for policies that save money.[128] During the mid-1990s, members of Congress understandably tried to take advantage of the asymmetric scoring of discretionary and direct spending. Members proposed funding some programs through direct spending instead of discretionary spending so that the CBO would score the secondary savings.[129]

In response, the Budget Committees closed the loophole by creating a new scorekeeping guideline in the conference report of the Balanced Budget Act of 1997.[130] Scorekeeping Guideline #14 states that "[n]o increase in receipts or decrease in direct spending will be scored as a result of provisions of a law that provides direct spending for administrative or program management activities."[131] In other words, the guideline eliminated the asymmetry between discretionary and direct spending by extending Guideline #3's prohibition on scoring secondary effects to direct spending: the scorekeepers could not score any secondary effects resulting from direct spending on program management activities.

At this crossroads, three factors drove the Budget Committees—with support from the other scorekeepers—to expand Guideline #3 to direct spending rather than simply repeal it. First, the scorekeepers are a risk-averse group. They do not want to open the floodgates to legislators and interest groups who seek to game the budget process and thereby risk undercutting their credibility and

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128. *See* Garrett, *Rethinking*, *supra* note 26, at 399-401; *see also supra* Section I.B (describing the budgeting process).

129. Interview with Budget Staffer #1 (July 20, 2016); Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #5, *supra* note 93.

130. BALANCED BUDGET ACT OF 1997, H.R. REP. NO. 105-217, at 1012 (Conf. Rep.); Interview with Budget Staffer #1, *supra* note 129; Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #3, *supra* note 125; Interview with Budget Staffer #5, *supra* note 93; Interview with Budget Staffer #6, *supra* note 110.

131. Scorekeeping Guidelines, *supra* note 19, app. A at 4.

independence.[132] Professor and former CBO analyst Roy T. Meyers characterizes budgeting as a contest between "controllers" and "spending advocates."[133] The scorekeepers are decidedly in the "controller" camp. In fact, a key reason for the new scorekeeping guidelines was to formalize a scoring practice that the scorekeepers themselves had initially adopted and had faced pressure from members of Congress (i.e., "spending advocates") to change.[134]

Second, the scorekeepers believed that encouraging Congress to fund program administration through direct spending would undercut Congress's institutional role.[135] Congress has historically funded program administration through the annual appropriations process.[136] The Appropriations Committees closely monitor and review how the agencies use their program administration funding. By contrast, the authorizing committees, which are responsible for direct spending, generally do not review program administration funding on a regular basis.[137] Additionally, since appropriations, unlike direct spending, must be approved annually, the appropriations process tightly guards Congress's power of the purse and minimizes delegations to the executive.[138]

Third, the Senate Budget Committee majority staffer responsible for the scorekeeping guidelines strongly pushed to expand Guideline #3 to direct spending.[139] In light of the concerns surrounding the asymmetry, the other key staffers agreed to the change. Given the technical nature of the policy issue, only a small group of budgeteers needed to agree to make the change happen.

It is important to note that the scorekeepers could have also responded to the asymmetry between discretionary and direct spending by simply repealing

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132. Interview with Budget Staffer #3, *supra* note 125; Interview with Budget Staffer #11 (Aug. 16, 2017).

133. ROY T. MEYERS, STRATEGIC BUDGETING 14-15, 52-53 (1994).

134. *Cf.* JOYCE, *supra* note 54, at 112 (noting that Scorekeeping Guideline #11 was included in 1990 because Senator Daniel Patrick Moynihan (D-NY) had aggressively pressured CBO to favorably score loan asset sales).

135. Interview with Budget Staffer #2, *supra* note 125; Interview with Congressional Budget Office Staffers, *supra* note 20.

136. *See* John F. Cogan, *The Dispersion of Spending Authority and Federal Budget Deficits*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING, *supra* note 24, at 16.

137. *Cf.* SCHICK, *supra* note 41, at 274 ("Congress benefits from authorizing committees that emphasize program needs and objectives, and from appropriating committees that emphasize costs and financial constraints.").

138. *See* Chafetz, *supra* note 80, at 728 ("An appropriations provision is simply a delegation of spending authority. A long-term or indefinite appropriation significantly increases executive power.").

139. Interview with Budget Staffer #1, *supra* note 129; Interview with Budget Staffer #2, *supra* note 125.

Guideline #3. Repealing the guideline would have been a more straightforward way to address both the asymmetry and the funding issue. At the time, though, the scorekeepers did not believe that there was a fundamental problem with the guideline, which was based on a scorekeeping practice that had been followed for over twenty-five years.[140] Instead, the scorekeepers thought that the program integrity cap adjustments had successfully addressed the problems created by not scoring secondary effects.[141] As a result, when the asymmetry created by Guideline #3 was being considered, staff at CBO, OMB, and the Budget Committees were strongly committed to the guideline and program integrity cap adjustments.[142] Later years, however, would reveal that the program integrity cap adjustments were an inadequate solution.

III. EVALUATING THE CAP ADJUSTMENT PROCESS

Although cap adjustments were designed to rationalize the budget process, the intervening decades have proven that the problem was deeper than those ex post remedies; the funding problems created by Scorekeeping Guidelines #3 and #14 have remained. Recognizing the zero-sum dynamics of the budget process and the high likelihood that the Appropriations Committees would underfund enforcement agencies, Congress first created a program integrity cap adjustment—specifically, for the IRS—in 1990.[143] In later years, Congress created additional cap adjustments for enforcement agencies and program integrity activities related to Unemployment Insurance, Medicare, Medicaid, and the Children's Health Insurance Program, the Earned Income Tax Credit, and Social Security Disability Insurance and Supplemental Security Income.[144]

A cap adjustment encourages members of Congress to increase funding for enforcement and program integrity by essentially offering appropriators free money (i.e., the adjustment). The funding is "free" because it does not count toward the discretionary spending cap. The catch, though, is that in order for the adjustment to kick in, the appropriators must provide at least a pre-specified level of funding to the agency in the first place. In other words, the additional

140. Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #5, *supra* note 93.

141. Interview with Budget Staffer #2, *supra* note 125.

142. *Id.*

143. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 13101, § 251(b)(2)(A), 104 Stat. 1388, 1388-579 to 580.

144. *See infra* Table 2.

money provided by the adjustment only comes on top of existing funding that does count toward the discretionary spending cap.[145]

This Part argues that the cap adjustments have not worked for three reasons. First, Congress has neither consistently created cap adjustments nor consistently appropriated enough funding to trigger the funding increases. Second, Congress has not created cap adjustments for enough programs. Third, the cap adjustments do not deter deficit-increasing cuts to program integrity spending. These shortcomings are, in turn, the product of three factors: (1) high transaction costs, (2) inadequate political support, and (3) large cuts to discretionary spending. The inadequacy of the cap adjustments demonstrates that a more fundamental change in the scoring process is required to rationalize the budget process.

A. How Cap Adjustments Work

To use a cap adjustment, Congress must do two things. First, it must pass a budget resolution or enact a law that creates the cap adjustment. Each cap adjustment specifies (1) a base level of appropriations for the underlying agency and (2) an adjustment for the underlying agency. Second, in a separate law (usually an appropriations act), Congress must provide at least the base level of funding. Once Congress has provided the base amount, it can increase funding up to the adjustment amount without the adjustment funding counting toward the discretionary spending cap. It is as if the discretionary spending cap were increased by the amount of the available adjustment. But if Congress appropriates

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145. In some instances, Congress has used direct spending to increase program integrity funding. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 201, 110 Stat. 1936, 1992-96 (funding HCFAC for five years using direct spending). Using direct spending has some benefits. Unlike appropriating more money or using a cap adjustment, direct spending does not require enacting legislation each year, resulting in more predictable funding for government agencies. *Cf.* Philip G. Joyce, *The Costs of Budget Uncertainty: Analyzing the Impact of Late Appropriations*, IBM CTR. FOR BUS. GOV'T 24 (2012), http://faculty.publicpolicy.umd.edu/sites/default/files/joyce/files/the_costs_of_budget_uncertainty.pdf [http://perma.cc/YL32-76LW] (explaining that even a well-functioning appropriations system would "create some uncertainty that would lead to increased costs compared to what might happen if funding were guaranteed for a longer period of time"). Additionally, because members of Congress can cast a single vote to permanently fund these potentially unpopular programs, the programs may also be easier to enact through a direct spending bill than on an annual basis through appropriations. But using direct spending to fund program administration faces the same CBO scoring issues as using discretionary spending. *See supra* Section I.C. Additionally, funding program administration through direct spending undercuts Congress's institutional capacity. *See supra* notes 137-138 and accompanying text.

anything less than the base level, the cap adjustment is not triggered and no extra funds are provided.

Consider a recent example: The 2014 and 2015 Health Care Fraud and Abuse Control (HCFAC) cap adjustments have base appropriation levels of $311 million and corresponding adjustments of $329 million and $361 million.[146] In 2014, Congress appropriated only $294 million to HCFAC.[147] As a result, Congress did not satisfy the minimum base level of $311 million in funding and the $329 million adjustment was never triggered. By contrast, in 2015, Congress provided $311 million for HCFAC in the pertinent appropriation act, thereby triggering the adjustment.[148] Congress can, as a result, provide HCFAC with an additional $361 million, which would not count toward the discretionary spending cap. In 2015, Congress provided the entire $361 million adjustment, and total spending in 2015 was $672 million.[149]

From the perspective of the Appropriations Committees, a cap adjustment represents use-it-or-lose-it funding for the underlying program. The cap adjustment's designers believed that the cap adjustment's promise of extra funding for enforcement would induce the Appropriations Committees to appropriate the base level of funding.[150] Cap adjustments enable members of Congress to use a smaller portion of the discretionary spending cap to achieve the desired public policy (robust enforcement). In essence, cap adjustments depend upon members of Congress wanting to pursue good public policy.[151]

B. Why Cap Adjustments Have Not Worked

Cap adjustments are a multi-stage process for increasing funding for program integrity and enforcement. Congress must first create a cap adjustment, then trigger the adjustment by appropriating enough funds for the program, and

146. Budget Control Act of 2011, Sec. 101, § 251(b)(2)(C)(i)(III)-(IV), § 251(b)(2)(C)(ii); *see also infra* Table 3 (illustrating that the HCFAC cap adjustments, in 2014 and 2015, had base appropriation levels of $311 million and corresponding adjustments of $329 million and $361 million).

147. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. H, Tit. II, 128 Stat. 375.

148. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. G, tit. II, 128 Stat. 2130, 2478 (2014).

149. *Id.*

150. Interview with Budget Staffer #9 (June 28, 2016).

151. As I argue below, program integrity is generally a "zero credit" policy. *See infra* Section V.A.1. Members of Congress do not derive political benefit from increasing funding for program integrity. They largely do so because they care about good public policy. *See* RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973) (arguing that members of Congress seek to achieve one or more of three goals: reelection, power within the chamber and good public policy).

finally utilize the adjustment. In past years, Congress has failed at various stages of the process and has thus often not used cap adjustments. Additionally, cap adjustments have no mechanism for deterring funding cuts to program integrity and enforcement. In other words, even when cap adjustments are in place, Congress has sometimes cut funding for agency enforcement and program integrity. Each of these hurdles presents another pitfall for the cap adjustment. Consequently, those adjustments have not fulfilled their promise to incentivize robust funding of program integrity.

1. *Failure To Provide Cap Adjustments*

An initial problem is that Congress has not always provided cap adjustments for deficit-reducing programs. First, Congress has sometimes not passed a budget resolution or budget framework law, which are the primary legislative vehicles for cap adjustments. From 1990 to 2016, Congress did not pass a budget resolution for nine fiscal years. For six of those years, Congress had cap adjustments in place through preexisting budget laws, like the Budget Enforcement Act of 1990,[152] the Balanced Budget Act of 1997, [153] and the Budget Control Act of 2011.[154] Nevertheless, for three of those years (2003, 2005, and 2007) Congress simply did not create cap adjustments.

Second, as shown in Table 2 in the Appendix, even when Congress has passed budget resolutions or framework laws, it has not always included cap adjustments. For example, in the Budget Control Act of 2011, Congress included cap adjustments for continuing disability reviews and health care fraud but not

152. Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 13101(a), 104 Stat. 1388, 1388-579 to 580 (codified at 2 U.S.C. § 901) (providing a cap adjustment for the IRS for FY 1990 - FY 1995).

153. Balanced Budget Act of 1997, Pub. L. No 105-33, Sec. 10114, § 314(b)(5)(A), 111 Stat. 251, 689 (providing a cap adjustment for the IRS for FY 1998 - FY 2002); *id.* at Sec. 5408, § 901(c)(5)(A) (providing a cap adjustment for program integrity activities related to unemployment insurance for 1998 to 2002); *id.* at Sec. 10203, § 251(b)(2)(C) (providing a cap adjustment for continuing disability reviews for 1998 to 2002).

154. Budget Control Act of 2011, Pub. L. No. 112-25, Sec. 101, §251(b)(2)(B)-(C), 125 Stat. 240, 242-43 (providing cap adjustments for HCFAC and continuing disability reviews from FY 2012 to FY 2021). Although Congress generally includes cap adjustments in budget resolutions or budget framework laws, Congress has occasionally included cap adjustments in other laws. *See, e.g.*, Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 103, 110 Stat. 847, 848-51.

for the IRS. Indeed, Congress did not create an IRS cap adjustment for fourteen of the twenty-seven years between fiscal years 1991 and 2017.[155]

Third, Congress has never created cap adjustments for some deficit-reducing programs. This is so despite the fact that several other programs and initiatives generate positive returns on investment. For example, John Hudak and Grace Wallack determined that the offices of inspectors general of eighteen departments, on average, generate significant returns on investment.[156] Likewise, Ezra Ross and Martin Pritikin have argued that many agencies only collect a small portion of the penalties they actually impose, due in part to inadequate funding.[157] "Allocating funds to an agency's collections functions," they argue, "need not reduce the funds available to pay for other agency functions: Investment in collections could more than pay for itself."[158] Congress has not adopted any new program integrity cap adjustments since 2006.[159]

2. *Inconsistent Use of Cap Adjustments*

Even when cap adjustments are available, Congress has not always appropriated enough funds to trigger them in the first place. As shown in Table 3 in the Appendix, from 2012 to 2014, the Appropriations Committees did not provide HCFAC with enough funding to trigger the cap adjustment. As a result, the program did not receive the over $800 million authorized by the cap adjustment over the three-year period. Since the CBO has estimated that HCFAC funding generates $1.50 of savings for every dollar of funding, these funds would likely have reduced improper health care spending by over $1.4 billion, resulting in net savings of over $450 million.[160]

Furthermore, even when the Appropriations Committees provide enough initial funding to trigger the cap adjustment, they have not always appropriated all of the extra funds made available by the adjustment. As shown in Table 3, in fiscal year 2013, Congress appropriated only $483 million out of the $751 million

155. *See infra* table 2. For fiscal years 1998-2002, the cap adjustment to the IRS was only for enforcing eligibility requirements for the Earned Income Tax Credit.

156. Hudak & Wallack, *supra* note 13, at 6. (estimating mean and median annual returns on investment of $13.40 and $6.38 for each dollar appropriated).

157. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 497-98 (2011).

158. *Id.* at 498.

159. *See infra* table 2.; *see also supra* note 82 (describing possible programs for cap adjustments).

160. *See* CONG. BUDGET OFFICE, HOW INITIATIVES TO REDUCE FRAUD IN FEDERAL HEALTH CARE PROGRAMS AFFECT THE BUDGET 8 (2014).

authorized by the Social Security Administration cap adjustment for continuing disability reviews.[161] Since the CBO estimates that continuing disability reviews save three dollars for every dollar appropriated, from 2012 to 2016, Congress missed an opportunity to eliminate approximately $1.25 billion in unnecessary payments and thereby save approximately $840 million, on net.[162]

These are not isolated incidents. Congress only triggered and took advantage of the entire cap adjustments for both HCFAC and continuing disability reviews in one year between fiscal years 2012 and 2016.[163] Admittedly, the Appropriations Committees may have decided not to use the cap adjustments because of their policy judgment that these initiatives did not require additional funding. But even if this were the case, the empirical evidence demonstrates that their judgment was mistaken. The Social Security Administration had a large backlog of continuing disability reviews in 2013 and 2014.[164] Additionally, the very fact that Congress has at points funded SSA at much higher levels suggests that Congress recognizes the funding need. Although the amount of undetected health care fraud is unknown,[165] Congress is likely also underfunding HCFAC as evidenced by the fact that CBO still estimates savings for increased HCFAC funding.[166]

3. Failure To Deter Funding Cuts

Finally, the presence of a cap adjustment neither deters nor stops Congress from making deficit-increasing cuts to appropriations. The scorekeeping guidelines and budget process create two problems for program integrity cap adjustments: (1) there is little political incentive to increase funding for enforcement

161. *See* Kathy Ruffing, *Failure To Fund Disability Reviews Is Penny Wise and Pound Foolish*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Mar. 11, 2013, 12:27 PM), http://www.cbpp.org/blog/failure-to-fund-disability-reviews-is-penny-wise-and-pound-foolish [http://perma.cc/EC6G-TTXC]; *infra* Table 3.

162. CONG. BUDGET OFFICE, ANALYSIS OF AUGUST 1 BUDGET CONTROL ACT 4, 10 tbl.2 (2011), http://www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/budgetcontrolactaug1.pdf [http://perma.cc/K554-R7WY] (estimating that a $4 billion increase in appropriations for continuing disability will yield $12 billion in gross savings and $8 billion in net savings).

163. *See infra* Table 3.

164. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-250, SOCIAL SECURITY DISABILITY: SSA COULD INCREASE SAVINGS BY REFINING ITS SELECTION OF CASES FOR DISABILITY REVIEW 1, 5 fig. 1 (2016).

165. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-746, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 34-35 (2013).

166. *See* CONG. BUDGET OFFICE, *supra* note 10, at 8.

and program integrity, and (2) there is, in contrast, a strong political incentive to cut program integrity funding and fund something else instead. As previously discussed, cap adjustments partially correct the first problem.[167] But they are not designed to prevent the second problem and have, in fact, not stopped cuts in recent years.[168] Members of Congress have cut program integrity funding so that they can allocate more funds to other programs.

C. *Explaining the Shortcomings of Cap Adjustments*

The limited success of cap adjustments, especially since 2010, can be understood in light of three factors: (1) the high transaction costs inherent in the legislative process, (2) the limited political support for funding program integrity, and (3) the tight overall limits on discretionary spending.

1. *High Transaction Costs*

Because the cap adjustments require two separate bills to pass Congress, they effectively double the transaction costs of a normal bill. America's legislative process includes more veto points than that of nearly any other country in the world.[169] Bicameralism, the committee system, presidential vetoes, and the filibuster all raise significant hurdles to passing legislation.[170] Cap adjustments must make their way through many of these gates twice in order to become law. In other words, if Congress either fails to include the cap adjustment or fails to appropriate enough funding to trigger the adjustment, the entire process fails.

167. *See supra* Section III.A.

168. For example, Congress appropriated $16 million less to HCFAC in fiscal year 2013 than in fiscal year 2012. *See infra* Table 3. Similarly, Congress has included cuts to the offices of inspectors general in across-the-board cuts to discretionary spending. Hudak & Wallack, *supra* note 13, at 13-14 (criticizing the Budget Control Act of 2011's sequestration for cutting offices of inspectors general despite their positive return on investment).

169. Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSP. ON POL. 841, 844 (2011) (book review); *see also* William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 757-60 (2012) (describing nine vetogates in the legislative process).

170. *See generally* CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER (2000); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM (1997); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987).

Congressional negotiations are often a time-consuming and difficult process, and negotiations over budgetary matters are no exception. Staffers report spending a significant amount of time negotiating cap adjustments.[171] Increasing partisanship and polarization as well as decreasing comity have only made these negotiations more challenging.[172]

2. *Limited Political Support*

In addition, the cap adjustments do not change the underlying electoral incentives faced by members of Congress. Just as funding program integrity provides members of Congress—both Democrats and Republicans—with little or no political benefit, creating program integrity cap adjustments likewise offers politicians little, if any, political upside. The cap adjustments are too obscure for voters (or most legislators) to even be aware of them, and interest groups do not advocate for them. In other words, they are examples of what Alan Gerber and Eric Patashnik have termed "zero credit" policies.[173]

Unable to provide opportunities for "credit claiming,"[174] cap adjustments depend upon legislators wanting to pursue good public policy. Consequently, cap adjustments were more effective initially when there was bipartisan policy consensus to prioritize funding enforcement and program integrity.[175] With the fraying of this bipartisan consensus, support for, and in turn the efficacy of, cap adjustments has weakened.[176] Although some congressional Republicans have supported cap adjustments, important members of the party—particularly in the House—have opposed them. For example, in 2015, then-House Budget Committee Chairman Paul Ryan excluded cap adjustments from his fiscal year 2016

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171. Interview with Budget Staffer #1, *supra* note 129; Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #3, *supra* note 125.

172. Interview with Budget Staffer #2, *supra* note 125; Interview with Budget Staffer #3, *supra* note 125; *see also* Joseph Bafumi, *The Senate Budget Committee: Impact of Polarization on Institutional Design*, 45 PS: POL. SCI. & POL. 161, 165-66 (2012).

173. Alan S. Gerber & Eric M. Patashnik, *Government Performance: Missing Opportunities To Solve Problems*, *in* PROMOTING THE GENERAL WELFARE: NEW PERSPECTIVES ON GOVERNMENT PERFORMANCE 3, 12 (Alan S. Gerber & Eric M. Patashnik eds., 2006). Even if voters rewarded funding for program integrity, members of Congress would likely have a hard time claiming credit for the cap adjustments because of the procedural complexities. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-53 (1974) (arguing that members of Congress seek opportunities to "credit claim").

174. MAYHEW, *supra* note 173, at 52-55.

175. Interview with Budget Staffer #6, *supra* note 102.

176. *Id.*

budget proposal.[177] Additionally, some Republicans have argued against cap adjustments because they take "discretion and transparency out of the process of determining funding" for the adjusted activities.[178] Other congressional Republicans have erroneously argued that cap adjustments circumvent discretionary spending limits and increase federal spending.[179] They believe that these activities should only be funded within the existing discretionary spending limits.[180] For their part, congressional Democrats have created cap adjustments when in power, but they have expended limited political capital in support of these zero-credit policies when in the minority.[181]

3. *Large Cuts to Discretionary Spending*

Finally, dramatic cuts to discretionary spending in recent years have increased the likelihood that cap adjustments will fail at the appropriations stage. The Budget Control Act of 2011 created annual discretionary spending caps until fiscal year 2021.[182] Under the Act, analysts estimated that by 2022 non-defense

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177. *See* Robert Greenstein, *Despite Anti-Fraud Rhetoric, Republican Budgets Omit Funding To Combat Fraud and Abuse*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Mar. 25, 2015), http://www.cbpp.org/blog/despite-anti-fraud-rhetoric-republican-budgets-omit-funding-to-combat-fraud-and-abuse [http://perma.cc/9X5P-WJH6] ("The House budget expresses support for program integrity activities but states that they must be funded *within* the caps—meaning that fully funding them would require even deeper cuts in other non-defense discretionary programs, which already must adhere to the austere sequestration levels in 2016.").

178. Vicki Needham, *House Appropriations Republicans Call for Rejection of Program Integrity Cap Adjustment*, HILL (May 5, 2010), http://thehill.com/policy/finance/96979-house-appropriations-republicans-call-for-rejection-of-program-integrity-cap-adjustment [http://perma.cc/LH85-YD9M].

179. This assessment of cap adjustments is mistaken: cap adjustments need not increase spending. Congress could first agree to limiting total spending to, say, $1 trillion. Then, they could set the discretionary spending cap at $995 billion and create $5 billion in program integrity cap adjustments. Arguably, program integrity cap adjustments might reduce total appropriations, as the appropriations committees have inconsistently used the cap adjustments. Interview with Budget Staffer #6, *supra* note 102.

180. Interview with Budget Staffer #1, *supra* note 129; *see also* Greenstein, *supra* note 177 (discussing Republican resistance to program integrity cap adjustment absent cuts to other non-defense discretionary programs). The practical effect of eliminating the cap adjustment would be to reduce total program integrity funding. Eliminating the cap adjustments would not eliminate the zero-sum nature of the appropriations process. Congress would not reallocate funding away from other programs and toward program integrity to offset the funds lost by eliminating the cap adjustments. Even if Congress did so, this would amount to a roundabout means of cutting discretionary spending, which is already at historically low levels.

181. Interview with Budget Staffer #1, *supra* note 129.

182. *See* Budget Control Act of 2011 § 101, 2 U.S.C. § 901 (2012).

discretionary spending would be 15% lower than the 2010 inflation-adjusted level.[183] Despite subsequent legislation reducing these cuts for 2016 and 2017,[184] nondefense discretionary spending as a percentage of GDP is still projected to be at the lowest level since 1962, the first year for which government data is available.[185]

With fewer funds to allocate, in some years the Appropriations Committees have chosen to cut funding for program integrity rather than funding for more popular programs. They have therefore failed to trigger the cap adjustments. Recall that cap adjustments only work because members of Congress are motivated not only by electoral incentives but also by policy concerns.[186] But the large cuts to discretionary spending in recent years have heightened the zero-sum dynamic of the budget process, thus making it more likely that legislators prioritize political over policy considerations.

The increased use of budget gimmicks since 2011 further illustrates that appropriators are under growing political pressure. The Appropriations Committees have increasingly included cuts to direct spending in their bills and used these savings to appropriate additional funds. These cuts, known as changes in mandatory program spending (CHIMPS), are not inherently budget gimmicks, but in practice they often take advantage of scorekeeping flaws and do not produce real savings.[187] From 2011 to 2015, Congress averaged $18.4 billion per year in CHIMPS, nearly three times the annual average of $6.7 billion from 2007 to 2010.[188]

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183. Richard Kogan, *Congress Has Cut Discretionary Funding by $1.5 Trillion over Ten Years: First Stage of Deficit Reduction Is in Law*, CTR. ON BUDGET & POL'Y PRIORITIES 3 (2012), http://www.cbpp.org/sites/default/files/atoms/files/9-25-12bud.pdf [http://perma.cc/T4A7-QMX6].

184. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 101, 129 Stat. 584, 585-86.

185. *Policy Basics: Non-Defense Discretionary Programs*, CTR. ON BUDGET & POL'Y PRIORITIES 5 (2016), http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-NDD.pdf [http://perma.cc/57BE-ALRJ].

186. FENNO, *supra* note 151, at 1 (arguing that members of Congress seek reelection, influence within Congress, and good public policy).

187. *See Budget Gimmicks in the CRomnibus Bill*, COMMITTEE FOR RESPONSIBLE FED. BUDGET (Dec. 10, 2014), http://crfb.org/blogs/budget-gimmicks-cromnibus-bill [http://perma.cc/RX8A-4EC7] (claiming $20 billion in CHIMPS would not produce real savings).

188. *Senate Budget Takes Issue with CHIMPs*, COMMITTEE FOR RESPONSIBLE FED. BUDGET (Apr. 10, 2015), http://crfb.org/blogs/senate-budget-takes-issue-chimps [http://perma.cc/7JCP-W8BF]; *see also* Andrew J. Clarke & Kenneth S. Lowande, *Informal Consequences of Budget Institutions in the US Congress*, 41 LEGIS. STUD. Q. 965, 988 (2016) (finding increased use of CHIMPS involving agricultural programs when discretionary spending allocations were lower).

Together, the political and budgetary incentives make cap adjustments an ineffective substitute for a rationalized appropriations process. Because cap adjustments fall victim to the proliferation of veto points in American law making, are politically unpopular, and must still draw from a shrinking pot of discretionary funds, members of Congress remain disincentivized from funding program integrity. In order to properly align political and policy incentives then, Congress must change the front-end calculation in the scorekeeping process. The next Part describes how legislators could do so.

IV. A PROPOSAL FOR SCORING SECONDARY EFFECTS

This Note's proposal is simple: scorekeepers should score the secondary effects of funding program administration when there is robust evidence of such effects. To determine whether the effects are sufficiently robust, the CBO should apply the same rigorous standards it applies when scoring other policies that claim to generate savings. Although the CBO's exact standards are unclear, they should (and likely do) require that such effects are both significant and supported by robust data analysis or academic research. When such effects are present, the CBO should separately score the primary and secondary effects over a ten-year budget window.

To implement this proposal, the scorekeepers should repeal Scorekeeping Guideline #3[189] and Scorekeeping Guideline #14. They (or Congress) could repeal these guidelines by passing a resolution (or law), or by including a provision in a conference report.[190] In place of Guidelines #3 and #14, the scorekeepers should adopt a practice (or formal guideline) of scoring the secondary effects of spending changes on program administration when such effects are significant and well documented.[191] With these changes in place, there would be no need for cap adjustments, which should consequently also be repealed.

This proposal would overcome each of the obstacles that limit the efficacy of cap adjustments. First, repealing the guidelines would reduce transaction costs as Congress would only need to enact a single law to appropriate extra funds.

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189. I am only referring to the first sentence of Scorekeeping Guideline #3. The remainder of the guideline addresses how to score appropriations laws containing "[s]ubstantive changes to or restrictions on direct spending law." Scorekeeping Guidelines, *supra* note 19, app. A, at 1.

190. *See supra* note 130 and accompanying text (discussing how Guideline #14 was created in a conference report).

191. The scorekeepers could score the secondary effects of secondary spending on other things, but such a discussion is beyond the scope of this proposal. *See supra* text accompanying note 82.

Congress would no longer need to create the cap in one law and enact the adjustment in another. Second, this Note's proposal would generate political support from interest groups that want to use the increased funding for program integrity as an offset.[192] Third, for similar reasons, the tight limits on discretionary spending would actually make funding for program integrity more, not less, attractive under this Note's proposal. With limited funding for their political priorities, members of Congress are more likely to support alternative means of generating extra funding.[193]

This Part begins by explaining how scorekeepers would score the secondary effects arising from changes in funding for program administration. It then discusses the robust evidentiary standards that CBO uses when scoring other policies. By maintaining these standards when scoring secondary effects, CBO can preserve the accuracy and integrity of the current scorekeeping process while eliminating the problems created by not accounting for the indirect budgetary effects of funding program administration.

A. How To Score Secondary Effects

Scorekeepers could easily adapt to the proposed repeal of Scorekeeping Guidelines #3 and #14 and adoption of a new scorekeeping practice or guideline. Scorekeepers already score the secondary effects of all direct spending and revenue policies, except for changes in spending on program administration.[194] Ironically, to provide Congress with additional information, scorekeepers frequently estimate the secondary effects of additional funding for program integrity but exclude the savings from the bill's overall CBO score for the purposes of PAYGO.[195] This distinction is important because the overall CBO score must be budget neutral to avoid a point of order blocking the legislation on the Senate floor.[196] Additionally, if the OMB, which also follows the scorekeeping guidelines, estimates that the law increases the deficit, the President may need to issue a sequestration order.[197] Nevertheless, it demonstrates that the CBO has the

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192. *See infra* Section V.A.1.

193. *Id.*

194. *See supra* Section I.C.

195. *See, e.g.*, CONG. BUDGET OFFICE, *supra* note 76, at 23 tbl.5. The CBO began including estimates of nonscorable savings at the bottom of its cost estimates as early as 2009. *See, e.g.*, CONG. BUDGET OFFICE, PRELIMINARY ANALYSIS OF THE AFFORDABLE HEALTH CARE FOR AMERICA ACT, tbl.3 (2009), http://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/hr3962rangelo.pdf [http://perma.cc/WRV6-AYQP].

196. *See supra* note 52 and accompanying text.

197. *See supra* note 53 and accompanying text.

technical sophistication to score the secondary effects of increased program administration funding.[198]

Under this Note's proposal, when the CBO scores an increase in either direct or discretionary spending on program integrity initiatives, its final score would include the savings derived from the funding's secondary effects over the ten-year budget window.[199] Conversely, when the CBO scores a reduction in spending on program administration, the score would include the additional costs resulting from the secondary effects over the budget window. To calculate the total budget score, the CBO would employ a two-step process. First, it would score the primary effect: the increase or decrease in funding for the program. Second, it would score the secondary effect: the savings or losses due to the increase or decrease in audits, eligibility reviews, reemployment services, and other program integrity and enforcement efforts. It would then take the sum of the primary and secondary effects to calculate the total effect.

For instance, consider a $100 million increase in HCFAC funding.[200] First, the CBO would score the primary effect—the $100 million funding increase—as a cost. Second, the CBO would score the secondary effect of the funding increase—$150 million in savings generated over the following ten-year budget window—as additional revenue.[201] The final score would show that increased HCFAC funding decreases the deficit by $50 million.

At this point, Congress would be able to use these savings in different ways depending on whether the HCFAC funding was discretionary or direct spending. If the funding was discretionary spending, then the net reduction in spending represents an additional $50 million available for the Appropriations Committees to allocate. If it was direct spending, then the authorizing committee could use the savings as an offset under PAYGO. In either case, the spending

198. *See* Holtzblatt & McGuire, *supra* note 89, at 13-17 (describing their methodology for estimating the revenue effects of IRS appropriations).

199. Several other technical but important elements of the proposal would need consideration. For example, revenue generated from an increase in discretionary spending on IRS enforcement would need to be scored as an increase in available discretionary spending and not under PAYGO. Of particular importance, the scorekeepers would need to define a baseline against which to score funding changes. *See* David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143, 174-92 (2015) (creating a theoretical framework for budget baselines).

200. This simplified example does not account for the important distinction between budget authorities and outlays. These figures represent budget authorities. The outlays for the HCFAC appropriation (i.e., the primary effect) would be made early in the budget window. The savings from the increase in fraud enforcement (i.e., the secondary effect) would likely accrue later in the budget window.

201. *See* CONG. BUDGET OFFICE, *supra* note 10, at 8 (noting the CBO's return-on-investment factor of about 1.5:1 for HCFAC spending).

increase would generate extra funds that could be allocated to more politically desirable purposes.

A reduction in HCFAC funding would be the mirror image of a funding increase. The funding decrease would reduce the program savings that would otherwise accrue through reducing fraud. So, a $100 million cut to funding saves $100 million (primary effect) and results in $150 million in additional unrecovered waste, fraud, and abuse (secondary effect). If the funding was discretionary spending, the $50 million net deficit increase means the Appropriations Committees have $50 million fewer dollars to allocate. If it was direct spending, the authorizing committee would need to increase taxes or reduce spending by $50 million to offset the cut to HCFAC funding.

B. Maintaining Consistent Evidentiary Standards

The CBO has stated that Guidelines #3 and #14 "were established in large part to avoid crediting uncertain potential savings as offsets against very certain up-front spending (in case the hoped-for savings did not materialize)."[202] Yet, the CBO regularly credits "uncertain potential savings" as offsets.[203] This is not a problem for the CBO or its credibility because the Office already employs rigorous evidentiary standards when estimating whether other policies generate savings. When scoring changes in spending on program administration, the CBO should apply equally rigorous standards. Put another way, it should only score effects that are significant and well documented. By so doing, the CBO would maintain continuity with its existing practices and preserve the integrity of the overall scorekeeping process.

Maintaining rigorous evidentiary standards not only preserves the overall integrity of the scorekeeping system, but also deters requests for the CBO to score questionable savings.[204] Even if the number of such requests proves unmanageable, the CBO can always employ its existing triage strategy of having staff prioritize their scoring requests.[205] Alternatively, and perhaps more effectively, requests to score secondary effects could be limited to key committees

202. *Id.* at 2.

203. *Id.*

204. *See* MEYERS, *supra* note 133, at 180-81 (describing how Congress floods scorekeepers with positive evaluations for spending programs).

205. *See* CONG. BUDGET OFFICE, ANSWERS TO QUESTIONS FOR THE RECORD FOLLOWING A HEARING ON THE OVERSIGHT OF THE CONGRESSIONAL BUDGET OFFICE CONDUCTED BY THE SENATE COMMITTEE ON THE BUDGET 19 (Nov. 18, 2016) ("CBO regularly consults with committees and the Congressional leadership to ensure that its resources are focused on the work that is of highest priority to the Congress.").

(i.e., the House Ways and Means Committee, the Senate Finance Committee, and the House and Senate Appropriations Committees) or even just to the House and Senate Budget Committees.[206]

Although the CBO has not articulated bright lines around the volume or quality of evidence needed to score secondary effects, it has described the kinds of evidence it considers and how it evaluates them. When making cost estimates, the CBO relies on "studies by others," "historical data for federal programs, as well as any data available from states for many key grant programs," and its own "original research using administrative records and survey data."[207] The CBO considers the biases that might affect research results, how generalizable the research findings are, and the level of uncertainty in the findings.[208] Its cost estimates represent "the middle of the distribution of possible outcomes," which is generally the weighted mean of the valid point estimates in the literature.[209] The CBO does not assume that a policy has "no effect unless a null hypothesis of zero effect is rejected."[210] Effectively, the CBO appears to follow the evidentiary standard that OMB prescribes for scoring the effects that legislative changes to one program can have on other programs not linked by statutes:

> Under certain circumstances, estimates may also include effects . . . where such effects are *significant* and *well documented*. For example, such effects may be estimated where rigorous experimental research or past program experience has established a high probability that changes . . . will have significant effects on . . . [a] program.[211]

All that is to say: the CBO already employs a conservative approach to its scoring process. As a consequence of the evolution of its scoring practices, there is less of a worry that the Office would repeat its overly optimistic predictions that prompted the current guidelines.

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206. Elmendorf, *supra* note 66, at 112 (proposing a similar limitation for requests for macrodynamic cost estimates).

207. Jeffrey R. Kling, *CBO's Use of Evidence in Analysis of Budget and Economic Policies*, CONG. BUDGET OFF. 22 (Nov. 3, 2011), http://www.cbo.gov/sites/default/files/presentation/11-03-appam-presentation00.pdf [http://perma.cc/HS4N-L2Y4].

208. *Id.* at 25.

209. *Id.* at 26; *see also* ESTIMATING THE COSTS OF ONE-SIDED BETS: HOW CBO ANALYZES PROPOSALS WITH ASYMMETRIC UNCERTAINTIES, CONG. BUDGET OFF. 3 (Oct. 1999), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/15xx/doc1589/onesided.pdf [http://perma.cc/GQ8F-WSXT].

210. Kling, *supra* note 207, at 26.

211. OMB, FISCAL YEAR 2016, *supra* note 82, at 130 (emphasis added) (citations omitted).

Experts generally agree that CBO maintains a rigorous standard. If anything, the CBO often faces criticism for being inordinately conservative in its cost estimates. For example, one health care policy expert described the CBO's posture toward health care interventions as follows: "CBO rules require substantial evidence that a cost-saving initiative has historically achieved savings. Hence, when few historical antecedents exist—be they demonstrations or natural experiments—CBO is likely to score an initiative as yielding no savings. "In other words, 'don't know' becomes 'zero.'"[212] Similarly, Professor and former CBO analyst Philip Joyce notes, "CBO, as a budget office, is likely to require a higher level of proof than policy proponents sometimes desire—and if it thinks that some people are looking for a free lunch, it is probably because they are."[213]

For an example of this high evidentiary burden, consider the rigorous experimental research that CBO required before finding that a Medicare prescription drug program would result in savings. In 2002, after reviewing several academic papers, the CBO found insufficient evidence that giving Medicare beneficiaries better access to prescription drugs reduces their need for medical services.[214] As a result, when Congress created the Medicare prescription drug benefit in 2003, the CBO did not score any offsetting savings for reduced medical spending. The CBO again did not recognize these secondary effects in 2010 when the Affordable Care Act made prescription drugs cheaper for beneficiaries. Only in 2012, after the publication of eight new academic papers, did the CBO start recognizing the secondary effects.[215]

This example also demonstrates why the concern about using uncertain future savings as an offset for upfront costs makes little sense. When the CBO estimates that a bill that increases access to prescription drugs will reduce the use of Medicare services, the Office is using uncertain future savings to offset the upfront costs of increasing access to prescription drugs. If those potential savings

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212. Jon R. Gabel, *Does the Congressional Budget Office Underestimate Savings from Reform? A Review of the Historical Record*, COMMONWEALTH FUND 1 (Jan. 2010), http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2010/1367_Gabel_does_CBO_underestimate_savings_from_reform_ib.pdf [http://perma.cc/UX9V-LHB6]. As previously stated, the CBO has rejected this claim. Kling, *supra* note 207, at 26.

213. Philip Joyce, *Evaluating the Impact of the Congressional Budget Office at Middle Age*, 43 CONGRESS & PRESIDENCY 279, 293 (2016).

214. *See, e.g.*, ISSUES IN DESIGNING A PRESCRIPTION DRUG BENEFIT FOR MEDICARE, CONG. BUDGET OFF. 49-52 (Oct. 2002), http://www.cbo.gov/sites/default/files/107th-congress-2001-2002/reports/10-30-prescriptiondrug.pdf [http://perma.cc/6K55-LPR3].

215. OFFSETTING EFFECTS OF PRESCRIPTION DRUG USE ON MEDICARE'S SPENDING FOR MEDICAL SERVICES, CONG. BUDGET OFF. 1, 3 & nn.7-14 (2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43741-MedicalOffsets-11-29-12.pdf [http://perma.cc/932V-EAAT].

fail to materialize, Congress has increased the deficit by the amount of non-materializing savings. The same thing would happen if Congress used increased funding for enforcement activities (e.g., IRS enforcement) as an offset for tax cuts or spending increases. If those uncertain potential savings fail to materialize, Congress has again increased the deficit by the amount of non-materializing savings. It is not clear why the CBO can estimate savings in the first case but not the second. From an accounting perspective, the two situations are the same.

Moreover, the CBO (along with academic research) has already recognized that changing funding for IRS enforcement,[216] continuing disability reviews,[217] HCFAC,[218] and unemployment insurance[219] have secondary effects. Given the CBO's already rigorous standards, its prior recognition of the potential for secondary effects is strong evidence that increased funding for these programs would, in fact, generate net savings. In other words, Congress should abolish the arbitrary distinction between budget savings which are scored and those which are not.

216. *See, e.g.*, Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 761-72 (2015); *Additional Information*, *supra* note 77 (estimating that proposed spending increases on IRS enforcement initiatives in the President's fiscal year 2012 budget proposal would generate net budgetary gains of $42 billion over ten years); Holtzblatt, *supra* note 4, at 35 (estimating that proposed spending increases on IRS enforcement initiatives in the President's fiscal year 2016 budget proposal would generate net budgetary gains of $36.6 billion over ten years).

217. *See, e.g.*, CONG. BUDGET OFFICE, CBO ANALYSIS OF AUGUST 1 BUDGET CONTROL ACT 4 (Aug. 1, 2011) (estimating that a $4 billion increase in appropriations for continuing disability will yield $12 billion in gross savings); CONG. BUDGET OFFICE, *supra* note 77 (estimating net savings for increased funding to the SSA for continuing disability reviews and redeterminations).

218. *See, e.g.*, CONG. BUDGET OFFICE, *supra* note 10, at 8 (estimating that each additional dollar of HCFAC funding generates $1.50 of gross savings).

219. *See, e.g.*, CONG. BUDGET OFFICE, *supra* note 12, at 6-7 (estimating two dollars in gross savings for every dollar appropriated for in-person reemployment and eligibility assessments and improper payment reviews for the unemployment insurance program); Rachel West et al., *Strengthening Unemployment Protections in America: Modernizing Unemployment Insurance and Establishing a Jobseeker's Allowance*, CTR. AM. PROGRESS 14-15 (June 2016), http://cdn.americanprogress.org/wp-content/uploads/2016/05/31134245/UI_JSAreport.pdf [http://perma.cc/Y9WS-ZNCF] (summarizing research showing "that added investment in re-employment services, especially when focused on UI [unemployment insurance] claimants, can pay for itself by shortening unemployment spells, facilitating better-quality matches between workers and employers, and lowering the cost of hiring for employers").

Finally, one might argue that the CBO cannot accurately score secondary effects, citing its misstep with the IRS in the mid-1980s.[220] As previously discussed, the CBO made two major mistakes when scorings the savings for the IRS: (1) it relied on the agency's overly optimistic estimates, and (2) it estimated the savings over too short a window of time.[221] But the Office is unlikely to make the same mistake today for a number of reasons.

For one thing, although the CBO still starts with IRS estimates, it now makes significant modifications, which leads to more prudent estimates.[222] For another, this Note's proposal would use a ten-year budget window to mitigate the inaccuracies of scoring long-term savings. But perhaps most importantly, the CBO now has significant experience scoring other secondary effects. CBO has estimated the secondary effects for dozens, if not hundreds, of funding increases for program integrity.[223] Additionally, CBO regularly estimates the secondary effects of changes in statutory authority.[224] The CBO's estimates are not always correct. But if they have been biased, the heavy evidentiary burden means that they have likely been biased toward *under*estimating secondary effects.[225] There is therefore little risk that this Note's proposal will lead to systematic gaming of the budget process. Rather, it will allow Congress to recognize real savings and thereby avoid the many problems resulting from the current process.

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220. *Cf.* Driessen, *supra* note 30, at 1663 & n.13 (arguing that the budget gimmicks present a "historical reason to be leery of the overstatement of the indirect revenue effects of IRS budget changes," but characterizing the guidelines as "overkill").

221. *See supra* notes 104-109 and accompanying text.

222. Holtzblatt & McGuire, *supra* note 89, at 13-17 (describing the modifications that the CBO makes to the IRS's return-on-investment estimates).

223. *See, e.g.*, *supra* notes 216-219 and accompanying text.

224. *See, e.g.*, CONG. BUDGET OFFICE, RECONCILIATION ACT, *supra* note 64.

225. *See* Gabel, *supra* note 212, at 6-7 (arguing that the CBO has underestimated the savings of various health care reforms); David M. Cutler, Observations on CBO's Scoring of Health Proposals (May 2015), http://www.brookings.edu/wp-content/uploads/2015/06/Cutler-slides.pdf [http://perma.cc/X32R-H5SS] (positing different theories for why the CBO overestimated the cost of the ACA). *But cf.* Brendan Mochoruk & Louise Sheiner, *CBO Scoring of Health Legislation*, BROOKINGS INSTITUTION 11 (Feb. 17, 2015), http://www.brookings.edu/wp-content/uploads/2015/06/Hutchins-Center-CBO-Health-Scoring-2015-Feb-17.pdf [http://perma.cc/S2NM-3GZX] ("In four of the five health care reform cases studied in this paper, health spending following major health reforms was significantly lower than CBO had projected. However, in the majority of cases, it is unclear whether CBO underestimated the impact of the health reform, or whether the underlying baseline projections were incorrect."); G. William Hoagland, Senior Vice President, Bipartisan Policy Ctr., Remarks at Hutchins Center on Fiscal & Monetary Policy at Brookings 1-3 (May 27, 2015), http://www.brookings.edu/wp-content/uploads/2015/06/Hoagland-remarks.pdf [http://perma.cc/T89B-MDBL].

V. FIXING THE PROBLEMS CREATED BY THE SCOREKEEPING GUIDELINES

Although only a few people outside the network of federal budgeteers have heard of—let alone considered—the scorekeeping guidelines, the guidelines have significant consequences for our system of lawmaking and federal enforcement policy. Specifically, this Note's proposal corrects three kinds of problems created by the guidelines. First, repealing the guidelines will eliminate pathologies in the legislative process that encourage Congress to underfund program integrity and agency enforcement, expand enforcement authorities and regulatory burdens, and privatize government programs and contract out enforcement activities. Second, repealing the guidelines will enhance agency performance by increasing agency autonomy and creating incentives for more vigorous enforcement. Third and finally, repealing the guidelines will eliminate the unfair distributional consequences of subsidizing tax cheats and fraudulent providers and weakening social insurance programs.

These changes are consistent with core commitments of both parties. They enable Republicans to reduce bureaucratic dysfunction and regulatory complexity, and Democrats to protect entitlement programs. Moreover, the proposal furthers jointly held policy goals, like reducing fraud and arbitrary government subsidies.

A. Legislative Process

This Note's proposal would eliminate pathologies in the legislative process created by Guidelines #3 and #14. The guidelines, in conjunction with the zero-sum appropriations process, encourage Congress to underfund enforcement. This proposal would encourage a more efficient funding level by aligning Congress's electoral incentives with sound public policy. In addition, repealing Guidelines #3 and #14 would make Congress more resistant to interest-group capture by creating a broad constituency for funding agency enforcement and program integrity. Lastly, this proposal eliminates the scorekeeping incentives for Congress to expand executive enforcement authorities. Rather than create additional regulatory burdens through the creation of new enforcement authorities, Congress should simply increase its funding for existing enforcement programs.

1. Increasing Funding

Congress underfunds program integrity and agency enforcement because these programs provide legislators with minimal political benefit. Members of

Congress understandably prefer to fund popular programs—those supported by constituents and interest groups—for which they can claim credit.[226] Legislators cannot, for example, run for reelection on a platform of funding more tax audits. Indeed, even members of Congress have acknowledged their funding incentives. As Senator J. Robert Kerrey noted in response to a vote to cut IRS funding, most Senators think, "I don't get my votes back home from IRS increases."[227]

In other words, agency enforcement and program integrity are examples of "zero credit" policies.[228] These policies "offer[] no captureable political returns even though [they] ha[ve] large net social benefits."[229] Neither voters nor interest groups demand funding for these programs. Moreover, in the case of the IRS, funding for program integrity may be better thought of as a "negative credit" policy, as members of Congress may face criticism from ideological opponents of the agency.

The zero-sum dynamic of the budget process puts further pressure on the Appropriations Committees to shift funding away from program integrity because every dollar spent on such programs is one less dollar that the committees can use for more popular initiatives.[230] For example, the House and Senate Appropriations Subcommittees on Labor, Health and Human Services, Education, and Related Agencies have stronger political incentives to appropriate funds to the National Institutes of Health (NIH) for combatting tragic diseases than to the Centers for Medicare & Medicaid Services (CMS) for combatting Medicare fraud.[231] Many patient advocacy groups lobby for more medical research; very few groups advocate for more medical record reviews. The predictable result of these dynamics is that Congress underfunds enforcement agencies and program integrity activities. This underfunding problem is so predictable that, soon after

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226. MAYHEW, *supra* note 173.

227. *See* DONALD L. BARLETT & JAMES B. STEELE, THE GREAT AMERICAN TAX DODGE 125 (2000) (citing John Godfrey & Ryan J. Donmoyer, *Senate Panel Approves Deeper Cuts in IRS Budget*, 68 TAX NOTES 510, 510 (1995)).

228. *See* Gerber & Patashnik, *supra* note 173, at 12.

229. *Id.*

230. James A. Thurber, *Congressional Budget Reform: Impact on the Appropriations Committees*, 17 PUB. BUDGETING & FIN. 62, 69 (1997) (arguing that the zero-sum appropriations process "intensified pressure on the members of the Appropriations Committees to protect their favorite programs and to make cuts in other programs").

231. John K. Iglehart, *Doing More with Less: A Conversation with Kerry Weems*, 28 HEALTH AFF. w688, w691-92 (2009) ("[T]he basis for this underinvestment [in fighting fraud and abuse] is . . . [that] elected officials would rather spend money on programs of greater interest to their constituents—the more popular biomedical research and public health efforts at NIH and CDC.").

Congress enacted the budget limits that created the zero-sum dynamic, it also created cap adjustments in anticipation of the problem.[232]

This Note's proposal reverses this political dynamic. If the CBO scored secondary effects from program administration, then increased funding for program integrity and agency enforcement would generate more money to spend on other programs or to finance tax cuts. In this way, scoring secondary effects would create a broader political constituency for these programs as interest groups would have an incentive to lobby members of Congress to generate this extra funding. For example, patient advocacy groups seeking additional funding for the NIH could encourage legislators to fund it by increasing spending on HCFAC. In other words, members of Congress would no longer cut HCFAC spending to fund the NIH; they would, instead, *increase* HCFAC spending to fund it.

To be clear, under this Note's proposal, program integrity and agency enforcement programs themselves remain zero-credit policies. Members of Congress still cannot campaign on more Medicare audits. But if CBO began to score secondary effects, then program integrity and enforcement would become a political asset that would allow legislators to enact and take credit for more popular policies. Put another way, these programs would indirectly create positive credits for politicians. And as a result, Congress would likely increase funding for program administration to a more appropriate level.

This Note's proposal, unlike cap adjustments, would also increase the political costs of cutting spending on program administration and would, thereby, create a bulwark against interest-group capture of the appropriations process. When CBO scored cuts to program administration, its score would reflect the primary effects (the cuts to agency funding) and the secondary effects (increased spending or reduced revenue resulting from the program cuts). In short, the score would reflect the true costs of the policy. In many cases, CBO would score cuts to agency enforcement and program integrity as deficit-increasing. And if Congress continued to cut funding for program administration, these deficit-increasing effects would grow in size as the cuts increasingly crippled agency operations. Scoring secondary effects would therefore make cuts to program administration politically untenable as such cuts would reduce the funding available for other programs.[233] Although certain interest groups may still oppose agency enforcement or program integrity—for financial or political reasons—

232. *See supra* Part III.

233. Even when cuts to program integrity are not fully offset by the resulting increase in spending or loss of revenue, this proposal will still weaken the political incentives for members of Congress to cut program integrity funding. These incentives will be reduced as each dollar of funding cut generates less than a dollar of savings to reallocate to more popular alternatives.

their opposition would now be counterbalanced by other interest groups who would be trying to use increased program administration as an offset for other more popular programs.[234]

2. *Limiting Enforcement Authority*

Guidelines #3 and #14 currently encourage Congress to create new enforcement authorities and compliance requirements—where the secondary effects are scored—rather than to fund existing authorities—where the secondary effects are not scored. New authorities and requirements provide agencies with the necessary tools to respond to new issues. Nevertheless, the incentive for Congress to expand authorities instead of funding imposes unnecessary costs on the private sector and government agencies. This Section will show why repealing the guidelines would eliminate this incentive and will explain the costs it imposes.

Congress could slow the growth of complexity in its programs by repealing Guidelines #3 and #14. Because the budget process places so much emphasis on budget neutrality, Congress often prioritizes savings recognized by the scorekeepers (i.e., scorable savings) over broader public policy concerns. It is not enough that a policy will reduce the deficit; the cost estimate must state that the policy will reduce the deficit. Since Guidelines #3 and #14 do not allow the CBO to score the secondary effects from existing program integrity authorities, Congress has little incentive to increase funding for existing authorities.[235] As a result, when legislators do decide that more robust enforcement is necessary, they have a strong incentive to create new enforcement authorities—with scorable savings—which in turn imposes new compliance requirements on private parties. In other words, the scorekeeping guidelines contribute to regulatory bloat.[236]

The scorekeeping guidelines produced the expected effect in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[237] After passing large tax cuts

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234. Garrett, *Harnessing Politics*, *supra* note 26, at 517-18 (describing interest groups identifying and advocating for offsets to finance their own preferred policies).

235. *See* Gerber & Patashnik, *supra* note 173, at 12.

236. *See, e.g.*, Graetz, *supra* note 27, at 672 (citing "the tendency of congressional decisionmakers to enact complex and otherwise indefensible legal rules simply in order to make revenue estimates 'come out right'"); Steven M. Teles, *Kludgeocracy in America*, 17 NAT'L AFF. 97, 109 (2013) ("Public policies would also become less kludgy if Congress shifted the power over the 'micro-design' of policies away from Capitol Hill and toward the agencies that will actually have to administer them once they are passed.").

237. At the time, Scorekeeping Guidelines #3 and #14 had not yet been formalized. Nevertheless, the scorekeepers were still adhering to them. James W. Wetzler, *Comment on Alan H. Plumley* the year before, Congress decided to increase revenues to ensure fiscal stability.[238] But rather than fund existing IRS enforcement programs (which would not result in scorable savings), Congress "imposed various additional reporting, penalty, and withholding burdens on taxpayers"[239] (which would result in scorable savings). James Wetzler, the chief economist of the Joint Committee on Taxation during TEFRA's drafting, described the influence of budget scoring on the law-making process:

> Because the political support for stronger tax enforcement was driven to a certain degree by the exigencies of budget accounting, it was somewhat vulnerable to budgetary gamesmanship. As a result, the provision of additional inputs for the tax administration program consisted largely of additional burdens placed on taxpayers, not additional outlays for the IRS, because budget scorekeeping enabled policymakers to score revenue gained from legislation that imposed additional burdens on taxpayers toward their deficit-reduction targets but generally not revenue gained from additional funds appropriated to the IRS.[240]

The same incentives that created distortions in the tax code may have also created distortions elsewhere.[241] The rampant underfunding of government agencies combined with the growth of enforcement authorities provides circumstantial evidence that the scorekeeping guidelines and budget process may skew federal enforcement schemes. Congress's treatment of food safety at the Food and Drug Administration (FDA) provides a particularly stark example. In 2010, following outbreaks of tainted eggs, peanut butter, and spinach, Congress enacted the Food Safety Modernization Act to improve FDA's enforcement capabilities.[242] A sweeping expansion of FDA's food safety authority, the Act increased the frequency of inspections, expanded oversight to more farms, and

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& C. Eugene Steuerle, Ultimate Objectives for the IRS: Balancing Revenue and Service, *in* THE CRISIS IN TAX ADMINISTRATION 341, 343 (Henry J. Aaron & Joel Slemrod eds., 2004); *see also* Section II.A (describing the pre-guidelines practice of not scoring secondary effects).

238. Wetzler, *supra* note 237, at 343-44.

239. *Id.* at 343.

240. *Id.* at 344. Even though TEFRA predates Gramm-Rudman-Hollings by three years, the dynamic was the same. Congress needed savings that the scorekeepers would recognize, so it passed policies producing scorable savings.

241. *See, e.g.*, Ramirez, *supra* note 35, at 517 (noting that "most proposals for regulatory reform [of financial markets] have not focused on" agency funding).

242. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011); Ron Nixon, *Funding Gap Hinders Law for Ensuring Food Safety*, N.Y. TIMES (Apr. 7, 2015), http://www authorized the FDA to conduct mandatory recalls.[243] The CBO estimated that between fiscal years 2011 and 2015 the FDA would need over $1 billion to implement the law.[244] But over this period, Congress only increased FDA funding for food safety and implementing the Act by $168 million.[245] In other words, Congress expanded the FDA's enforcement authority (which required no offsets) but did not follow through with increased funding (which would have required offsets).

One core problem with the incentive to expand enforcement authorities is that it imposes greater compliance costs, uncertainty, and legal risk on the public. New enforcement authorities create compliance costs when taxpayers and regulated entities must go through the costly process of learning about and taking steps to comply with new laws.[246] These costs may be undesirable in their own right, but they also have harmful effects on the broader economy. For example, increasing compliance costs can create uncertainty and make it challenging for businesses to plan and invest.[247] This, in turn, can undermine economic growth.[248] Increased compliance costs can also heighten barriers to entry, which likewise slow growth.[249] Admittedly, additional audits and inspections—from increased funding for existing enforcement authorities—also impose costs on the private sector. But they do not carry the extra compliance costs involved with navigating a changing and increasingly complex regulatory regime.

.nytimes.com/2015/04/08/us/food-safety-laws-funding-is-far-below-estimated-requirement.html [http://perma.cc/B3AT-V3TA].

243. RENÉE JOHNSON, CONG. RESEARCH SERV., R44309, FY2016 APPROPRIATIONS: SELECTED FEDERAL FOOD SAFETY AGENCIES 1 (2016).

244. *Id.* at 2.

245. *Id.*

246. Linda A. Schwartzstein, *Smoke and Mirrors: Tax Legislation, Uncertainty and Entrepreneurship*, 6 CORNELL J.L. & PUB. POL'Y 61, 67-68 (1996); Taxpayer Advocate Serv., *2012 Annual Report to Congress, Volume One*, INTERNAL REVENUE SERV. (2012), http://taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Most-Serious-Problems-Tax-Code-Complexity.pdf [http://perma.cc/SQ7B-G4B8] (providing the "estimate[] that the costs of complying with the individual and corporate income tax requirements for 2010 amounted to $168 billion—or a staggering 15 percent of aggregate income tax receipts" and arguing that the tax code's complexity is a serious problem for consumers).

247. Schwartzstein, *supra* note 246, at 62.

248. *Id.* Of course, it is also possible that the new rules have a net public benefit.

249. *See* Pontus Braunerhjelm & Johan E. Eklund, *Taxes, Tax Administrative Burdens and New Firm Formation*, 67 KYKLOS 1, 8-9 (2014).

Creating new enforcement authorities and compliance requirements also burdens agencies and frustrates political accountability.[250] Just as complexity imposes costs on bewildered consumers, it also imposes costs on the agencies that must help consumers comply with the law. For example, the IRS received 115 million calls in 2011, and, unsurprisingly, struggled to answer them all.[251] In addition, the complexity of federal policies also makes the political process more opaque. As a consequence, it has become more difficult for the public to assess the true size of the government and it has become easier for policymakers to succumb to rent-seeking.[252] Not surprisingly, then, complexity also makes the public more suspicious of a government that appears increasingly incompetent and corrupt.[253]

With Scorekeeping Guidelines #3 and #14 repealed, the CBO would score the secondary effects of enforcement spending just as it does for changes in enforcement authority. The proposal would treat increasing an agency's authority and increasing an agency's funding as equivalent policies from a budget perspective and would, therefore, no longer incentivize Congress to expand authority rather than funding.

3. *Discouraging Unnecessary Privatization and Contracting Out*

Scorekeeping Guidelines #3 and #14 have also encouraged Congress to privatize government programs and contract out enforcement programs. On the privatization front, because the scorekeeping guidelines cause Congress to underfund government enforcement, understaffed agencies have performance problems, including high error rates and backlogged responsibilities. These problems make it easier for critics in Congress to justify private contractors. Proponents of privatization often cite program integrity failures when defending efforts to privatize these programs. They argue that program integrity failures produce unsustainably high spending that should be solved by market-based solutions.[254]

250. Teles, *supra* note 236, at 98-103.

251. Taxpayer Advocate Serv., *supra* note 246, at 9.

252. Teles, *supra* note 236, at 100-01.

253. *Id.* at 101-02; Taxpayer Advocate Serv., *supra* note 246, at 8 ("Simplifying the tax code so tax policy choices and computations are more transparent would go a long way toward reassuring taxpayers that the system is not rigged against them.").

254. *See, e.g.*, Tad DeHaven, *The Rising Cost of Social Security Disability Insurance*, 733 POL'Y ANALYSIS 1, 3, 10-11 (Aug. 6, 2013), http://object.cato.org/sites/cato.org/files/pubs/pdf/pa733_web.pdf [http://perma.cc/2YNF-T9JG] (arguing that misuse of SSDI has contributed to "skyrocketing expenditures" and that policymakers should therefore "leav[e] the provision of

For example, Daniel Kessler cites Medicare's susceptibility to fraud as a rationale for converting Medicare to a "premium support" model.[255] Kessler argues that program integrity protections in Medicare remain underfunded because of provider opposition to more aggressive oversight. Kessler then argues that Medicare's fraud and abuse problems—as well as several other problems with the program—cannot be fixed through conventional program changes but instead require the privatization of Medicare.[256] This Note, in contrast, argues that the repeal of Scorekeeping Guidelines #3 and #14 would create strong incentives for Congress to enhance funding for program integrity and resist interest-group pressure.[257]

In addition to making entitlements more vulnerable to privatization, Scorekeeping Guidelines #3 and #14 have also encouraged the contracting-out of government auditing and tax collection. When Congress is considering a bill to direct an agency to hire private audit contractors, the CBO and the Budget Committees must determine whether Guidelines #3 and #14 apply. Put another way, the CBO (in consultation with the Budget Committees) must determine whether the bill gives the agency "new tools" for enforcement—and thus is exempt from the guidelines' prohibition on scoring secondary effects—or effectively gives the agency more funds to hire contractors to do the same work as federal employees—and thus is subject to the guidelines' prohibition.[258] Notably, this "new tools" criterion is another way that the guidelines create incentives for Congress to expand agency authority.[259]

Often, the CBO must make difficult, fine-grained distinctions to determine if the guidelines apply to a given bill.[260] Most of these audit contractor bills direct the agency to pay the contractor a contingency fee tied to a percent of the improper payments recovered. Such bills can at least arguably provide the agency

long-term disability insurance to the private sector"); Avik Roy, *Why Washington Lets Medicare and Medicaid Fraudsters Bilk Taxpayers of Trillions*, FORBES (July 21, 2011, 09:52 AM), http://www.forbes.com/sites/aroy/2011/07/21/why-washington-lets-medicare-and-medicaid-fraudsters-bilk-taxpayers-of-trillions [http://perma.cc/QHP5-JL7G] (citing Medicare waste, fraud, and abuse as "one of the most important reasons why premium support is a superior approach to Medicare reform").

255. Daniel P. Kessler, *Real Medicare Reform*, 13 NAT'L AFF. 77, 87-89 (2012).

256. *Id.*

257. *See supra* Section V.A.1.

258. Interview with Budget Staffer #6, *supra* note 102; Interview with Congressional Budget Office Staffers, *supra* note 20; *cf.* Holtzblatt & McGuire, *supra* note 89, at 18 (providing examples of "new enforcement tools" for the IRS).

259. *Cf. supra* Section V.A.2.

260. Interview with Congressional Budget Office Staffers, *supra* note 20.

with "new tools" and thus generate scorable savings. By contrast, legislation providing an agency with additional funds to employ auditors cannot.[261] Although the CBO must make distinctions that do not always reflect substantial policy differences, these distinctions nevertheless have large political consequences. If the guidelines do not apply, the provision is scored as deficit reducing and is thus a political asset. By contrast, if the guidelines do apply, the provision is estimated as deficit increasing and is thus harder to pass.[262]

When the CBO scores savings for contracting out legislation—treating the law as creating "new tools" for enforcement—the guidelines are providing the legislation with a political subsidy.[263] The creation of the Medicare recovery audit contractors and the IRS's private debt collection agencies demonstrates the importance of this subsidy. In 2003, Congress directed CMS to conduct a contractor demonstration by hiring recovery contractors to audit Medicare payments in at least two states.[264] The CBO scored the provision as deficit neutral, presumably making a conservative estimate that contingency fees paid to contractors would be offset by recovered payments on a one-to-one basis.[265] Since funding for additional federal employees to perform these audits would have been treated as deficit-increasing, it is less likely that Congress would have enacted such an option.[266] Similarly, if the CBO had applied Guideline #14 to the

261. Even if Congress created a revolving fund for the agency (i.e., the agency could retain a portion of its recoveries) and the CBO did not apply the guidelines to the fund, the CBO, all things equal, would estimate less savings for the revolving fund than for contracting out. Interview with Congressional Budget Office Staffers, *supra* note 20 (reasoning that the profit motive of a private contractor is greater than the desire of an agency to increase its budget).

262. *See supra* Section V.A.1.

263. I am not implying and do not believe that the CBO intends to bolster efforts to contract out government services or has a view on the policy merits of such proposals. I am simply referring to the effects of the guidelines as applied. Moreover, as previously stated, the CBO does not have a position on the merits of Guidelines #3 and #14. *See supra* note 20 and accompanying text.

264. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 306, 117 Stat. 2066, 2256-57.

265. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 1, MEDICARE PRESCRIPTION DRUG AND MODERNIZATION ACT OF 2003, at 62 tbl.13 (2003). The CBO (in consultation with the Budget Committees) later estimated that Medicare recovery audit contractors would have a four-to-one return on investment. CONG. BUDGET OFFICE, COST ESTIMATE FOR H.R. 6111, TAX RELIEF AND HEALTH CARE ACT OF 2006, at 14 (2006) [hereinafter CBO, COST ESTIMATE FOR TRHCA].

266. The budget resolution allotted $400 billion for the Medicare reform law, placing tremendous pressure on policymakers to control the bill's score. *See* KIMBERLY J. MORGAN & ANDREA LOUISE CAMPBELL, THE DELEGATED WELFARE STATE: MEDICARE, MARKETS, AND THE GOVERNANCE OF SOCIAL POLICY 132-33 (2011).

contractor program—as it did when Congress expanded the program nationwide in 2006—the bill would have also been treated as deficit-increasing and Congress would have been less likely to include the program in the law.[267]

The scorekeeping guidelines have also directly encouraged Congress to contract out elements of tax collection. In the early 2000s, with low funding and no prospects of receiving a funding increase, the IRS sought legislative authority to outsource some of its tax collection to private contractors.[268] The provision was estimated to save about $680 million over ten years: the CBO projected a $678 million spending increase and the Joint Committee on Taxation (JCT)—Congress's primary scorekeeper on tax legislation—projected $1.36 billion in additional revenue.[269] For the contracting out bill, the CBO and JCT included the secondary effects of increased recoveries even though the CBO, per the guidelines, does not score the secondary effects of increased funding for federal employees.[270] Moreover, in other analogous contexts, the CBO has not scored the secondary effects of contingency payments to private contractors.[271]

But by scoring the provision as a net saver, the CBO and JCT boosted the proposal's political prospects. According to one stakeholder, "The conversation changed or stopped once it was scored and set up there as an offset."[272] A lobbyist

267. *See* CBO, COST ESTIMATE FOR TRHCA, *supra* note 265, at 14. The CBO scored the provision as a deficit increase of $4.4 billion despite estimating it would generate gross savings of over $16 billion in secondary effects. Yet by this time, fiscal discipline in Congress had waned, and PAYGO was not a limiting factor. Based on a review of available cost estimates, by 2006, the CBO was applying Scorekeeping Guideline #14 to recovery audit contractors and was no longer treating them as "new tools." *See infra* note 271.

268. GARY GUENTHER, CONG. RESEARCH SERV., RL33231, THE INTERNAL REVENUE SERVICE'S PRIVATE TAX DEBT COLLECTION INITIATIVE: CURRENT STATUS, LEGISLATIVE PROPOSALS, AND ISSUES FOR CONGRESS 5 (2008). The IRS had previously piloted private debt collection agencies, but the program lost money and was canceled early. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-129R, ISSUES AFFECTING IRS' PRIVATE DEBT COLLECTION PILOT (1997).

269. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 4520, AMERICAN JOBS CREATION ACT OF 2004, at 10 (2004); JOINT COMMITTEE ON TAXATION, JCX-69-04, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 4520, THE "AMERICAN JOBS CREATION ACT OF 2004" 9 (2004).

270. The JCT would not be responsible for scoring legislation increasing funding for program administration.

271. CONG. BUDGET OFFICE, COST ESTIMATE, S. 1409, IMPROPER PAYMENTS ELIMINATION AND RECOVERY IMPROVEMENT ACT OF 2011, at 3-4 (2012) (stating that recovery audit contractors for income support programs would be subject to Scorekeeping Guideline #14); CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 4872, THE RECONCILIATION ACT OF 2010, at 11 tbl.5 (2010) (displaying the savings from a Medicaid recovery audit contractor program as non-scorable).

272. Amy Hamilton, *The "Fight" over the IRS Hiring Private Debt Collectors*, 101 TAX NOTES 321, 321 (2003) (quoting Colleen Kelley, President of the National Treasury Employees Union, an organization that represents IRS employees and opposed the program).

commented that the proposal was "being considered [as an offset] for almost every tax bill."[273] The program was ultimately included as a deficit-reducing provision in the American Jobs Creation Act of 2004.[274] Although we cannot know whether the positive score was decisive, it clearly had a positive impact. If the CBO and JCT had applied Scorekeeping Guideline #14 to the provision, it would not have been treated as deficit-reducing; it would have, instead, been treated as deficit-increasing and thus required its own offset. The same dynamic transpired ten years later. In 2009, the IRS decided to cancel the private debt collection program due to poor performance.[275] Yet Congress ultimately required the IRS to restart the program.[276] Estimated to save $2.4 billion over ten years, Congress included the provision as a deficit-reducing offset in a 2015 law extending the Highway Trust Fund.[277]

At each step of the legislative process, the discrepancy in how the CBO and JCT scored private debt collectors as compared to IRS staff provided a political subsidy to contracting out. This political subsidy is particularly concerning as the federal government may already contract out too many of its functions.[278] According to critics, contracting out costs more than having the same work done by government employees,[279] aggravates the complexity of federal programs,[280] and undermines democratic accountability and government performance reform efforts.[281] Some of these problems can be seen in the IRS's use of private debt

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273. Amy Hamilton, *Senate Taxwriters OK Proposal for Private Collection Agencies*, 101 TAX NOTES 11, 11 (2003).

274. Pub. L. No. 108-357, § 881, 118 Stat. 1418, 1626-27 (codified at I.R.C. § 6306 (2012)).

275. *See* GARY GUENTHER, CONG. RESEARCH SERV., IF10339, IN FOCUS: THE NEW INTERNAL REVENUE SERVICE PRIVATE TAX DEBT COLLECTION PROGRAM 2 (2016).

276. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32102, 129 Stat. 1312, 1733-36 (2015).

277. *See id.*; CONG. BUDGET OFFICE, COST ESTIMATE, THE CONFERENCE AGREEMENT ON H.R. 22, THE FAST ACT, AS POSTED ON THE WEBSITE OF THE HOUSE COMMITTEE ON RULES ON DECEMBER 1, 2015, at 4 tbl.2 (2015) (estimating the provision would increase direct spending by $2.408 billion and increase revenue by $4.816 billion dollars).

278. *See generally* JOHN J. DIIULIO JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT 29-54 (2014).

279. *Id.* at 74-75.

280. *Id.* at 7.

281. *Id.* at 6-7.

collectors. Private collectors are likely less efficient than IRS employees,[282] increase the risk of taxpayers being scammed by third-parties,[283] and disproportionately target low-income taxpayers.[284]

This Note's proposal would eliminate any remaining subsidy for private contractors by scoring the secondary effects of both contractors and government employees. Moreover, it would encourage Congress to direct agencies to use the more efficient option. If CBO believes private contractors or agency staff are more efficient, Congress will generate greater savings by using the more efficient option.

B. Agency Administration

As Congress has expanded statutory authorities and reduced or held constant agency funding, the administrative capacity of enforcement agencies and, in turn, their political autonomy have suffered. As argued above, Congress has strong incentives to expand statutory authority without expanding funding.[285] At the same time, the implementing agency must often devote resources to implement the new authority. When implementation problems and program integrity failures predictably arise, agency autonomy is undermined.[286] By enhancing agency funding and thereby reducing program integrity problems, this

282. Taxpayer Advocate Serv., *2013 Annual Report to Congress, Volume Two Section Six, The IRS Private Debt Collection Program*, INTERNAL REVENUE SERV. 98-108 (2013), http://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/The-IRS-Private-Debt-Collection-Program-A-Comparison-of-Private-Sector-and-IRS.pdf [http://perma.cc/NJ6F-TLS4] (finding that the IRS was more efficient than contractors in the last private debt collection initiative).

283. Kelly Phillips Erb, *Congress Gets Earful from Watchdogs on IRS Private Debt Collection Program*, FORBES (June 1, 2017, 8:08 PM), http://www.forbes.com/sites/kellyphillipserb/2017/06/01/congress-gets-earful-from-watchdogs-on-irs-private-debt-collection-program [http://perma.cc/A28Z-JQQJ] (citing concerns from Treasury Inspector General for Tax Administration J. Russell George).

284. Taxpayer Advocate Serv., *Private Debt Collection: Hardship (Part 2 of 3)*, NTABLOG (July 12, 2017), http://taxpayeradvocate.irs.gov/news/private-debt-collection-hardship-part-2-of-3 [http://perma.cc/4CGF-WZXB].

285. *See supra* Section V.A.2.

286. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-317, HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS 500 (2017) ("IRS's capacity to implement new initiatives, carry out ongoing enforcement and taxpayer service programs, and combat identity theft (IDT) refund fraud under an uncertain budgetary environment remains a challenge."). I am not arguing, however, that additional funding will guarantee competence and autonomy. The IRS is grossly underfunded, but money alone will not solve all of its problems. *See* Steve R. Johnson, *The Future of American Tax Administration: Conceptual Alternatives and Political Realities*, 7 COLUM. J. TAX L. 5, 19-22 (2016).

Note's proposal makes agencies and their programs less vulnerable to these attacks. The proposal also gives these agencies strong incentives to vigorously enforce the law.

1. *Enhancing Bureaucratic Autonomy*

The program integrity failures that inevitably arise when agencies are underfunded prevent affected agencies from cultivating "bureaucratic autonomy."[287] Such failures undermine an agency's "demonstrated capacity" – "the *belief* by political authorities and citizens that agencies can provide benefits, plans, and solutions to national problems."[288] The perception of poor agency performance is strongly correlated with limited administrative discretion.[289] Moreover, a poor reputation makes it all but impossible for an agency to exercise autonomy from elected officials.[290] Without autonomy, "bureaucracies can be excessively slow moving and indecisive because they are excessively rule bound."[291] Indeed, "[a] high degree of autonomy is what permits innovation, experimentation, and risk taking in a bureaucracy."[292]

Despite the predictability of many program integrity problems, members of Congress regularly berate agencies when these problems arise. For example, at a 2016 congressional oversight hearing on health care fraud and abuse, Representative Chris Collins told Dr. Shantanu Agrawal, Deputy Administrator and Director of the Center for Program Integrity, "If you worked for me, you'd be

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287. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 4 (2001) ("Bureaucratic autonomy occurs when bureaucrats take actions consistent with their own wishes, actions to which politicians and organized interests defer even though they would prefer that other actions (or no action at all) be taken.").

288. *Id.* at 14.

289. *See* Francis Fukuyama, *Commentary: What Is Governance?*, 26 GOVERNANCE 347, 357 (2013) (arguing that "[a]utonomy . . . is inversely related to the number and nature of the mandates issued" by the legislature); Jason A. MacDonald & William W. Franko, Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RES. 790, 790-93 (2007) (finding that agency performance is inversely correlated with the number of limitation riders attached to agencies' appropriations).

290. CARPENTER, *supra* note 287, at 17 ("[T]he key prerequisite for autonomy is bureaucratic reputation.").

291. Fukuyama, *supra* note 289, at 358.

292. *Id.* at 359.

fired this afternoon."[293] This criticism was made with no recognition of Congress's long history of underfunding CMS, which houses the Center for Program Integrity.[294] Moreover, the criticism ignored Congress's failure to fully utilize the program integrity cap adjustment for HCFAC in four of the past five fiscal years.[295] As Kerry Weems, the acting Administrator of CMS from 2007 to 2009, noted:

> This is one of the real frustrations for CMS leaders: on the one hand, the agency is lacerated by Congress because every day there is a new fraud story, a new OIG report, or a new GAO . . . report, and on the other hand, you feel very vulnerable because, essentially, the agency is being denied the resources necessary to tackle a task where billions of federal dollars are at stake.[296]

Congress has levied similar criticism against the IRS. At a 2016 hearing, Representative Jim Jordan cited the IRS's program integrity problems to bolster his criticism of the Agency's investigation of 501(c)(3) and 501(c)(4) organizations: "The very agency that has a $385 billion tax gap [but] can't even do half of the recommendations that GAO says you should do to accomplish your fundamental mission has time to target people for exercising their First Amendment [rights]."[297] This criticism was also made in spite of Congress's persistent underfunding of the IRS.[298] This Note's proposal would make the IRS and other agencies less prone to such criticism by increasing their funding.[299] With more funding, agencies will have the resources needed to limit embarrassing program integrity failures and cultivate bureaucratic autonomy.

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293. Shannon Muchmore, *CMS Lambasted for Failing To Curb Medicaid, Medicare Fraud and Abuse*, MOD. HEALTHCARE (May 24, 2016), http://www.modernhealthcare.com/article/20160524/NEWS/160529959 [http://perma.cc/7C58-3SZB].

294. *See* Stuart M. Butler et al., *Crisis Facing HCFA & Millions of Americans,* 18 HEALTH AFF. 8, 8-9 (1999).

295. *See infra* Table 3.

296. Iglehart, *supra* note 231, at w692.

297. Fred Stokeld, *IRS Subject of Heated Debate at House Hearing*, 151 TAX NOTES 428, 429 (2016).

298. *See* Chuck Marr & Cecile Murray, *IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement*, CTR. ON BUDGET & POL'Y PRIORITIES 1-4 (2016), http://www.cbpp.org/sites/default/files/atoms/files/6-25-14tax.pdf [http://perma.cc/34LQ-BNAF].

299. *See supra* Section V.A.1.

2. *Incentivizing Agency Enforcement*

In addition, the proposal in this Note will incentivize underperforming agencies to enhance their enforcement efforts. Margaret Lemos and Max Minzner have argued that financial incentives for public enforcement "are properly understood as tools with which policymakers can calibrate the desired intensity of enforcement."[300] Policymakers have applied these incentives to encourage private enforcement but have underutilized them for public enforcement.[301] Lemos and Minzner argue that financial incentives, such as revolving funds, can ameliorate inadequate agency enforcement.[302] At the same time, though, they acknowledge that financial incentives could create incentives for agencies to overenforce the law,[303] compete with other agencies for recoveries,[304] and prioritize large recoveries over other remedies, such as injunctive relief.[305] They consequently make a qualified argument for creating financial incentives for government agencies.[306]

Like revolving funds, the proposed scorekeeping changes in this Note would create financial incentives for agency enforcement. Although the proposal does not directly tie an agency's funding to its return on investment, it would cause appropriators to consider an agency's return on investment when distributing appropriations. Because agencies align their behavior to the metrics on which they are being evaluated,[307] under my proposal, agencies would also become more concerned with their return on investment.

Unlike revolving funds, however, this Note's proposal actually addresses the scorekeeping obstacles to funding agency enforcement. When Congress creates or expands a revolving fund, it must still offset the costs by raising taxes or decreasing spending to comply with PAYGO's budget neutrality requirements.[308]

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300. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 903 (2014).

301. *Id.* at 904.

302. *Id.* at 908. A revolving fund allows an agency to retain a specified percentage of its recoveries, though Congress typically caps the total funds that the agency can retain. As a result, the agency has a financial incentive to generate recoveries and thereby enhance its budget. *Id.* at 864.

303. *Id.* at 895-98.

304. *Id.* at 901-03.

305. *Id.* at 898-901.

306. *Id.* at 908.

307. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1170-73 (2016).

308. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE, S. 1319, 21ST CENTURY DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT 1 (2001) (estimating that expanding the DOJ's re-

In other words, revolving funds fail to address the underlying cause of enforcement underfunding. By contrast, my proposal would both address the underfunding problem and incentivize agency enforcement efforts. The proposal ameliorates the underfunding problem by encouraging Congress to appropriate funds for program integrity activities that show a positive return on investment.[309] And in response, agencies would increase their enforcement efforts to generate the positive returns that lead Congress to increase their funding.

Admittedly, this proposal—like revolving funds—could encourage agencies to engage in overenforcement, to compete with one another for recoveries, and to seek monetary damages over other remedies. Congress would certainly need to watch for these potential problems. But this concern should not prevent Congress from repealing the guidelines as legislators already respond to "fire alarms" from interest groups and the public when agencies engage in overenforcement.[310] As political scientist James Q. Wilson has observed, "Members of Congress may say they want an efficient Internal Revenue Service but in fact they want one that is efficient only up to a point—the point at which voters begin complaining that they are being harassed."[311]

Congressional and public oversight is not limited to unpopular agencies. In addition to the IRS, Congress has rebuked far more popular agencies for overzealous enforcement. In response to a 1980 law, the Social Security Administration aggressively used continuing disability reviews to reduce the number of people enrolled in Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). Public outcry ensued as individuals with clearly demonstrated disabilities lost their benefits. Congress subsequently held twenty-seven

volving fund would result in an increase in direct spending). If a new revolving fund is accompanied with a new audit authority, it could be characterized as a new tool and thus not subject to Scorekeeping Guidelines #3 and #14. *See, e.g.*, CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 1827, GOVERNMENT WASTE CORRECTIONS ACT OF 1999 (1999); *see also* Interview with Congressional Budget Office Staffers, *supra* note 20 (stating that all else equal, CBO recognizes greater savings from contracting-out than it does from creating revolving funds).

309. *See supra* Section V.A.1.

310. *See generally* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that Congress provides "fire-alarm oversight" by creating and responding to a decentralized system of citizen and interest group monitoring of agencies).

311. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 174 (2000). Perhaps this is an understatement. As political observers and tax scholars alike have argued, members of Congress have repeatedly used the IRS as a punching bag to bolster fundraising and win votes. *See, e.g.*, Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 COLUM. J. TAX L. 36, 77 (2016) (characterizing the IRS oversight hearings of the late 1990s and mid-2010s as "politicians . . . criticiz[ing] the IRS for simple political gain" (internal citations omitted)).

hearings before passing legislation reforming disability insurance.[312] In other words, as between chronic underenforcement and overenforcement, there is good reason to think that legislators will prevent agencies from overenforcing the law.

Still, Congress should strengthen its capacity for "police patrol" oversight.[313] Rachel Barkow, for example, has argued that Congress and the President should require agencies to report metrics that monitor and encourage enforcement goals.[314] If Congress repealed Guidelines #3 and #14, it could also require enforcement agencies to report measures that would enable Congress to identify potential agency overenforcement or misconduct. Additionally, Congress could direct inspectors general to more actively monitor agency enforcement patterns.[315] Repealing the guidelines could itself strengthen congressional oversight. Since the OIGs, on average, are deficit-reducing,[316] Congress would have an incentive to increase funding for them if the CBO determined that the savings were significant and well documented.[317]

A final reason why concerns around overenforcement should not stop Congress from repealing Guidelines #3 and #14 regards the timing of my proposal. Because the CBO requires clear and robust evidence of savings before it will include them in its budget score, my proposal would initially affect only a handful of agencies. Although the number of qualifying agencies could expand over time, the slow rollout would create opportunities for Congress to gauge the impact of the changed procedures on agency behavior and adjust accordingly.

C. Distributional Consequences

Beyond their effects on the legislative process and agency administration, Guidelines #3 and #14 also harm the public. Underfunding program integrity and agency enforcement can directly hurt individuals, such as when health care

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312. *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SECURITY BULL. 1, 15 (2005).

313. McCubbins & Schwartz, *supra* note 310, at 166 (defining "police patrol oversight" as a centralized system in which Congress, on its own initiative, monitors agency performance).

314. Barkow, *supra* note 307, at 1173-75.

315. *Id.* at 1175-80.

316. Hudak & Wallack, *supra* note 13, at 6.

317. *See supra* Section V.A.1.

fraud and abuse exposes patients to unnecessary and dangerous medical treatments.[318] But the guidelines also create broader distributional consequences. For one thing, underenforcement creates arbitrary and often regressive subsidies that favor those who cheat the system. For another, underenforcement allows fraud and waste to drain the federal trust funds that finance key social insurance programs. In turn, opponents can use the weakened finances to paint these programs as financially unsustainable and enact legislation cutting these social insurance programs. This Note's simple proposal seeks to remedy these problems.

1. *Reducing Arbitrary Subsidies*

Both Democrats and Republicans should be troubled by the ways in which inadequate agency enforcement and program integrity arbitrarily benefit some groups over others. What is even more concerning is that underfunding often benefits those who are least deserving—individuals who flout federal law—to the detriment of those who follow the law.

These arbitrary subsidies arise across a number of different programs. For example, inadequate funding for health care fraud enforcement enables health care providers to overbill Medicare. This fraud disproportionately benefits providers in specific states, such as Florida, Louisiana, and Texas.[319] In addition, although individuals who are no longer eligible for SSDI or SSI are generally not flouting federal law, inadequate funding for continuing disability reviews results in them continuing to receive program benefits. This outcome should be alarming both to Republicans, who have argued that SSDI is used to avoid work,[320]

318. *See, e.g.*, Office of Pub. Affairs, *Detroit-Area Neurosurgeon Admits Causing Serious Bodily Injury to Patients in $11 Million Health Care Fraud Scheme*, U.S. DEP'T JUST. (May 22, 2015), http://www.justice.gov/opa/pr/detroit-area-neurosurgeon-admits-causing-serious-bodily-injury-patients-11-million-health [http://perma.cc/W97A-MU5C] (describing a doctor "performing unnecessary, invasive spinal surgeries and implanting costly and unnecessary medical devices, all at the expense of his patients' health and welfare"). Inadequate funding can also harm a program's intended beneficiaries. Workers and employers are harmed when Congress underfunds reemployment services, which shorten unemployment spells, enable better matches between workers and employers, and reduce hiring costs. West et al., *supra* note 219, at 14-15.

319. Office of the Inspector Gen., *Medicare Fraud Strike Force*, U.S. DEP'T HEALTH & HUM. SERV. (2017), http://oig.hhs.gov/fraud/strike-force [http://perma.cc/MTK4-TWXY] (listing nine high-fraud areas with Medicare Fraud Strike Force Teams: Miami, Los Angeles, Detroit, southern Texas, Brooklyn, southern Louisiana, Tampa, Chicago, and Dallas).

320. *Off-Camera Briefing of the FY18 Budget by Office of Management and Budget Director Mick Mulvaney*, WHITE HOUSE (May 22, 2017, 1:35 PM), http://www.whitehouse.gov/the-press-office/2017/05/22/camera-briefing-fy18-budge-omb-director-mulvaney [http://perma.cc/XKN8

and Democrats, who want to protect the political legitimacy and financial viability of the program.[321]

Inadequate enforcement can also have regressive distributional consequences, as shown by the example of IRS enforcement. In recent years, inadequate funding has forced the IRS to shrink its workforce,[322] delay information technology projects designed to improve enforcement efforts,[323] and reduce spending on employee training.[324] With fewer staff and less institutional expertise, the Agency has scaled back its tax enforcement efforts. Between 2010 and 2015, the percentage of individual tax returns audited by the IRS has declined from 1.1% to 0.8%.[325] Admittedly, over this period, the IRS has shifted some of its diminished resources toward auditing high-income individuals.[326] But overall, the Agency is still conducting fewer audits of high-income taxpayers, and of taxpayers more generally.[327]

As Leandra Lederman has argued, reduced enforcement disproportionately benefits high-income and high-wealth taxpayers (including corporate taxpayers) for a number of reasons.[328] First, with its reduced capacity, the IRS is less effective at auditing high-income and high-wealth taxpayers.[329] As the IRS's

-SBST] ("If you're on disability insurance and you're not supposed to be—you're not truly disabled, we need you to go back to work.").

321. *See, e.g.*, *Wyden Responds to Republican Claims that Social Security Disability Insurance Is in "Crisis*,*"* SENATE COMMITTEE ON FIN. (Feb. 11, 2015), http://www.finance.senate.gov/ranking-members-news/wyden-responds-to-republican-claims-that-social-security-disability-insurance-is-in-crisis [http://perma.cc/8HNZ-E5QN] (calling for "measured, equitable and common-sense solutions that ensure the Social Security Disability Insurance program can pay all benefits on time and in full").

322. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-534R, INTERNAL REVENUE SERVICE: ABSORBING BUDGET CUTS HAS RESULTED IN SIGNIFICANT STAFFING DECLINES AND UNEVEN PERFORMANCE 6 (2014) (noting that the IRS had to lay off eight thousand full-time equivalent employees).

323. *Id.* at 24, 41 tbl.14.

324. *Id.* at 25 (documenting the reduction of employee training costs by eighty-three percent).

325. Marr & Murray, *supra* note 298, at 6.

326. Treasury Inspector Gen. for Tax Admin., *Improvements Are Needed in Resource Allocation and Management Controls for Audits of High-Income Taxpayers*, U.S. DEP'T TREASURY 1, 4 (2015), http://www.treasury.gov/tigta/auditreports/2015reports/201530078fr.pdf [http://perma.cc/56TL-78CD].

327. Marr & Murray, *supra* note 298, at 6.

328. Leandra Lederman, *The IRS, Politics, and Income Inequality*, 150 TAX NOTES 1329, 1332 (2016).

329. David Cay Johnston, *The Cost of the Shrinking IRS Budget*, 147 TAX NOTES 1043, 1043-44 (2015) ("Proposed adjustments [for large companies] fell 54 percent, which . . . likely reflects the increasing complexity of corporate finance and that the IRS is performing less thorough audits . . . .").

most experienced staff have retired and funding for training has dried up,[330] the IRS does not have the same expertise that it once did. High-income and high-wealth taxpayers generally have more complicated tax returns, which require greater expertise to decipher. As a result, these taxpayers disproportionately benefit from the IRS's diminished expertise.[331] Second, high-income and high-wealth taxpayers can more easily take advantage of abusive tax shelters because they have the financial ability to hire tax experts and use complicated asset structuring.[332] Third, these taxpayers simply gain more from underenforcement because they have more money and, thus, more tax liability to evade.[333] Inadequate enforcement therefore undermines the federal tax system's progressivity in fundamental and concerning ways.[334]

By increasing funding for enforcement, my proposal would reduce the fraud, waste, and abuse that generate these arbitrary subsidies. Conservatives and liberals alike should welcome that result. More concretely, Republicans opposed to health care fraud and Democrats opposed to corporate tax avoidance have good reasons to support this reform.

2. *Limiting Program Retrenchment*

Lastly, program integrity problems are doubly damaging for trust fund programs as they drain the fund's reserves and create opportunities for retrenchment.[335] The first problem is simple: when Congress underfunds trust fund program integrity—such as federal unemployment insurance grants to states, health care fraud enforcement, or SSDI continuing disability reviews—it undermines the financial viability of the respective trust funds and in turn the programs they finance.[336]

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330. Marr & Murray, *supra* note 298, at 3-4.

331. CHARLES LEWIS ET AL., THE CHEATING OF AMERICA: HOW TAX AVOIDANCE AND EVASION BY THE SUPER RICH ARE COSTING THE COUNTRY BILLIONS—AND WHAT YOU CAN DO ABOUT IT 267 (2001) ("[T]raditional tax avoidance schemes and crimes . . . are frankly beyond the current competence and budget of the Internal Revenue Service.").

332. Lederman, *supra* note 328.

333. *Id.*

334. *Id.* at 1333 ("[I]f the tax laws are not adequately enforced, the net effect of a progressive tax system may be to increase income inequality." (emphasis omitted)).

335. Although unemployment insurance, Medicare, and SSDI are not means-tested, legislation scaling back the programs would disproportionately harm the programs' beneficiaries, namely the unemployed, sick, and people with disabilities.

336. Those trust funds are the state unemployment insurance trust funds, Hospital Insurance Trust Fund, and the Disability Trust Fund.

But program integrity problems also lead to longer term efforts to scale back these programs. When fraud or waste drains trust funds, legislators respond by increasing contribution requirements or cutting benefits.[337] As Paul Pierson has noted,

> [i]n the United States, successful cutbacks (though not radical overhauls) in unemployment insurance, Social Security pensions, and Medicare were all produced at times of heightened concern over trust-fund balances. Trust-fund crises reshape the political debate in ways that facilitate cutbacks. The threat of financial shortages prevents program supporters from keeping cutbacks off the agenda and allows retrenchment advocates to argue that reductions are necessary to save the programs.[338]

States with depleted unemployment insurance trust funds often enact legislation increasing taxes and reducing benefits to bolster their trust fund's solvency.[339] These policies impose economic hardship on employers and program recipients.[340] Similarly, in 2015, members of Congress tried to use declining reserves in the Disability Insurance Trust Fund to justify cuts to SSDI.[341] While the Bipartisan Budget Act of 2015 restored the Fund's solvency without program retrenchment, the solvency crisis nevertheless created a "focusing event" for program opponents that might not have otherwise arisen.[342]

Jonathan Oberlander has demonstrated that when Medicare's Hospital Insurance Trust Fund has faced declining reserves with less than a decade of remaining funds, Congress has undertaken major Medicare reforms to enhance the trust fund's solvency.[343] Historically, these reforms have focused on cuts to health care providers and have not increased the financial burden on Medicare

337. *See* Eric M. Patashnik, *Unfolding Promises: Trust Funds and the Politics of Precommitment*, 112 POL. SCI. Q. 431, 432 (1997).

338. PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 173-74 (photo. reprint 1996) (1994) (footnote omitted).

339. Wayne Vroman, *Unemployment Insurance: Current Situation and Potential Reforms*, URB. INST. 6 (2009), http://webarchive.urban.org/UploadedPDF/411835_unemployment_insurance.pdf [http://perma.cc/8TC2-WZTB].

340. *Id.*

341. Stephen Ohlemacher, Associated Press, *House GOP Forcing 2016 Debate on Social Security's Finances*, CNSNEWS (Jan. 7, 2015, 9:06 PM), http://www.cnsnews.com/news/article/house-gop-forcing-2016-debate-social-securitys-finances [http://perma.cc/V5VZ-LWUQ] ("Advocates for older Americans say the [House procedural] rule could be used to help push through benefit cuts [to SSDI] . . . .").

342. Patashnik, *supra* note 337, at 448 n.43 (quoting political scientist John Kingdon).

343. JONATHAN OBERLANDER, THE POLITICAL LIFE OF MEDICARE 93 (2003).

beneficiaries,[344] but since 2003, Congress has demonstrated a much greater willingness to increase beneficiary expenses. Between 2003 and 2015, Congress raised Medicare Part B premiums for middle- and upper-income beneficiaries at least three times[345] and has prohibited supplemental plans from covering the Medicare Part B deductible.[346] Given recent trends, it now seems likely that Congress may increase costs for beneficiaries the next time the Hospital Insurance Trust Fund's reserves start drying up.

By encouraging Congress to fund program integrity, this Note's proposal will promote the long-term viability of trust funds and will prevent reductions in benefits or increased contribution requirements.

CONCLUSION

Every year the Treasury loses a significant amount of money to waste, fraud, and abuse. But such losses are easy to prevent: robust evidence suggests that increased funding for agency enforcement and program integrity could save the federal government billions of dollars. This Note argues that Congress has not embraced this simple reform because of a little-recognized feature of the budget process: the scorekeeping guidelines. Two guidelines in particular—#3 and #14—prevent the CBO from recognizing the savings from program administration and have therefore led Congress to underfund such programs.

This Note argues that Congress should repeal Guidelines #3 and #14 so that the CBO could score the secondary effects of funding fraud enforcement and program integrity efforts. This change would eliminate distortions in the legislative process, improve agency performance, and eliminate subsidies for fraudulent actors. This proposal would thereby advance key elements of each party's policy agenda. It would help Democrats protect social insurance programs, while helping Republicans reduce regulatory complexity and burdens on the private sector. Additionally, the savings from this proposal could finance either party's

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344. *Id.* at 100-01 ("In general, however, increasing beneficiary costs has not been a prominent response to funding shortfalls in Medicare hospitalization insurance . . . . However, there has been significant public support for charging wealthier beneficiaries more or cutting their benefits.").

345. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 811, 117 Stat. 2066, 2364-69 (adjusting Medicare Part B premiums for income); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 3308, 3402, 124 Stat. 119, 472-75, 488-89 (2010) (increasing the income-related premiums for Medicare Parts B and D); Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, § 402, 129 Stat. 87, 160 (same).

346. Medicare Access and CHIP Reauthorization Act at § 401.

agenda. Whether Democrat or Republican, members of Congress and their staffs should support this simple proposal.

APPENDIX

TABLE 2.
CAP ADJUSTMENT AVAILABLE[347]

Fiscal Year	Internal Revenue Service[348]	Unemployment Insurance[349]	Health Care Fraud and Abuse Control Program[350]	Continuing Disability Reviews[351]
1991	Y			
1992	Y			
1993	Y			
1994	Y			
1995	Y			
1996				Y
1997				Y
1998	Y*			Y
1999	Y*			Y
2000	Y*			Y
2001	Y*			Y
2002	Y*			Y
2003				
2004				
2005				
2006	Y	Y	Y	Y
2007				
2008	Y	Y	Y	Y
2009	Y	Y	Y	Y
2010	Y	Y	Y	Y
2011				
2012			Y	Y
2013			Y	Y
2014			Y	Y
2015			Y	Y
2016			Y	Y

2017	Y	Y
2018	Y	Y
2019	Y	Y
2020	Y	Y
2021	Y	Y
* Congress limited this funding to enforcement initiatives related to the Earned Income Tax Credit.		

347. This table only shows if a cap adjustment was created. It does not necessarily mean the cap adjustment was triggered or fully utilized by Congress. *Cf. infra* Table 3.

348. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13101, 104 Stat. 1388, 1388-579 to 580 (providing cap adjustments for FY1991-1995); H.R. Con. Res. 218, 103d Cong. § 25 (1994) (enacted), *repealed by* H.R. Con. Res. 67, 104th Cong. § 209 (1995) (enacted) (modifying cap adjustment for FY1995 and then repealing the modification); Balanced Budget Act of 1997, Pub. L. No 105-33, §§ 10114, 10203, 111 Stat. 251, 689-90, 698-702 (providing cap adjustments for FY1998-2002); H.R. Con. Res. 95, 109th Cong. § 404(b)(2) (2005) (enacted) (providing cap adjustment for FY2006); S. Con. Res. 21, 110th Cong. §§ 207(c)(2)(B), 207(d)(1)(B) (2007) (enacted) (providing cap adjustment for FY2008); S. Con. Res. 70, 110th Cong., §§ 301(a)(2), 312(c)(2)(B) (2008) (enacted) (providing cap adjustment for FY2009); S. Con. Res. 13, 111th Cong. §§ 401(c)(2)(B), 422(a)(2) (2009) (enacted) (providing cap adjustment for FY2010).

349. H.R. Con. Res. 95 § 404(b)(4) (providing cap adjustment for FY2006); S. Con. Res. 21 § 207(c)(2)(D), 207(d)(1)(D) (providing cap adjustment for FY2008); S. Con. Res. 70 §§ 301(a)(4), 312(c)(2)(D) (providing cap adjustment for FY2009); S. Con. Res. 13 §§ 401(c)(2)(D), 422(a)(4) (providing cap adjustment for FY2010).

350. H.R. Con. Res. 95 § 404(b)(3) (providing cap adjustment for FY2006); S. Con. Res. 21 § 207(c)(2)(C), 207(d)(1)(C) (providing cap adjustment for FY2008); S. Con. Res. 70 §§ 301(a)(3), 312(c)(2)(C) (providing cap adjustment for FY2009); S. Con. Res. 13 §§ 401(c)(2)(C), 422(a)(3) (providing cap adjustment for FY2010); Budget Control Act of 2011, Pub. L. No. 112-25, § 101, 125 Stat. 240, 243 (providing cap adjustments for FY2012-2021).

351. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 103, 110 Stat. 847, 848-49 (providing cap adjustment for FY1996-2002); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(d)(5), 110 Stat. 2105, 2191-92 (modifying cap adjustments for FY1997-1998); Balanced Budget Act of 1997 § 10203 (modifying cap adjustments for FY1998-2002); H.R. Con. Res. 95 § 404(b)(1) (providing cap adjustment for FY2006); S. Con. Res. 21 § 207(c)(2)(A), 207(d)(1)(A) (providing cap adjustment for FY2008); S. Con. Res. 70 §§ 301(a)(1), 312(c)(2)(A) (providing cap adjustment for FY2009); S. Con. Res. 13 §§ 401(c)(2)(A), 422(a)(1) (providing cap adjustment for FY2010); Budget Control Act of 2011 § 101 (providing cap adjustments for FY2012-2021); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 815(1)(B), 129 Stat. 584, 604 (adjusting cap adjustments for FY2017-FY2019 and FY2021).

TABLE 3.
CONGRESS INCONSISTENTLY APPROPRIATED FUNDS FOR CAP ADJUSTMENTS[352]
($ IN MILLIONS)

		Cap Adjustment			Actual Appropriations			Impact		
	Fiscal Year	Base Funding	Available Adjustment	Total	Base Funding	Adjustment Used	Total	Shortfall	Increased Waste, Fraud & Abuse	Missed Savings
Continuing Disability Reviews	**2012**	$273	$623	$896	$273	$483	$756	$140	$420	$280
	2013	$273	$751	$1,024	$273	$483	$756	$268	$804	$536
	2014	$273	$924	$1,197	$273	$924	$1,197	$0	$0	$0
	2015	$273	$1,123	$1,396	$273	$1,123	$1,396	$0	$0	$0
	2016	$273	$1,166	$1,439	$273	$1,153	$1,426	$13	$39	$26
	Subtotal	$1,365	$4,587	$5,952	$1,365	$4,166	$5,531	$421	$1,263	$842
Health Care Fraud & Abuse Control Program	**2012**	$311	$270	$581	$310	$0	$310	$271	$407	$136
	2013	$311	$299	$610	$294	$0	$294	$316	$474	$158
	2014	$311	$329	$640	$294	$0	$294	$346	$519	$173
	2015	$311	$361	$672	$311	$361	$672	$0	$0	$0
	2016	$311	$395	$706	$311	$370	$681	$25	$38	$13
	Subtotal	$1,555	$1,654	$3,209	$1,555	$696	$2,251	$958	$1,438	$480
Total		**$2,920**	**$6,241**	**$9,161**	**$2,920**	**$4,862**	**$7,782**	**$1,379**	**$2,701**	**$1,322**

352. The Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Div. H, tits. II, IV, 129 Stat. 2242, 2611, 2647 (appropriating funds for HCFAC and continuing disability reviews for FY2016); The Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, Div. G, tits. II, IV, 128 Stat. 2130, 2478, 2513 (2014) (appropriating funds for HCFAC and continuing disability reviews for FY2015); Budget Control Act of 2011 at § 101 (creating cap adjustments for HCFAC and continuing disability reviews); Stein & Gelfond, *supra* note 29, at 6 (presenting the cap adjustment and appropriations data for fiscal years 2012 to 2014). Each dollar spent on continuing disability reviews and the Health Care Fraud and Abuse Control Program is assumed to prevent, respectively, $3.00 and $1.50 in waste, fraud, and abuse.