



AMERICANS for TAX REFORM

January 23, 2018

The Honorable Steven T. Mnuchin
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Mnuchin:

I urge you to use your authority to modify the calculation of capital gains taxes to include an inflation adjustment. There are clear economic benefits, strong legal precedent, and historic congressional support for indexing capital gains taxes to inflation.

President Trump and Congress passed a bold, pro-growth tax reform bill late last year. However, because of legislative constraints, the bill could not contain every tax cut that Republicans have campaigned on.

The next step should be Treasury delivering a significant tax cut by using its regulatory authority to add an inflation adjustment to the calculation of capital gains taxes. Treasury's authority to enact this tax cut has been analyzed by lawyers Charles J. Cooper, Michael A. Carvin and Vincent Colatriano in a [1993 legal memo](#) published in *Virginia Tax Review*, and again by Cooper and Colatriano in a [2012 legal memo](#) published in the *Harvard Journal of Law and Public Policy*.

This tax cut would have a strong, positive effect on the economy and will benefit millions of Americans that invest in the stock market, or own a 401(k) or IRA. This tax cut would also not require a Congressional Budget Office (CBO) score and would not need to be voted on by Congress.

Under current law, the capital gains tax fails to account for gains that are based on inflation. This unfairly exposes taxpayers to additional taxation. For example, an investor makes a capital investment of \$1,000 in 2000 and sells that investment for \$2,000 in 2017 will be taxed for a \$1,000 gain at a top capital gains tax rate of 23.8 percent. After adjusting for inflation, the “true gain” is much lower – just \$579. (1,000 in 2000 - \$1,421 in 2017).

According to a 2013 analysis by the Tax Foundation on individual capital gains taxes, the average effective rate excluding gains from inflation between 1950 and 2012 was [42.5 percent](#), nearly twice today's 23.8 percent top capital gains tax rate.

Treasury has the legal authority to index the calculation of capital gains taxes to inflation. Under the precedent set by the Supreme Court in *Chevron U.S.A. v. National Resources Defense Council (1984)*, the ability of Treasury to add an inflation adjustment hinges on whether a new definition of “cost” is plausible. Currently, the capital gains tax is calculated as the difference between the cost of the asset and the sale price of the asset.

While in this context, “cost” is commonly understood to mean historical cost, this definition is not explicitly enshrined in law and Treasury has utilized regulatory discretion in the past.

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For instance, in 1918, Treasury decided that an asset's cost was not strictly purchase price but was purchase price less depreciation and depletion taken by the taxpayer prior to sale.

Recent legal precedent proves that there is precedent for the term "cost" to include inflation. For instance, in *Verizon v. FCC (2002)* the Supreme Court affirmed that the term "cost" was ambiguous and the use of historical cost was not required by law. *National Cable & Telecommunications Ass'n v. Brand X Internet Services (2005)*, affirmed the right of an agency to interpret an ambiguous provision of the law, while in *Mayo Foundation for Medical Education & Research v. United States (2011)*, the Supreme Court affirmed that the Chevron doctrine applies to Treasury regulations.

There is also significant congressional support for indexing the calculation of capital gains taxes to inflation. In 2007, then-Congressman Mike Pence introduced legislation to index capital gains taxes to inflation. This legislation was co-sponsored by now-Office of Management and Budget Director Mick Mulvaney, House Speaker Paul Ryan (R-Wis.) and House Ways and Means Chairman Kevin Brady (R-Texas).

Given the clear economic rationale, strong legal precedent, and significant congressional support for indexation, I urge Treasury to swiftly utilize its regulatory authority and index capital gains taxes to inflation.

Sincerely,



Grover G. Norquist
President
Americans for Tax Reform

Cc:

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The Honorable Kevin Brady
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