Emergency Electronic Savings Accounts in a Post-COVID World

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The shutdowns stemming from COVID-19 revealed the need for emergency cash savings, especially for unbanked and low- to middle-income people. As COVID-19 emerged, the US turned to impromptu solutions like government stimulus payments and expanded unemployment benefits. But those solutions were only available because a large-scale emergency galvanized political support around immediate aid. The stop-gap measures suggest the need for a transformational and long-term strategy for people to be more prepared for emergencies, as most emergencies in life are not nationwide events, but personal shocks where government rescue packages are not available.

This Article proposes the creation of tax-favored Emergency Electronic Savings Accounts ("EESAs") to address two concerns. First, EESAs should be designed to help low- to middle-income people save for future emergencies. The tax code incentivizes savings for other anticipated life expenses, such as retirement and medical expenses. But many middle- to low-income people do not have retirement accounts in the first place. And for those who do, raiding a retirement account is a perverse way to survive an economic emergency, for it sacrifices the future to endure the present. Additionally, medical savings accounts are too limited because emergencies are not confined to healthcare expenses. Furthermore, this Article proposes that EESAs should include refundable tax credits paid electronically as matching savings funds deposited

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directly into EESAs, like employers' matching investments deposited directly into employees' 401(k) accounts.

Addressing an additional concern, EESAs should be designed to help unbanked people establish online bank accounts. By not having a bank account, unbanked people lose out on lower-cost and more-efficient financial products and, instead, often resort to payday lenders that charge exorbitant interest rates. Capitalizing on innovations in scalable financial technologies that make free online accounts with no minimum balance requirements (such as PayPal and Venmo) easier to access than ever before, EESAs should usher unbanked people into free or low-cost online banking relationships. An added benefit of establishing electronic EESAs is that they can serve as a bridge to, or integrate seamlessly into, the future development of a central bank digital currency ("CBDC").

I. INTRODUCTION

The federal government pays lip service to the simple, time-honored maxim of wise stewardship in preparing for personal financial emergencies: "Save for a rainy day."[1] But lip service is insufficient for three primary reasons. First, it is insufficient in the purest pragmatic sense that it is not working. The majority of Americans have little to no personal savings available to endure financial emergencies: in one recent survey, 61 percent of people could not afford a $1,000 emergency expense,[2] and the unexpected economic shock of COVID-19 laid bare on a nationwide scale many Americans' paucity of emergency savings, leaving many without enough money even for the basic necessity of buying food.[3] Furthermore, approximately 5.4 percent of Americans, or 7.1 million households, remained unbanked in 2019, prior to the pandemic,[4] meaning they did not have a bank account at all, making it even more difficult to save money for emergencies (or for any other purpose).[5]

The other two reasons why lip service is insufficient arise because federal tax policy does grant tax incentives to other types of designated savings accounts (such as retirement savings through 401(k) accounts and Individual Retirement Accounts ("IRAs")). These incentives have two perverse effects on emergency savings. First, in comparison to retirement savings, emergency savings are disadvantaged from a tax perspective because emergency savings are subject to double taxation and retirement savings are not, making it more expensive to save money

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[1] The phrase can be traced to at least the mid-1500s. *See Save Something for a Rainy Day*, GRAMMARIST, https://grammarist.com/idiom/save-something-for-a-rainy-day/ (last visited Apr. 26, 2021) (tracing the phrase to an Italian play, *La Spiritata*, adapted into English as *The Bugbears*: "Wold he haue me kepe nothing against a rayne day?").

[2] Lorie Konish, *Just 39% of Americans Could Pay for a $1,000 Emergency Expense*, CNBC (Jan. 11, 2021, 9:00 AM), https://www.cnbc.com/2021/01/11/just-39percent-of-americans-could-pay-for-a-1000-emergency-expense.html.

[3] Sharon Cohen, *Millions of Hungry Americans Turn to Food Banks for First Time*, ASSOCIATED PRESS (Dec. 7, 2020), https://apnews.com/article/race-and-ethnicity-hunger-coronavirus-pandemic-4c7f1705c6d8ef5bac241e6cc8e331bb (noting that, as a result of the COVID-19 shutdowns, "unemployment skyrocketed to 14.7 percent, a rate not seen in almost a century," causing many Americans to lack money even for food, unlike anything "[t]hose fighting hunger [had ever seen] in America, even during the Great Recession of 2007-2009").

[4] FED. DEPOSIT INS. CORP., *2019 FDIC Survey*, *How America Banks: Households Use of Banking and Financial Services* 1 (2019) [hereinafter *2019 FDIC Survey*], https://www.fdic.gov/analysis/household-survey/2019report.pdf (noting that 5.4 percent of U.S. households were unbanked in 2019, which was "the lowest since the survey began in 2009").

[5] *See* discussion of savings and the unbanked *infra* Section II.A.

for emergencies than for retirement.[6] Second, although tax laws have led to a ready-made system for employers to offer 401(k)s and individuals to establish IRAs, there is no designated or default pathway for emergency savings, either for companies to offer to employees or for individuals to establish for themselves.[7] And as research on choice architecture and default rules has shown in the context of retirement accounts, creating automated pathways for saving does tend to increase savings rates.[8] The net result, then, is a government recommendation that—in word but not in deed—encourages people to save money for emergencies, yet fails to create a pathway for emergency savings and double taxes those who forge their own path.

This Article proposes a tangible solution: Congress should create tax-favored Emergency Electronic Savings Accounts ("EESAs") in pursuit of the twin goals of (1) incentivizing low- to middle-income Americans to better prepare for financial emergencies by saving money in advance and (2) helping to bring unbanked people into modern electronic banking relationships with mainstream financial institutions. The latter goal is achievable like never before for two primary reasons. First, free electronic accounts with no minimum balance requirements are more widely available than ever before. Second, COVID-19 prompted the federal government to construct and embrace, also like never before, a system of distributing direct electronic payments to Americans—a system that can be leveraged to aid the unbanked in adopting electronic bank accounts.

The goal of incentivizing emergency savings is also achievable. Federal tax policy already encourages and incentivizes tax-advantaged savings through designated accounts for multiple foreseeable life events—such as retirement, medical care, and higher education.[9] Sadly, personal emergencies are also foreseeable insofar as they tend to strike everyone indiscriminately at some point or at multiple points in life; no one is immune, even if the timing of emergencies is unpredictable. Accordingly, EESAs are appropriate tools for federal tax policy to deploy on behalf of non-wealthy Americans in anticipation of emergency expenses, just as federal tax policy already helps people prepare for the anticipated costs of higher education, medical care, and retirement.

This Article proceeds in four parts. After this Introduction, Part II surveys the current state of savings and the prevalence of being

[6] Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 810, 900 (2005). *See also* discussion of tax treatment of savings *infra* Sections III.B, III.C.

[7] *See infra* Section III.C.

[8] *See infra* Section III.C.

[9] *See infra* Section III.C.

unbanked in the United States, as well as the legislative response to the COVID-19 emergency, insofar as that response relates to savings. Part II also considers the appropriateness of using choice architecture and default rules to help people increase their savings. Part III sketches the panoply of existing government incentives for savings and explains why they fail to address the need for emergency savings. Part IV then proposes EESAs as a means to help bring unbanked people into mainstream financial relationships and incentivize tax-favored, readily-available, electronic emergency savings for middle- to low-income Americans. Part V concludes with a call to action to create EESAs as a lesson learned from the COVID-19 global emergency.

II. SAVINGS, STIMULUS MEASURES, AND DEFAULT RULES

This Section II.A highlights Americans' lack of savings, particularly for unbanked and middle- to low-income people. Section II.B summarizes the extensive Congressional stimulus packages enacted in the wake of COVID-19 and their dramatic (yet temporary) effect on savings rates. Section II.C explores the ethics of using choice architecture and default rules (or "nudges") to encourage people to save money.

A. *Savings and the Unbanked*

It is well documented that Americans tend not to save. The Federal Reserve's annual *Report on the Economic Well-Being of U.S. Households* showed that in 2013, 50 percent of U.S. households would not have been able to cover a $400 expense from their savings.[10] By 2019, that figure improved to 37 percent of U.S. households that would not be able to cover a $400 expense.[11] But in a different 2019 survey, 45 percent of respondents said they had $0 saved, and 24 percent had less than $1,000 saved, for a total of 69 percent of respondents who would have been unable to afford a $1,000 emergency expense.[12] Naturally, as the size of the emergency expense grows, fewer people are able to afford it, from 37 percent not covering a $400 expense, to 69 percent not covering a

[10] BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020, at 21 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf.

[11] *Id.*

[12] Cameron Huddleston, *Survey: 69% of Americans Have Less Than $1,000 in Savings*, GOBANKINGRATES (Dec. 16, 2019), https://www.gobankingrates.com/saving-money/savings-advice/americans-have-less-than-1000-in-savings/.

$1,000 expense; nevertheless, studies have shown that low-income people can and do save money.[13]

But low savings rates are only part of the problem. Prior to the pandemic, a significant (but declining) percentage of Americans did not have a bank account at all: from 7.6 percent in 2009, to 8.2 percent in 2011, to 7.0 percent in 2015, to 5.4 percent in 2019.[14] It is possible, of course, for unbanked individuals to save money without a bank account, but those with a bank account are significantly more likely to do so.[15] Furthermore, not utilizing mainstream financial services causes the unbanked to pay significantly more for basic financial services, which mainstream banks often provide for free.[16] For example, a low-income person might pay $400 per year, just to cash paychecks, where mainstream banks offer free direct deposit, which eliminates not only the fees for cashing checks but also the inconvenience, time, and risk of loss of cashing physical checks in the first place.[17]

B. *Savings and Stimulus Measures*

COVID-19 created a financial emergency for many Americans and prompted Congress to respond with numerous emergency measures, as summarized below. Notwithstanding the flurry of legislative activity and trillions of dollars in stimulus funds provided in various forms, though, Congress has yet to create a definitive path for Americans to establish long-term emergency savings accounts to prepare for future emergencies.

Savings are not only vital for surviving personal financial emergencies, but more broadly, savings are like "rocket fuel" for the economy.[18] In the absence of savings, when the COVID-19 financial

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[13] Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REGUL. 121, 137–38 (2004) (describing evidence of low-income people saving money, even though "[o]bviously, the ability to save is a function of income").

[14] *2019 FDIC Survey*, *supra* note 4, at 1.

[15] Barr, *supra* note 13, at 137 ("In a survey of New York and Los Angeles low-income neighborhoods, 78% of the banked held some form of savings, broadly defined, while only 30% of the unbanked had savings.").

[16] *See* discussion of payday lending practices *infra* Section III.A.

[17] Christopher Choe, *Bringing in the Unbanked Off the Fringe: The Bank of San Francisco Model and the Need for Public and Private Partnership*, 8 SEATTLE J. FOR SOC. JUST. 365, 366 (2009).

[18] Pippa Stevens, *Palihapitiya Says Money in Savings Will Be 'Rocket Fuel' for Assets Like Housing and Stocks*, CNBC (Jan. 7, 2021, 1:05 PM), https://www.cnbc.com/2021/01/07/palihapitiya-says-money-in-savings-will-be-rocket-fuel-for-assets-like-housing-and-stocks.html?recirc=taboolainternal; Misyrlena Egkolfopoulou & Julia Fanzeres, *Americans' Saved-Up Stimulus Checks Could Bring Economic Boost*, BLOOMBERG (Feb. 11, 2021), https://www.bloomberg.com/news/articles/2021-02-11/stimulus-

emergency arose, the response was to simulate the effect of savings by providing immediate cash infusions directly to U.S. households. This approach—reminiscent of the idea of dropping money to people from a helicopter[19]—provides immediate assistance to those in need while simultaneously encouraging spending. And consumer spending, representing approximately 70 percent of U.S. GDP,[20] is the lubricant that allows the U.S. economy to keep moving, with people continuing to consume goods and services and companies correspondingly continuing to hire workers and pay salaries to provide those goods and services.[21]

This approach of immediate aid has been the government's recipe for responding to the COVID-19 emergency.[22] Never has so much cash been infused into the U.S. economy in such a short time, with COVID spending, on an inflation-adjusted basis, surpassing both U.S. military spending on World War II and the total budget of the federal government from as recently as 2019.[23] From stimulus payments deposited directly into taxpayers' bank accounts (or mailed, where necessary), to increased unemployment benefits, to expanded child tax credit payments, to medical and education funding,[24] to subsidies for

checks-americans-plan-to-save-not-spend-covid-relief-money (noting that people plan to save, not spend, their stimulus checks).

19 Ben S. Bernanke, Governor, Fed. Rsrv. Bd., Remarks Before the National Economists Club, Deflation: Making Sure 'It' Doesn't Happen Here (Nov. 21, 2002), https://www.federalreserve.gov/boarddocs/Speeches/2002/20021121/default.htm#fn18 (referencing "Milton Friedman's famous 'helicopter drop' of money").

20 Kimberly Amadeo, *Personal Consumption Expenditures, Statistics, and Why It's Important*, BALANCE (Nov. 21, 2020), https://www.thebalance.com/personal-consumption-expenditures-3306107.

21 Kimberly Amadeo, *Consumer Spending and Its Impact on the Economy*, BALANCE (Sept. 27, 2020), https://www.thebalance.com/consumer-spending-definition-and-determinants-3305917.

22 Nicholas Wu & Javier Zarracina, *All of the COVID-19 Stimulus Bills, Visualized*, USA TODAY (Mar. 11, 2021), https://www.usatoday.com/in-depth/news/2021/03/11/covid-19-stimulus-how-much-do-coronavirus-relief-bills-cost/4602942001/.

23 Calvin Woodward, *Warp-Speed Spending and Other Surreal Stats of COVID Times*, ASSOCIATED PRESS (Mar. 13, 2021), https://apnews.com/article/us-news-pandemics-world-war-ii-coronavirus-pandemic-economy-ca4d27105a7a897a737421eda8464c78 (noting that COVID stimulus funds, at approximately $6 trillion, exceed U.S. military expenditures in World War II by approximately $1 trillion and exceed the entire budget of the U.S. government just two years ago, which was approximately $4.4 trillion).

24 *COVID-19 Economic Relief*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/coronavirus (last visited Aug. 30, 2021); *Assistance for American Families & Workers*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-American-families-and-workers (last visited Sept. 23, 2021); *Federal Stimulus Funds for Education*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/ncsl-in-dc/standing-committees/education/federal-stimulus-funds-for-education.aspx (last visited Sept. 23, 2021).

low-income people's access to broadband,[25] the federal government sent cash to people like never before to avoid the deeper recession that could have resulted from the sudden shutdown in national and international economic activity.[26]

But amid all the emergency stimulus, no provision for increasing emergency savings in the future has been made. There were a handful of pre-pandemic savings bills introduced in Congress, but they did not make it out of committee review for a vote.[27] It is short sighted to engage only in stimulus programs designed to provide immediate cash, even when this infusion of cash, coupled with the uncertainty introduced by the pandemic, has led to a short-term spike in the aggregate U.S. savings rate.[28]

The spike in increased savings has been skewed heavily towards wealthy people boosting their savings.[29] After the pandemic, only in March and April of 2020 did the bottom 40 percent of earners increase

[25] Brian Fung, *FCC Approves $50 Monthly Internet Subsidies for Low-Income Households During Pandemic*, CNN (Feb. 26, 2021), https://www.cnn.com/2021/02/26/tech/fcc-internet-subsidies-pandemic/index.html.

[26] James Politi, *Powell Says Too Little Stimulus Is Worse than Too Much*, FIN. TIMES (Oct. 6, 2020), https://www.ft.com/content/1ccf18fb-7760-4d4f-a5dc-2b91ef1a56f2.

[27] For instance, three Congressional bills related to savings were introduced in April 2019, nearly one year before the COVID-19 pandemic. *See* Refund to Rainy Day Savings Act, S. 1018, 116th Cong. (2019) (proposing to allow taxpayers to defer 20 percent of a tax refund into a government-run fund invested in Treasury bills, for a six-month period); Strengthening Financial Security Through Short-Term Savings Accounts Act of 2019, S. 1019, 116th Cong. (2019) (proposing to allow employers to offer short-term savings accounts, with balances capped at $10,000, either as stand-alone accounts or as part of a retirement account); Saving for the Future Act, S. 1053, 116th Cong. (2019) (proposing to mandate that employers with over ten employees provide a defined-benefit pension plan to all employees and contribute a certain amount (e.g., $0.50 per hour worked) for each employee).

[28] A. Lee Smith, *Why Are Americans Saving So Much of Their Income?*, FED. RSRV. BANK OF KAN. CITY ECON. BULL., Dec. 4, 2020, at 1, 1 https://www.kansascityfed.org/documents/6727/EconomicBulletin_WhyAmericansSavingSoMuchIncome_2020.pdf (noting a record high savings rate of 33.7 percent of personal disposable income in April 2020 and 13.6 percent in October 2020, which was "higher than its peak in any recent recession and nearly twice its pre-recession level"); Federal Reserve Bank of St. Louis, *Personal Saving Rate*, ECON. RSCH., https://fred.stlouisfed.org/series/PSAVERT (showing historical data since the 1960s on the personal savings rate in the United States); Ann Saphir, *U.S. Households Ended 2020 with Record $130.2 Trillion in Wealth*, REUTERS (Mar. 11, 2021), https://www.reuters.com/article/us-usa-fed-wealth/u-s-households-ended-2020-with-record-130-2-trillion-in-wealth-fed-says-idUSKBN2B32H5 (noting that "savings deposits rose . . . to a record $14.1 trillion" by the end of 2020).

[29] Denitsa Tsekova, *Stimulus Checks: Personal Income, Savings, and Spending Surged after Round Two of Direct Payments*, YAHOO! MONEY (Feb. 26, 2021), https://money.yahoo.com/stimulus-checks-personal-income-savings-and-spending-surged-160728266.html (breaking down savings rates by income level and noting that "[h]igh-income households largely have driven the high savings rate during the pandemic, even though some low-income families may have some in savings").

their share of cumulative personal savings.[30] From May through December 2020, in contrast, low- to middle-income people depleted their savings more rapidly than higher earners.[31] It makes sense, of course, that higher-earners would save more, for the straightforward reason that they can cover their basic living expenses more easily and still have money left over to save. But it's also important to note that stimulus payments were designed precisely to stimulate consumer spending, not increase savings, so the fact that middle- to low-income earners did not increase their savings can also be viewed as a byproduct of the form of stimulus payments that Congress approved.

For example, emphasizing that stimulus payments are not meant to be saved, a then-potential presidential candidate, Mark Cuban, suggested that future stimulus payments be issued in the form of debit cards whose value would decline and expire rapidly (a "use-it-or-lose-it" stimulus payment).[32] This approach would push recipients to spend stimulus funds quickly and make it difficult or impossible to save the stimulus funds. For low-income households, though, that goal was largely achieved without explicitly structuring the stimulus payments in a use-it-or-lose-it manner. Accordingly, given that Congress approved massive stimulus bills but has yet to address emergency savings in any direct or lasting way, Part IV outlines a longer-term solution with its targeted proposal of a tax-favored, individually-owned, and easily-accessible emergency electronic savings account to help sustain low- to middle-income people during personal emergencies, when government stimulus funds are not forthcoming.

C. *Savings and the Ethics of Nudges*

There are four distinct paths to consider when contemplating the design of an emergency savings program. The first is whether emergency savings should be left entirely to people's initiative and decision-making, without any "nudges"[33] or government incentives (i.e., the status quo, as discussed in Part III). The second is whether the

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30 *Id.*

31 *Id.*; Jonnelle Marte, *Low-Income U.S. Households Are Spending Savings Quicker than High Earners*, REUTERS (Dec. 15, 2020), https://www.reuters.com/article/us-usa-economy-savings/low-income-u-s-households-are-spending-savings-quicker-than-high-earners-study-idUSKBN28Q0IX (discussing a JPMorgan Chase study that shows savings rates declining more rapidly for low-income households than high-income households from May to October 2020).

32 Julia La Roche, *Mark Cuban Proposes 'Use It or Lose It' Debit Card as Coronavirus Stimulus*, YAHOO! FIN. (May 28, 2020), https://finance.yahoo.com/news/mark-cuban-proposes-use-it-or-lose-it-debit-card-as-coronavirus-stimulus-135928871.html.

33 *See* discussion of default rules and nudges *infra* Section II.C.

federal government should require people to contribute to an emergency savings account, such as through a mandatory deduction from every employee's paycheck (i.e., similar to required contributions to social security). The third is the opt-out path where employees are enrolled in a savings plan by default and must opt out if they choose not to participate (like California's "auto-save" program[34] or the British NEST program).[35] The fourth path is the opt-in path, where the federal government creates the infrastructure to facilitate emergency savings and designs default rules and incentives to encourage emergency savings, but only for those who choose to participate (i.e., like existing incentives for retirement savings). This Article advocates for the fourth path; therefore, this Section II.C explores the ethics of using choice architecture and nudges to implement an emergency savings program.

The concept of nudges originated in the early 2000s[36] and quickly gained popularity as a public policy tool used around the world.[37] In short, "[n]udges are interventions that steer people in particular directions but that also allow them to go their own way."[38] An example is a default rule, which can be designed either to require a person to opt in to participate in a program, or to opt out to avoid participating in the program.[39] Either way, the person retains freedom of choice to participate or not participate. One of the key insights of nudging, derived from behavioral science,[40] is that altering the default rule is a

[34] Angela Antonelli, *Nine Ways California's New Retirement Plan Changes the Retirement Savings Landscape*, MARKETWATCH (Aug. 18, 2019), https://www.marketwatch.com/story/9-ways-californias-new-retirement-plan-changes-the-retirement-savings-landscape-2019-08-16. *Compare* Richard H. Thaler, *State IRA Plans Are Ready, If Congress Doesn't Interfere*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/upshot/state-ira-plans-are-ready-if-congress-doesnt-interfere.html (arguing in favor of default, opt-out retirement plans), *with* Andrew G. Biggs, *How Hard Should We Push the Poor to Save for Retirement?*, J. RETIREMENT (Spring 2019) (arguing against default, opt-out retirement plans for low-income workers).

[35] Alessandra Malito, *UK Companies Are Required to Enroll Workers in Retirement Plans—And Its Helping Them Save More*, MARKETWATCH (Sept. 15, 2019), https://www.marketwatch.com/story/uk-companies-are-required-to-enroll-workers-in-retirement-plans-and-its-helping-them-save-more-2019-09-06.

[36] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3–6 (2008); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1191 (2003).

[37] Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 683–84, 689 (2017) (discussing the use of nudges internationally and noting that "[o]ne of the most fascinating things about nudging . . . is how quickly it has taken hold in government and business").

[38] Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REGUL. 413, 417 (2015).

[39] *Id.* at 418.

[40] Haugh, *supra* note 37, at 694–99 (discussing "the behavioral science behind nudging").

way to "steer people in particular directions" and overcome behavioral biases that prevent people from making optimal decisions.[41]

Nudges preserve choice; they are not mandates.[42] But nudges do intentionally impact the context for an individual's choice and seek to encourage, or "steer," people to make optimal decisions.[43] Importantly, the individual should define what constitutes an optimal decision, not the program designer.[44] Nonetheless, the potential for abuse and manipulation is clear because the program designer is intentionally influencing the context of an individual's choice.[45]

But it is also clear that nudges are inevitable, whether they are consciously used to influence a person's decision or simply arise through happenstance.[46] In other words, choice does not occur in a vacuum. The context for a choice can be set in one way or another, but it must be set in some way.[47] And if nudges and choice architecture are inevitable, the ethical use of them is an important consideration for any emergency savings proposal. Nudges began as a tool for government policy but are also becoming increasingly commonplace in private business, in areas such as compliance.[48] This Article's EESA proposal includes both a government component and a private business component.[49]

The foundational ethical argument for emergency savings accounts is simply that hypocrisy is not a virtue. As a matter of consistency, the government should not encourage people to create an emergency savings account and then fail to provide a path to do so.[50] Furthermore, the government already provides multiple incentives for retirement

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41 Sunstein, *supra* note 38, at 416–17.

42 *Id.* at 423 (noting that "the most serious harms [from government] tend to come from mandates and bans (from genuine coercion), and not from nudges, which maintain freedom of choice").

43 *Id.* at 417.

44 *Id.* at 429–33 (describing the "as judged by themselves" standard and noting that "it must be acknowledged that the standard raises normative, conceptual, and empirical challenges").

45 Heidi M. Hurd, *Fudging Nudging: Why 'Libertarian Paternalism' Is the Contradiction It Claims It's Not*, 14 GEO. J.L. & PUB. POL'Y 703, 731 (2016) (casting doubt on the idea that "choice architecture that is chosen for us is of no different moral significance than choice architecture that is the product of natural happenstance and social contingencies"). *See also* Sunstein, *supra* note 38, at 442–48 (evaluating "the problem of manipulation, which is a possible objection to various nudges").

46 Sunstein, *supra* note 38, at 420–22.

47 *Id.*

48 Haugh, *supra* note 37, at 683, 710–15 (providing "a typology of private nudges being used within companies").

49 *See infra* Part IV.

50 *See infra* Part III.

savings and multiple programs in which retirement savers may participate.[51] But no incentives or programs exist for emergency savings. In addition, higher income people are more able to save for retirement, while middle- to low-income people are more in need of emergency savings accounts; therefore, beyond eliminating hypocrisy, tailoring incentives for emergency savings to middle- and low-income people is an appropriately targeted approach.

But recognizing that emergency savings accounts should exist is different from determining an ethical manner in which to deploy them. If having emergency savings is beneficial, then should people be forced, encouraged, or even lightly nudged into putting aside a portion of their income into an emergency savings account? For example, people are forced into participating in other government savings programs, such as social security. But even if people are not forced to participate in emergency savings accounts, then the question still remains: should people be free to opt in to an emergency savings account if they want to save for emergency expenses, or should they have to opt out of an emergency savings account if they prefer not to participate?

The latter question is particularly important for emergency savings accounts because, in the context of retirement savings, it is well known that when the default rule is to enroll all employees automatically in a tax-advantaged retirement savings plan, savings rates increase compared to when the default rule requires employees to opt in to the savings plan.[52] Furthermore, studies show that the presence of a default pathway is even more impactful for low-income savers.[53] Specifically, in situations where sub-optimal default rules are in place, there is a "tendency of poorer people to stay with even detrimental defaults . . . ."[54] In other words, lower-income savers are less likely than higher-income savers to opt out of sub-optimal default arrangements. The current default arrangement for emergency savings is to not provide an emergency savings account. It is no surprise, then, that most middle- and low-income people lack emergency savings, for that is exactly what

[51] *See infra* Section III.C.1.

[52] Sunstein & Thaler, *supra* note 36, at 1159–60.

[53] Jessica L. Roberts, *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, 116 MICH. L. REV. 1045, 1056 (2018) (noting that "lower-income employees are slower to opt out of unfavorable defaults than higher-income employees" and citing studies from CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE 174–75 (2016), where Sunstein indicates that "[s]imilar findings have been made elsewhere, with growing evidence that those who are less educated, and less sophisticated, are more likely to stick with the default").

[54] Roberts, *supra* note 53, at 1056.

the default rule is set up to accomplish, and people (especially middle- and low-income people) tend to stick with default selections.

In considering the question of default rules for emergency savings accounts, this Article applies Sunstein's ethical framework of four criteria for evaluating default rules, plus Roberts' fifth criterion, before raising Hurd's criticism of whether nudging is an appropriate framework at all. Sunstein's framework is intended to encourage policymakers to use default rules (or other nudges) in an ethical manner by evaluating them in terms of four principles: "(1) welfare, (2) autonomy, (3) dignity, and (4) self-government."[55] Also, to the extent not already implicitly included in the prior four principles, Roberts proposed distributive justice as an explicit fifth principle.[56]

By these criteria, this Article's EESA proposal is likely to be viewed favorably. First: welfare. EESAs are explicitly designed to help people's financial condition in times of emergency. Second: autonomy. As explained in Part IV, EESAs are independently owned and freely chosen, not government-owned or mandatory. Third: dignity. EESAs recognize the inherent worth of all people, regardless of income level, because EESAs are targeted to both help those most in need of emergency savings and draw the unbanked into mainstream banking relationships, as explained in Part IV. Fourth: self-government. To the extent self-government applies to EESAs, the accounts are designed to help people depend on their own resources (i.e., govern themselves) in times of emergency. Fifth: distributive justice. The EESA proposal recognizes that tax incentives currently flow to retirement accounts, which low-income people are less likely to own, but EESAs are explicitly intended to benefit middle- to low-income people, such as through income phase-outs and refundable tax credits paid as matching EESA funds, as explained in Part IV. Thus, EESAs are aligned with distributing resources and financial incentives in a way that benefits low-income people.

The five-criteria framework, therefore, suggests that a default rule whereby people are automatically enrolled in EESAs may be appropriate. But the ethical inquiry is not complete. There are at least three important reasons to resist a default rule that would require people to opt out of EESA participation. First, as noted above, low-

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[55] *Id.* at 1053.

[56] *Id.* at 1065. Roberts acknowledges that distributive justice can also be thought of as implicit in the consideration of Sunstein's four principles. *Id.* at 1053 (framing Sunstein's four principles succinctly as suggesting that "governments should give their citizens good lives, protect their citizens' freedom to choose, show respect for their citizens, and let their citizens govern themselves").

income people are less likely to opt out of detrimental default arrangements, meaning that the default rule for EESAs is likely to be particularly influential, or sticky, precisely because EESAs serve low- to middle-income people. Second, and related to the prior point, for low-income people living paycheck-to-paycheck with little to no money left over, it could be arrogant and paternalistic to presume to remove (i.e., save) a portion of a person's meager income with the justification that saving the money for a future emergency is better. It may not be better when the sacrifice of current income is too severe. Coupled with the stickiness of default selections for low-income people, these first two reasons weigh heavily in favor of an opt-in (not opt-out) rule for EESAs. These two initial reasons also set the stage for Hurd's more fundamental objection to default rules: freedom of choice is an ethical value in and of itself.[57] In other words, whether a person should or should not participate in an EESA is a choice best left to the individual, *even if* the individual makes a sub-optimal choice.

On balance, then, this Article advocates leaving the default rule decision to each implementer of an EESA, not prescribing a one-size-fits-all requirement. As described in Part IV, on a case-by-case basis, an employer could be justified in creating a program to automatically enroll employees in an EESA—perhaps along with matching contributions from the employer—and then providing employees with clear and accessible opt-out rights. This Article's EESA proposal does not foreclose that possibility for employers that are so inclined, but this Article seeks to position EESAs primarily as accounts to be opted in to, not opted out of.

The most pressing concern, of course, is that currently there is not even an emergency savings account to opt in to, or opt out of, in the first place. Creating EESAs as an automated, tax-favored, accessible, and flexible account for emergency savings is the ethical first step to take. The opt in or opt out decision should not be government mandated and should be left to each employer's particular circumstance and discretion.

[57] Hurd, *supra* note 45, at 730 (arguing that "a life lived autonomously, even if less happily, is of a value that cannot be compared to, or trumped by, a happier life that is crafted by another").

III. EXISTING INCENTIVES FOR SAVINGS FALL SHORT

The Consumer Financial Protection Bureau ("CFPB") provides *An Essential Guide to Building an Emergency Fund* to encourage individuals to establish an emergency savings account.[58] And the Essential Guide delivers effectively on its promise, containing well-intentioned and accurate recommendations and justifications for building up emergency savings. For instance, would-be savers are told that "[a]n emergency fund is a cash reserve that's specifically set aside for unplanned expenses or financial emergencies," such as "car repairs, home repairs, medical bills, or a loss of income."[59] The Essential Guide recognizes that "putting any money aside can feel difficult," especially "[i]f you're living paycheck to paycheck," and it therefore urges people to take small steps towards their savings goals because "even a small amount can provide some financial security."[60]

But after describing the virtues of emergency savings, it is incongruous, if not hypocritical, that the Essential Guide cannot then lead people to an account designed for emergency savings. The fault does not lie with the CFPB, for such an account does not exist. As Section III.A explains, instead of leading people to a designated emergency savings account, the Essential Guide notes that people without emergency savings often must resort to taking out high interest rate loans or carrying credit card balances.[61] To avoid those costly and potentially predatory options,[62] the Essential Guide exhorts people to use a standard checking or savings account for emergency savings.[63] Unfortunately, as Section III.B explores, standard bank accounts are inadequate vehicles for emergency savings. Finally, beyond standard bank accounts, the Essential Guide suggests a variety of tax-advantaged savings accounts designed for purposes other than emergency savings, but which can double as vehicles for emergency savings, such as accounts for retirement or medical expenses. Certain tax-favored

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58 *An Essential Guide to Building an Emergency Fund*, CONSUMER FIN. PROTECTION BUREAU [hereinafter CFPB, *Essential Guide*], https://www.consumerfinance.gov/start-small-save-up/start-saving/an-essential-guide-to-building-an-emergency-fund/ (last visited Apr. 26, 2021).

59 *Id.*

60 *Id.*

61 *Id.*

62 Robert W. Emerson, *Franchisees in a Fringe Banking World: Striking the Balance Between Entrepreneurial Autonomy and Consumer Protection*, 46 AKRON L. REV. 1, 16, 23 (2013) (discussing regulatory efforts "to curb what some see as a predatory practice, or a structural problem," but also recognizing that "there are aspects of fringe lending services that are appealing [to consumers], regardless of the high fees that may be charged").

63 CFPB, *Essential Guide*, *supra* note 58.

accounts, and their deficiencies for emergency savings, are described in Section III.C.

A. *Emergency Loans*

The Essential Guide describes, accurately but euphemistically, two frequent consequences of not having an emergency savings account. One of the consequences is described in this Section III.A; the second is explored in Section III.C. First, the Essential Guide states that "[w]ithout savings, a financial shock—even minor—could" cause people to "rely on credit cards or loans, which can lead to debt that's generally harder to pay off."[64] True enough, but that's a bland, euphemistic description of how primarily low-income people can be driven into notoriously high interest rate loans, such as small payday advances (generally in amounts of approximately $300) at an annual percentage rate ("APR") of around 400 percent, larger installment loans (in the range of $500 to $2,000) from an APR of 100 percent to 300 percent, or credit card balances with a comparatively low (but still onerous) average APR of approximately 17 percent.[65]

Short-term, high interest rate loans exist, of course, because they fill an economic niche, and from a purely economic standpoint, such loans can be beneficial.[66] People taking out such loans may have no other lending options, so taking out a short-term, high-interest rate loan can be worthwhile when the alternative is no money at all.[67] For instance, if an employee cannot afford a necessary emergency car repair but needs the car to remain employed, then paying high interest on a short-term loan to fix the car may be a necessary investment.[68] But it's not an ideal investment; saving money in advance of an emergency is possible and far more preferable, even for low-income people who by definition lack significant investable funds.[69]

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[64] *Id.*

[65] Carlie Malone & Paige Marta Skiba, *Regulation and Recent Trends in High-Interest Credit Markets*, 16 ANN. REV. L. & SOC. SCI. 311, 312–13 (2020).

[66] *Id.* at 314 (describing the "consumption-smoothing process" that can benefit borrowers, even at high interest rates).

[67] *Id.* (recognizing that when borrowers take out a payday loan they "typically have already experienced months or years of financial hardship and likely have tapped out their credit cards and gone delinquent on all other debts . . . [such] that the use of a payday loan at that moment is a last resort . . . .").

[68] *Id.* (noting that "unexpected car repairs may mean paying $60 in interest/fees to borrow $300 for mechanic work but also allowing a worker to keep their job").

[69] *See* Barr, *supra* note 13, at 137–38 (noting evidence of low-income people saving money).

B. *Standard Bank Accounts*

One of the simplest alternatives to high interest rate loans is to save money in a checking or savings account. But there are significant drawbacks to using standard bank accounts for emergency savings. Far from any tax incentives, the tax system creates economic *dis*incentives to save in a standard bank account because, while everyone's wages are taxed, only savers face (1) two risks of losing the value of their savings, and (2) a second tax on any increase in their savings.[70]

As a simple example, if a saver and spender each earns $100 subject to a 20 percent tax, then each one keeps $80. The spender consumes a full $80 worth of goods or services while the saver forgoes consumption and saves the $80. The saver's $80 immediately begins facing the first risk—that of losing value at a rate equal to inflation—thus lowering the future purchasing power of the saver's $80 at the rate of inflation. The spender, in contrast, maximizes the full purchasing power of the $80 immediately and avoids any risk of loss due to inflation.

To counteract the effect of inflation, the saver invests the $80, hoping to achieve a rate of return equal to or greater than the rate of inflation. But in seeking to match or beat inflation, the saver encounters a second risk that the spender avoids: the saver's $80 investment could decline in value and even become worthless through a bad investment. More optimistically, the saver's $80 could rise in value through interest, dividends, or appreciation, and become, say, $90, which would be a 12.5 percent gain. But in this more optimistic scenario, the saver's gain is then taxed, so out of the $10 gain, the saver keeps $8, which is a 10 percent after-tax gain (using the same 20 percent tax rate that was applied to the wages initially). Of course, inflation reduces the purchasing power of the 10 percent gain, so if inflation were equal to 4 percent, the saver's gain would be reduced to 6 percent.

Yet again, then, the Essential Guide proves to be accurate but euphemistic. Yes, "putting any money aside can feel difficult," especially "[i]f you're living paycheck to paycheck,"[71] but it's more than difficult. Adding in the dual risks of losing value to inflation or through bad investments and the taxation of any gains, saving money can seem downright foolish, especially in times of high inflation or low (or even negative) interest rates.[72] In view of these downsides, tax policy

[70] McCaffery, *supra* note 6, at 810–11 (tracing the "'double taxation' of savings" argument to John Stuart Mill in the mid-1800s).

[71] CFPB, *Essential Guide*, *supra* note 58.

[72] Indeed, one of the world's wealthiest people (Elon Musk) advocates not saving cash, but instead investing in crypto currency, because "[w]hen fiat currency has negative real interest, only a fool wouldn't look elsewhere." Theo Golden, *Elon Musk*

provides various incentives to savers to remove double taxation on savings in certain types of accounts, as discussed below in Section III.C. Checking and savings accounts, however, enjoy no such special treatment and are thus undesirable methods for saving money. The Essential Guide is right to encourage emergency savings, but tax policy should follow suit and pave the way for emergency savings instead of erecting the additional barrier of double taxation on savings held in standard bank accounts.[73]

C. *Tax-Favored Accounts*

Recognizing the unfairness of a double tax on savers, tax policy does pave the way for certain types of tax-advantaged savings, as discussed below. Unfortunately, in relation to these other types of savings, the Essential Guide mentions an additional negative consequence of lacking an emergency savings account: without emergency savings, "[people] may also pull from other savings, like retirement funds, to cover [emergency] costs."[74] That may be a less egregious euphemism than glossing over the risks and disproportionate impact of high interest rate loans; nonetheless, robbing one's retirement funds due to inadequate reserves for present-day emergencies is a serious consequence in its own right. In fact, as financial advisers warn, "[t]apping into your retirement plan in case of emergency should be your last resort."[75] But the last resort is precisely where tax policy leaves many people when dealing with emergency expenses.

The sections below describe certain tax-advantaged paths for savings that tax policy does encourage and facilitate, such as savings for retirement, medical, and disability expenses, in addition to one type of account designed for people living in or close to poverty. The discussion below also explains why these paths are insufficient for emergency savings. These existing paths for tax-favored savings for particular purposes do, however, provide a roadmap for the emergency electronic savings proposal set forth in Part IV.

Admits that Bitcoin and Ethereum 'Seem High' in Exchange with 'Gold Bug' Peter Schiff, MKTS. INSIDER (Feb. 20, 2021, 6:15 AM), https://markets.businessinsider.com/currencies/news/elon-musk-admits-on-twitter-that-bitcoin-and-ethereum-seem-high-2021-2-1030103846.

[73] McCaffery, *supra* note 6 at 900 (recognizing that "[i]t is simply a difficult and scattershot affair to try to encourage and reward savings within a tax system ideally designed to double tax savings").

[74] CFPB, *Essential Guide*, *supra* note 58.

[75] Javier Simon, *IRA Hardship Withdrawal: How to Avoid Penalties*, SMARTASSET (Oct. 23, 2020), https://smartasset.com/retirement/ira-hardship-withdrawal.

1. Retirement Accounts: IRAs and 401(k)s

Tax policy provides significant tax incentives for retirement savings. Two of the most common vehicles for tax-favored retirement savings are outlined below: individual retirement accounts ("IRAs")[76] and employer-sponsored 401(k) plans.[77] These accounts are evaluated in terms of their deficiencies for emergency expenses and their suitability for low-income people.

IRAs and 401(k)s offer two ways to avoid the double tax on savings: the saver may either avoid the initial tax on wage earnings or the second tax on capital appreciation.[78] IRAs and 401(k)s were originally created to avoid the initial tax on wage earnings; thus, they have come to be known as "traditional" IRAs or 401(k)s. Later, Roth IRAs and Roth 401(k)s were designed to avoid the second tax on capital appreciation instead of the initial tax on wage earnings.[79] The traditional structure allows savers to reduce their taxable income by the amount contributed to the IRA, up to a maximum amount per year.[80] The current maximum for both traditional and Roth IRAs is $6,000 (or, for those 50 years or over, $7,000).[81] Gains on the traditional IRA investment are taxed when withdrawn; thus, contributions to a traditional IRA (or a traditional 401(k)) are "pre-tax" contributions, as the initial tax is waived but the second tax is collected when investment gains are realized.[82] In contrast, Roth IRAs allow savers to pay the initial tax on their earnings and contribute "after-tax" money to the Roth IRA.[83] After the contribution, the capital appreciation in the Roth IRA (or the Roth 401(k)) is not taxed, as the funds invested were taxed before being saved.[84]

IRAs are open to middle- and low-income earners and exclude high-income earners; accordingly, the ability to contribute to IRAs phases out as income rises. For example, the amount of an individual's

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[76] *Traditional and Roth IRAs*, INTERNAL REVENUE SERV. [hereinafter IRS, *Traditional and Roth IRAs*], https://www.irs.gov/retirement-plans/traditional-and-roth-iras (last visited Apr. 26, 2021).

[77] *401(k) Plans*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/401k-plans (last visited Apr. 26, 2021).

[78] *See* McCaffery, *supra* note 6, at 861–62.

[79] *Id.*

[80] IRS, *Traditional and Roth IRAs*, *supra* note 76 (Answer to *How Much Can I Contribute?*).

[81] *Id.*

[82] *See* IRS, *Traditional and Roth IRAs*, *supra* note 76 (Answer to *Are My Withdrawals and Distributions Taxable?*).

[83] *See id.*

[84] *See id.*

tax-deductible contributions to a traditional IRA currently phases out progressively with income between $66,000 and $76,000, with no tax-deductible contributions allowed in any year where an individual's adjusted gross income exceeds $76,000.[85] For a Roth IRA, individual contributions phase out progressively with income between $125,000 and $140,000 and are prohibited entirely at incomes above the $140,000 threshold.[86] For joint filers, the progressive phase-out for traditional IRAs applies to income between $104,000 and $124,000; for a Roth IRA, the phase out for joint filers applies to income between $196,000 and $206,000. [87]

On the other end of the income spectrum, low-income earners are eligible for an enhanced tax incentive for contributions made to an IRA (or to a 401(k) or to several other types of tax-favored accounts).[88] Through the "saver's credit," individuals with adjusted gross income below a certain amount (currently $19,750 or less; $39,500 or less for joint filers) receive a non-refundable tax credit equal to 50 percent of the first $2,000 saved.[89] The credit phases out as income rises, such that individuals earning $33,000 (or joint filers earning $66,000) receive a tax credit of 10 percent (instead of 50 percent) of the amount contributed.[90] To illustrate, a 50 percent credit means that $1,000 saved reduces a person's taxes by $500, dollar-for-dollar; however, because the credit is nonrefundable, if the amount of the credit exceeds the person's tax liability, then the excess amount of the credit is lost.[91]

Whereas people whose annual income exceeds the IRA income thresholds are prohibited from making any IRA contributions at all during the year in which their income exceeds the thresholds, employer-sponsored 401(k) plans (both traditional and Roth) are significantly more permissive for high earners. An individual may defer up to $19,500 of salary into a 401(k) plan until the person earns more than

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[85] Christy Bieber, *Traditional IRA Income Limits in 2020 and 2021*, MOTLEY FOOL (Jul. 23, 2021, 4:35 PM), https://www.fool.com/retirement/plans/ira/income-limits/.

[86] *Income Ranges for Determining IRA Eligibility Change for 2021*, INTERNAL REVENUE SERV. (Oct. 26, 2020), https://www.irs.gov/newsroom/income-ranges-for-determining-ira-eligibility-change-for-2021.

[87] *Id.*

[88] *Retirement Savings Contributions Credit (Saver's Credit)*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit (last visited Apr. 26, 2021).

[89] *Id.*

[90] *Id.*

[91] *Non-Refundable Tax Credit*, CORP. FIN, INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/non-refundable-tax-credit/ (last visited Apr. 26, 2021).

$290,000 during the year.[92] For example, if a person earns $290,000 during the first six months of the year, the person may defer up to $19,500 during those six months. The contributions made during the first six months of the year are still valid even though the person continues earning money during the latter half of the year and brings his or her total annual income to significantly more than $290,000. In addition, the individual's employer may contribute to the employee's 401(k) up to a maximum aggregate amount of $58,000 per year (employer and employee contributions combined).[93] In short, for high-income earners, the employer-sponsored 401(k) is significantly more generous than the individually-funded IRA.

Because IRAs and 401(k)s are designed as retirement accounts, withdrawing money early (i.e., before the retirement age of 59½) normally leads to a 10 percent income tax penalty.[94] But there are two early-withdrawal exceptions for IRAs and permitted hardship withdrawals for 401(k)s. First, for Roth IRAs, a person may withdraw the principal at any time, without penalty, because the person already paid taxes on principal contributions to a Roth.[95] Roth IRAs also allow penalty-free withdrawals prior to retirement age if the person held the account for at least five years and the withdrawal is for an eligible purpose (such as a first-time home purchase or after becoming disabled).[96] Second, a person may withdraw any funds from a traditional IRA, penalty free and prior to retirement age, only if the withdrawal qualifies for certain exceptions.[97] Such exceptions are broader than the permitted withdrawals from a Roth IRA but are still limited to items such as medical, college, or reservist expenses, birth or adoption expenses, and disability expenses, among others.[98] For 401(k)s, eligible hardship withdrawals include expenses such as the

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92 *401(k) Plans - Deferrals and Matching When Compensation Exceeds the Annual Limit*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/401k-plans-deferrals-and-matching-when-compensation-exceeds-the-annual-limit (last visited Apr. 26, 2021).

93 *Id.*

94 *Retirement Topics - Exceptions to Tax on Early Distributions*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-tax-on-early-distributions (last visited Apr. 26, 2021).

95 *Traditional & Roth IRAs: Withdrawal Rules and Early Withdrawal Penalties*, H&R BLOCK, https://www.hrblock.com/tax-center/irs/tax-responsibilities/early-withdrawal-penalties/ (last visited Sept. 24, 2021).

96 *Id.*

97 *Id.*

98 *Id.*

purchase of a primary residence, payments necessary to prevent eviction or foreclosure, medical bills, college tuition, or funeral costs.[99]

Tax policy thus recognizes the legitimacy of early withdrawals from tax-favored retirement accounts for certain expenses, including some emergency expenses. But the process for gaining approval for early withdrawals from 401(k)s is often cumbersome and difficult, as retirement accounts are designed for retirement, not for emergencies.[100] Early withdrawals are exceptions, not the default for which the accounts are built.[101] Emphasizing that retirement accounts are not designed for emergencies, "[f]inancial planners consistently stress that your 401(k) account does not work very well as a savings account or emergency fund—the money is hard to get, the process is time consuming, and the damage you can do to your retirement savings account can take many years to repair."[102] Indeed, in the immediate aftermath of COVID-19, employers sought to streamline the process for employees to make emergency withdrawals from 401(k) accounts as a stop-gap measure for those who lacked a dedicated emergency savings account.[103] Similarly, Congress increased the limit for hardship distributions and spread out the income tax on distributed amounts over three years.[104] Drawing down a retirement account to pay for a present-day emergency is clearly better than having no savings at all; nonetheless, current tax policy is shortsighted and incomplete insofar as it leaves savers no better option in an emergency than the last resort of sacrificing tomorrow's financial security to survive today.

Furthermore, retirement accounts are ill-suited as vehicles for emergency savings because they disproportionately favor those who have the luxury of saving excess current income to prepare for future retirement (i.e., middle- to high-income people). Approximately 75 percent of people who earn at least $36,000 participate in a retirement plan, compared to only 25 percent of those who earn less.[105] Even

[99] James Royal, *401(k) and IRA Hardship Withdrawals – 5 Ways to Minimize Taxes and Penalties*, BANKRATE (Mar. 26, 2021), https://www.bankrate.com/retirement/401k-and-ira-hardship-withdrawals-ways-to-minimize-taxes/.

[100] *Emergency Access to Your 401(k): Hardship Withdrawals*, 401(K) HELP CTR., http://www.401khelpcenter.com/401k_education/401k_emergency_access_hardship.html#.YIni57VKiUl (last visited Apr. 26, 2021).

[101] *Id.*

[102] *Id.*

[103] Darla Mercado, *Employers Are Making It Easier for Workers to Tap Their 401(k) Savings*, CNBC (May 26, 2020, 3:06 PM), https://www.cnbc.com/2020/05/26/companies-are-making-it-easier-to-tap-your-401k-plan-in-emergencies.html.

[104] *Id.*

[105] Andrew G. Biggs, Opinion, *Stop Pushing Poor People to Save More for Retirement*, MARKETWATCH (Sept. 12, 2019, 11:14 AM), https://www.marketwatch.com/story/stop-

though the saver's credit provides an extra incentive for low-income people to save for retirement, it is understandable that a person who is barely making enough money to meet daily living expenses would be reluctant, or unable, to set aside a meaningful portion of current income for a distant and uncertain future retirement.[106] Low-income earners are further justified in not saving for retirement because social security benefits for low-income earners equate to approximately 84 percent of a low-income worker's average annual career earnings (adjusted for inflation).[107] Coupled with the decline in expenses that tends to occur in retirement, it is rational for low-income earners to rely on social security benefits and not reduce their scarce current income to bolster their retirement income.[108] In contrast to retirement savings, this Article contends that saving for emergency expenses is more urgent and justifiable for low-income earners; accordingly, Part IV proposes a savings policy designed around helping low-income people make it through everyday emergencies. Such a savings policy resists perpetuating the emphasis on retirement savings as an adequate source of funding to meet emergency expenses, a structure which has continually failed to address the needs of low-income households that struggle to meet daily expenses.

2. Medical Accounts: HSAs and FSAs

Tax policy also allows preferential tax treatment for savings placed in multiple types of medical savings accounts.[109] Two of the most common, Health Savings Accounts ("HSAs") and Flexible Spending Arrangements ("FSAs"), are briefly summarized below.[110] Like the availability of hardship withdrawals from retirement accounts, the existence of tax-favored medical savings accounts implicitly

pushing-poor-people-to-save-more-for-retirement-2019-09-12 (citing statistics from the Bureau of Labor); *see also* Monique Morrissey, *The State of American Retirement*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/the-state-of-american-retirement-savings/ (breaking down gaps in retirement savings by numerous factors, such as income, race, ethnicity, and education level).

106 *See* Biggs, *supra* note 105 (asserting it is "far from a no-brainer that lower-income Americans need to save more" for retirement).

107 *Id.* (citing statistics from the Congressional Budget Office).

108 *See id.*

109 Beyond HSAs and FSAs discussed in this article, additional tax-favored savings accounts for medical expenses include such other savings vehicles as Health Reimbursement Arrangements (HRAs) and Medical Savings Accounts (Archer MSAs or Medicare Advantage MSAs). *See Publication 969 (2020), Health Savings Accounts and Other Tax-Favored Health Plans*, INTERNAL REVENUE SERV. [hereinafter, IRS, *Publication 969*], https://www.irs.gov/publications/p969#en_US_2020_publink1000204083 (last visited Apr. 26, 2021).

110 *Id.*

demonstrates policy makers' recognition that savings for emergency expenses should not be subject to double taxation, at least to the extent funds in medical savings accounts are used to cover emergency medical expenses and not routine medical costs. Emergency medical expenses are only a part of the larger category of emergency expenses, though, making HSAs, FSAs, and other tax-favored medical savings accounts inadequate for emergency preparedness.

Up to certain limits, HSAs allow people to deduct amounts contributed to an HSA from their taxable income (in 2021, the limit is a $3,600 deduction for an individual; $7,200 for joint filers).[111] HSA funds may be spent only on qualified medical expenses, such as deductibles and copayments, but not on non-medical bills or even health insurance premiums (unless the premiums fall within a designated exception).[112] Only people covered under a high-deductible health care plan are eligible for an HSA.[113] Two of the most salient characteristics of HSAs include the following. First, employers or individuals are allowed to make contributions to the accounts, which are owned by the employee and portable (i.e., retained by the employee after a job change).[114] Second, participants may invest amounts deposited in HSAs (for example, by purchasing stocks, mutual funds, or bonds with HSA funds) and retain and roll over any outstanding balances left in the accounts at the end of the year.[115]

FSAs are similar to HSAs, but they are even more restrictive. Key differences are that employees do not own FSAs, cannot take FSAs with them if they change jobs, and cannot invest the funds held in an FSA.[116] Originally, any FSA funds not used by the end of the year would be forfeited; however, employers, as the sponsors of FSAs, now have the limited option of allowing employees to rollover up to $500 of unused

[111] IRS, *Publication 969, supra* note 109 (click on "Limits on Contributions" under "Contributions to an HSA").

[112] IRS, *Publication 969, supra* note 109 (click on "Qualified Medical Expenses" under "Distributions from HSA") (enumerating exceptions for when HSA funds may be used to cover insurance premiums, such as for long-term care or continuation of care under COBRA). Pursuant to the CARES Act, after 2019, the use of HSA funds was expanded to include over-the-counter medicine or menstrual care products. IRS, *Publication 969, supra* note 109 (click on "What's New").

[113] IRS, *Publication 969, supra* note 109 (click on "High Deductible Health Plan (HDHP)" under "Qualifying for an HSA") (describing the minimum and maximum deductible amounts for qualifying high deductible health plans).

[114] IRS, *Publication 969, supra* note 109 (click on "What are the Benefits of an HSA?").

[115] *Id.*

[116] IRS, *Publication 969, supra* note 109 (click on "Flexible Spending Arrangements (FSAs)"); Mila Araujo, *HSA vs. FSA: Which Is Better?*, BALANCE (June 28, 2021), https://www.thebalance.com/differences-between-hsa-and-fsa-and-best-options-4156726.

FSA funds each year.[117] Like HSA contributions, an employee's FSA contributions are not taxed.[118] Unlike HSAs, though, the FSA contribution limit is lower than the HSA limit (in 2021, the FSA limit is $2,750), and FSA contributions must be made through employee salary deductions, not separate contributions.[119]

From the perspective of preparedness for emergencies, tax policy does appropriately exempt from double taxation certain savings set aside for medical expenses. Many medical expenses, though, are known in advance, such as annual visits to an eye doctor; therefore, to the extent HSAs (or other medical savings accounts) are used to cover known medical costs, they have an entirely different purpose than an account designed to help people weather emergencies. But HSAs (more so than FSAs) do have some characteristics that make them appropriate vehicles for emergency preparedness (even if that preparedness is solely for emergency *medical* expenses), such as allowing the owner to hold the funds over the long term, invest the funds, and retain the funds in case of a job change. Accordingly, HSAs are a step in the right direction for emergency savings and inform the recommendations set forth in Part IV.

3. Disability Accounts: ABLEs

It is helpful to review an additional type of tax-advantaged savings account because it includes certain characteristics that are incorporated into the emergency savings accounts proposed in Part IV. Through ABLE accounts, individuals with disabilities—and family members or other supporters of such individuals—may save money in a tax-advantaged way for expenses related to a person's disability.[120] Compared to eligible HSA expenses or hardship withdrawals from IRA accounts, one noteworthy feature of ABLE accounts is that funds may be used on a much broader range of expenses, such as basic living expenses like food, housing, and transportation, in addition to healthcare and

117 IRS News Release, *Treasury Modifies "Use-or-Lose" Rule for Health Flexible Spending Arrangements*, https://www.treasury.gov/press-center/press-releases/Documents/103113FSA%20Fact%20Sheet.pdf (last visited Apr. 26, 2021).

118 IRS, *Publication 969, supra* note 109 (click on "What are the Benefits of an FSA?").

119 IRS, *Publication 969, supra* note 109 (click on "Amount of Contribution" under "Contributions to an FSA").

120 *Spotlight on Achieving a Better Life Experience (ABLE) Accounts—2021 Edition* SOC. SECURITY ADMIN. [hereinafter SSA, *Spotlight on ABLE Accounts*], https://www.ssa.gov/ssi/spotlights/spot-able.html (last visited Apr. 26, 2021); *see also* Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010, Title I (codified in scattered sections of 26 U.S.C.A.).

education costs.[121] Certain restrictions apply, such as requiring someone who withdraws funds for housing expenses to spend the money in the same month of the withdrawal.[122]

Another noteworthy feature of ABLE accounts is that the first $100,000 saved does not count against a person's eligibility for federal assistance,[123] such as Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI").[124] In contrast, when low-income earners who receive federal benefits save money in a retirement (or checking) account, those savings count as liquid assets and reduce the person's eligibility for federal benefits, creating a stark disincentive for low-income earners to save for retirement.[125] In fact, one study noted that a married couple with two children would lose almost $3,500 in benefits if their liquid assets (such as savings in a retirement or checking account) increased "from less than $1,000 . . . to between $1,000 and $2,000 . . . ."[126]

A program is deeply flawed indeed if it encourages a person to save and then celebrates the first sign of progress in saving by removing a disproportionate amount of the person's benefits. At some point, of course, benefits must decline as a person rises out of poverty, but a system perpetuates poverty when it creates disincentives to even start saving an initial amount. It is hardly the case that merely by saving $1,500 a family of four has escaped poverty, and regardless, losing $3,500 in benefits in exchange for saving $1,500 creates a perverse incentive to avoid saving.

With their focus on helping individuals with disabilities, ABLE accounts have a different and far narrower purpose than preparing middle- to low-income households for emergency expenses.

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[121] Qualified ABLE Programs, 26 U.S.C.A. § 529A(c)(3)(A), (e)(5) (defining "qualified disability expenses" and prescribing a 10 percent penalty on withdrawals for ineligible expenses).

[122] SSA, *Spotlight on ABLE Accounts, supra* note 120.

[123] *Program Operations Manual System (POMS): SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts*, SOC. SECURITY ADMIN., https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740 (last visited Apr. 26, 2021). Additionally, there is an annual contribution limit, including gifts from relatives or other sources, that is currently set at $15,000, although a person with a disability who is employed may contribute additional amounts up to the federal poverty level ($12,760 in 2020). *See id.*

[124] SSA, *Spotlight on ABLE Accounts*, *supra* note 120; CAL. DEP'T OF SOC. SERVS., *Frequently Asked Questions About ABLE Accounts*, https://www.cdss.ca.gov/benefits-services/more-services/calable/calable-faq (last visited Sept. 24, 2021).

[125] HENRY CHEN & ROBERT I. LERMAN, DO ASSET LIMITS IN SOCIAL PROGRAMS AFFECT THE ACCUMULATION OF WEALTH? 4, OPPORTUNITY & OWNERSHIP PROJECT, THE URBAN INSTITUTE (Aug. 2005), https://www.urban.org/sites/default/files/publication/51686/311223-Do-Asset-Limits-in-Social-Programs-Affect-the-Accumulation-of-Wealth-.PDF.

[126] *Id.*

Nonetheless, as explained in Part IV, three characteristics of ABLE accounts are worthwhile to incorporate into the optimal design of emergency savings accounts: (1) an expansive list of eligible expenses, (2) a short-term withdrawal and expense window, and (3) the exclusion of a meaningful threshold amount of savings from eligibility calculations for government benefit programs.

4. Anti-Poverty Accounts: IDAs

A final type of tax-favored savings account is important to mention before progressing to this article's proposal in Part IV. Individual Development Accounts ("IDAs") were established in the 1990s as an anti-poverty measure.[127] Although individual states, foundations, corporations, or other private donors may still fund IDA programs, Congress terminated the primary funding source for IDAs in 2017 when the Assets for Independence ("AFI") program did not receive federal funding.[128] Nonetheless, it is useful to consider the structure of IDAs—specifically, two of their deficiencies and one of their virtues—when designing savings accounts for emergency expenses.

Through IDAs, the AFI program was,[129] and remaining state programs are,[130] "a community-based approach for giving low-income families a hand up out of poverty."[131] Grants are made to non-profit organizations, which then administer IDAs for low-income individuals on a local basis.[132] The administering non-profits select qualifying low-income individuals, provide financial literacy training, and distribute matching grants for IDA deposits that program participants make.[133] Although the specific terms of each grant vary, the matching grants are often 1:1 for each dollar the low-income individual invests, and 2:1 for funds the individual invests for the purpose of a home purchase.[134] IDA

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[127] *See Individual Development Accounts: A Vehicle for Low-Income Asset Building and Homeownership*, DEP'T HOUSING & URB. DEV. [hereinafter HUD, *Individual Development Accounts*], https://www.huduser.gov/portal/periodicals/em/fall12/highlight2.html (last visited Apr. 26, 2021) (reviewing the history and results of IDAs).

[128] *Assets for Independence (AFI)*, DEP'T HEALTH & HUM. SERVS. [hereinafter HHS, *AFI Program*], https://www.acf.hhs.gov/ocs/programs/afi (last visited Apr. 26, 2021).

[129] *Id.*

[130] For an interactive map of IDA programs, see Prosperity Now, *Find an IDA Program*, https://prosperitynow.org/map/idas (last visited Apr. 26, 2021).

[131] HHS, *AFI Program*, *supra* note 128.

[132] For an example of a local program, see Neighbor Impact, *Matched Savings (IDA)*, https://www.neighborimpact.org/get-help/help-with-finances/matched-savings-ida/ (last visited Apr. 26, 2021).

[133] HUD, *Individual Development Accounts, supra* note 127.

[134] Rebecca Richards, *Integrity of Individual Development: Watering Down the IDA*, 4 GEO. J. GENDER & L. 919, 924 (2003).

funds are approved for use on expenses related to starting or running a small business, higher education, or purchasing a home, and some programs also allow funds to be used for home repairs and retirement.[135]

Two of the deficiencies of IDAs are helpful guideposts for designing emergency savings accounts. Whatever the virtues are of the narrow focus of IDAs on alleviating poverty, emergency savings accounts should be available to a wider segment of the population. To qualify for an IDA, most programs require a recipient's income to be less than 200 percent of the federal poverty level.[136] But even middle-income people lack emergency savings; thus, the IDA model is too restrictive for emergency savings accounts. Second, the IDA model is not uniform because it allows each administering non-profit organization to define the precise requirements for, and benefits of, IDA participation.[137] Whatever the virtues of allowing local experimentation in poverty alleviation programs, emergency savings accounts should be standard account types available at nationwide financial institutions (not merely local banks and credit unions) to facilitate widespread use and adoption by individuals and employers alike.

But one characteristic of IDAs should be incorporated into emergency savings accounts: matching contributions. IDA's 2:1 or 1:1 matching incentive is worthwhile to help people overcome the difficulties of postponing consumption and saving money. To the extent emergency savings accounts include government subsidies for low-income people, like the saver's tax credit, the subsidy payments should be deposited and held in the emergency savings accounts themselves, similar to an employer match in a 401(k) plan. This approach is contrary to current tax credit programs, like the saver's credit,[138] which provide direct payments to eligible taxpayers instead of depositing the credit amount as a matching contribution into a savings account to further bolster a person's savings.

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[135] *Id.* at 924.

[136] *Id.* at 925.

[137] HUD, *Individual Development Accounts, supra* note 127 (noting that "[b]ecause so many entities sponsor them, IDA programs show significant variation in design characteristics and eligibility requirements").

[138] *See* Section III.C.1 for a discussion of the saver's credit.

IV. EMERGENCY ELECTRONIC SAVINGS ACCOUNTS: EESAS

Good intentions have not resulted in good policy. The CFPB's Essential Guide is correct to encourage people to create an emergency savings account; sadly, no designated account for emergency savings exists. Accordingly, Part IV delineates this Article's proposal for tax-favored EESAs to accomplish two goals. First, EESAs should provide a tax-favored way for low- to middle-income people to save for life's emergencies. Additionally, EESAs should be structured to encourage and facilitate the creation of mainstream, electronic banking relationships for unbanked people. After explaining the principles and priorities that should guide the design of EESAs, Part IV then sets forth a summary table presenting key elements of the EESA proposal.

A. *Principles and Priorities*

EESAs are necessary because emergencies are a fact of life that afflict all people indiscriminately. And, unfortunately, the present options for emergency savings are either nonexistent or deficient. Accordingly, the following principles and priorities should guide the design and development of EESAs.

First, EESAs should put the government's actions where its words are: no more empty encouragement to save for a rainy day without providing a path to do so. The overarching point of EESAs is to avoid hypocrisy and not double-tax those who follow the government's advice. The point is *not* to solve the emergency savings problem immediately or to tackle too many problems at once. EESAs should have relatively low annual dollar limits and thus should not be conceived of as an immediate solution to Americans' lack of emergency savings. The goal should not be, for example, to suddenly or continually provide everyone with the recommended amount of three to six months of emergency savings,[139] which is akin to what recent stimulus measures have achieved, as discussed in Section II.B. Rather, the goal of EESAs should be to provide a readily-available, tax-favored path for Americans to increase their emergency savings over time. It is true that saving a relatively low amount (e.g., $100 per month, or $1,200 per year) could be used up by, or insufficient for, a single emergency expense the following year. But the most important initial goal of EESAs is to forge a pathway for emergency savings, not to aim immediately for high amounts of savings. Accumulating a lasting buffer of emergency savings will take time.

[139] *What's the Right Emergency Fund Amount?*, VANGUARD, https://investor.vanguard.com/emergency-fund/amount (last visited Apr. 26, 2021).

The second priority for EESAs should be to make emergency savings even simpler than retirement savings. To do so, EESAs should avoid the bifurcated world of retirement savings where employers offer 401(k) plans and individuals separately establish IRAs. EESAs should collapse these bifurcated paths into one, permitting employers to offer EESAs as additional employee benefits, like 401(k)s, or individuals to establish EESAs separate from their employer, like IRAs. Employers should be allowed to contribute to their employees' EESAs, and individual account owners should be allowed to contribute to their own EESAs either through salary deductions or separate contributions; thus, independent contractors or others who do not receive employee benefits from an employer may establish EESAs individually and independently.

Furthermore, it can be confusing for employees to manage multiple retirement accounts—a 401(k) at work and an IRA at home, for example—not to mention needing to roll over a prior 401(k) account into a new employer's plan after a job change. EESAs should therefore be designed from the start to avoid replicating this inefficient system of having multiple different accounts for the same purpose. If an employee already has an EESA, or prefers to open an EESA at a different financial institution than where the employer's EESA is held, there should be no barrier for the employee to make contributions to any EESA the employee desires. In the same way employers require employees to complete a direct deposit form with the employee's bank account information for bi-weekly or monthly salary payments, so should employers accept any EESA for making periodic deposits of emergency cash savings into the employee's chosen EESA.

Like retirement accounts, EESAs should be available in either a traditional or Roth structure, as selected by the account holder. For the sake of simplicity, income limits for contributions to EESAs could mirror the income limits for traditional and Roth IRAs. But the income limits of EESAs need not track the higher income eligibility thresholds of 401(k) accounts because EESAs are targeted to lower-income people.

As individually-held accounts, even if sponsored by an employer, EESAs should be as easy to open as IRAs. For example, Vanguard, a leading financial services firm that offers low-cost retirement and other accounts, already provides detailed information recommending how much a person should save in an emergency savings account.[140] Similarly, Prudential, another large, mainstream financial services firm, published a white paper on the benefits for employees and employers

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140 *Id.*

alike in establishing an emergency savings account.[141] But despite the well-intentioned recommendations, there is no emergency savings account for companies to offer, only a standard (and double-taxed) savings account.[142] In contrast, Vanguard offers multiple tax-advantaged accounts for retirement, education, and other purposes, each of which carries minimal to no fees and is quick and easy to open.[143] EESAs should be just as readily accessible as these other tax-advantaged accounts.

Not only should opening and contributing to an EESA be seamless, but so should withdrawing funds from an EESA. The priority is to make emergency savings easy, both on the front- and back-end. The point is decidedly *not* to police what exactly constitutes an emergency expense. Because EESAs should be designed with a low annual contribution limit (e.g., $1,200), the withdrawal rules need not be onerous. Completing a hardship withdrawal from a 401(k), in contrast, can be exceptionally difficult and time consuming, so much so that Congress even passed an emergency measure to loosen the 401(k) withdrawal rules during the COVID-19 emergency shutdowns.[144] Few things show the need for EESAs more clearly than an act of Congress being necessary to facilitate hardship withdrawals from retirement accounts during an emergency. EESAs are designed for emergencies; therefore, a cumbersome process (or the need for an act of Congress!) to withdraw EESA funds is untenable.

It is appropriate that medical savings accounts (like HSAs) have higher annual contribution amounts than EESAs because withdrawals from medical savings accounts can be tracked relatively easily, given that eligible expenses must be medically related.[145] For EESAs, though, it is too difficult to predict what should qualify as an emergency expense in each person's life. Of course, it is appropriate to require EESA account holders to certify that EESA withdrawals are used for necessary living

[141] PRUDENTIAL, *Increasing Financial Security with Workplace Emergency Savings* (2020), https://www.prudential.com/wps/wcm/connect/b1474cb2-7fcf-40f0-b09d-0b7aef9ceed0/Building_Employer-Aided_Emergency_Savings.pdf?MOD=AJPERES&CVID=mqxCTvL (last visited Apr. 26, 2021); *see also* BUSINESS WIRE, *Emergency Savings Feature Can Help Plan Sponsors Increase Employees' Financial Wellness, Prudential Says* (July 24, 2018), https://www.businesswire.com/news/home/20180724005861/en/.

[142] *E.g.*, *Where to Put Your Emergency Fund*, VANGUARD, https://investor.vanguard.com/emergency-fund/where-to-put-emergency-fund (last visited Apr. 26, 2021) (recommending a money market fund in a standard brokerage account for holding emergency savings).

[143] *Account Types*, VANGUARD, https://investor.vanguard.com/investing/investment-accounts (last visited Sept. 24, 2021).

[144] *See supra* note 103 and accompanying text.

[145] *See supra* notes 113–115 and accompanying text.

expenses in a bona fide time of need (and not for a vacation, for example). It is also appropriate to require, like ABLE accounts, that EESA funds be spent reasonably soon after they are withdrawn (e.g., within thirty days).

But the primary control mechanism for EESAs should be the low annual contribution amount, such that the risk of creating a tax loophole is less significant. In an IRS audit, people who withdrew EESA funds would have to demonstrate that the funds were used for emergency expenses, which should help avoid blatant misuse of the funds for non-emergency purposes. But creating a system with elaborate rules for withdrawal would be nearly impossible to administer and would detract from the fundamental purpose of making funds easily and quickly available in an emergency.

In addition, also similar to ABLE accounts, a threshold amount of money held in EESAs should not count against a low-income person's eligibility for federal assistance programs. As emergency savings accounts, EESAs are not meant to hold large sums of money, but rather approximately enough money to cover three to six months of expenses.[146] Accordingly, for EESAs, the amount excluded from federal benefits calculations should be significantly lower than the threshold for ABLE accounts, such as $25,000 for EESAs (compared to $100,000 for ABLE accounts).

An additional priority that this Article proposes for EESAs relates to tax treatment and matching funds. The EESA tax benefit should be a credit, not a deduction, to avoid duplicating the same inequality that currently exists with the tax deduction available for contributions to traditional IRAs. Because marginal tax rates increase as a person's income increases, tax deductions are worth more to people in higher-income brackets. For example, a low-income person in the 12 percent tax bracket avoids $0.12 in taxes for every dollar of a tax deduction; whereas, a higher-income person in the 32 percent tax bracket avoids $0.32 in taxes for every dollar of a tax deduction. Because EESAs are designed to help low- to middle-income people, it would be particularly counterproductive to include a regressive tax incentive in the context of emergency savings.

Instead of a deduction, the EESA tax credit should have three distinguishing attributes. First, the EESA credit should be available to all who are eligible for an EESA at a uniform (not declining) rate. This is both more restrictive and more permissive than the saver's credit described above in Section III.C.1. It is more restrictive because the

146 VANGUARD, *What's the Right Emergency Fund Amount?*, *supra* note 139.

saver's credit applies to up to $2,000 of contributions, whereas total annual EESA contributions should be capped at a lower amount (e.g., $1,200). But the EESA credit is more permissive because the saver's credit severely restricts eligibility even at moderate income levels.[147] EESAs, and thus the EESA tax credit, in contrast, should be available to people whose income level exceeds the limits for the saver's credit, as middle-income earners also lack emergency savings. And the EESA credit should remain at 50 percent of the amount saved for all income levels, unlike the saver's credit that reduces the percentage credit as a person's income rises. With a low annual cap like $1,200, the simplicity of maintaining the 50 percent credit for all income levels is justified.

The second distinguishing attribute of the EESA credit is that it should be refundable. If the goal is to incentivize savings, then an "incentive" that disappears completely for those who do not have tax liability is an inefficient and unequal incentive. It is inefficient because it has no incentivizing effect on savings (i.e., it fails as to its essential purpose), to the extent the amount of the credit exceeds a person's tax liability. And it is unequal because it helps some people more than others (i.e., those with tax liability greater than the amount of the credit benefit more than those with tax liability less than the amount of the credit). Thus, in seeking to avoid the marginal inequality of the traditional IRA tax deduction, the EESA tax credit should be refundable to avoid both the inequality and inefficiency of a nonrefundable credit.

The third distinguishing mark of the EESA tax credit is that it should not be a cash refund program, but rather a matching savings program. Specifically, the EESA credit should be deposited directly into the EESA (like IDA matching funds) instead of being paid directly to the recipient in the form of a tax refund (like current tax refunds). The goal of EESAs is to boost emergency savings, so a tax credit that deposits funds into EESAs is aligned with the overarching goal, while a tax credit that sends cash back to EESA participants would be at odds with the core justification for EESAs.

The matching savings incentive should also incentivize employers to match employee contributions or make EESA contributions on behalf of employees, even if employees do not make EESA contributions on their own. Employer contributions should benefit the employer, not entitle EESA owners to a refundable tax credit for funds the employer contributes. Employers should be incentivized in two tiers. At a base level, employers should receive a standard tax deduction for the amount of matching contributions made to employees' EESAs. At a second tier,

[147] *See supra* notes 88–91 and accompanying text.

though, to incentivize employers to promote EESAs to low-income employees, employers that make EESA contributions (whether matching or not) on behalf of low-income employees should receive a tax credit instead of a deduction. Like the EESA credit available to individuals, the employer credit should also equal 50 percent of the amount the employer contributes.

Providing higher incentivizes for employers to match low-income employees' EESA contributions is advisable for at least two reasons. First, low-income employees are less likely to have other financial accounts, such as an IRA, as noted above in Section III.C.1; therefore, EESAs are likely to be less accessible to low-income employees. Incentivizing employers to promote EESAs to low-income employees, therefore, may make EESAs more accessible to low-income employees. Second, it is more difficult for low-income employees to save money (because, by definition, they earn less money in the first place); therefore, incentivizing employers to either match contributions, or simply to make contributions on a low-income employee's behalf, is appropriate to help boost participation rates among low-income employees.

Employer incentives are particularly important to help attract unbanked people to EESAs. Comparative case studies have shown that one of the critical differences between successful and unsuccessful efforts to reach unbanked people with mainstream financial products is appropriate and intentional tailoring of marketing campaigns.[148] Incentivizing employers to attract low-income employees and unbanked individuals into EESAs is one way to spur companies to market EESA programs more intentionally and provide matching funds or company contributions on behalf of participants. In addition, the government could promote EESAs for low-income and unbanked people as well, using insights from framing effects—a type of nudge—to increase the effectiveness of marketing materials.[149]

Another reason why EESAs represent an excellent opportunity to attract unbanked people into utilizing mainstream financial services is that technology has removed multiple barriers that previously could have discouraged unbanked people from opening bank accounts, such

[148] Choe, *supra* note 17, at 387, 395–98 (describing effective and ineffective marketing campaigns to unbanked populations and noting collaboration with state and local government agencies to promote low-cost, accessible bank accounts).

[149] Haugh, *supra* note 37, at 683 (describing government flyers using framing effects in Michigan and the UK).

as minimum balance requirements, monthly fees, and credit checks.[150] It is now easier than ever to open an online account for free, using services such as PayPal, Venmo, or another similar service. Many free online accounts do not require a minimum balance and, by definition, do not carry monthly fees. Similarly, opening a free online account does not require credit verification; thus, a negative credit history is not an obstacle to opening such an account.

The modern business model of many technology companies also suggests why such companies would welcome unbanked people as customers. Traditional banks make more money from wealthier customers, who deposit larger amounts of money, than from low-income customers, who deposit lower amounts of money; therefore, traditional banks are often reluctant to advertise to low-income customers or locate branch offices in low-income neighborhoods.[151] The internet economy is different. Many technology companies offer their product for free and make money from a large user base because their primary revenue stream is from advertising or transaction fees, both of which become more profitable as the number of users of the site or app increases.[152] Accordingly, EESAs should be launched in coordination with corporate partners that offer free online bank accounts and stand to benefit from enrolling unbanked customers (such as PayPal or Venmo, among numerous other firms in the financial technology, or FinTech, space).[153]

Designing EESAs as solely electronic accounts also dovetails with other innovations in the way the federal government sends money to people. Not only has the IRS long prioritized issuing tax refunds electronically, and not only did the IRS recently create a system for issuing COVID-19 stimulus payments electronically, but also the Federal Reserve is actively investigating a central bank digital currency, or CBDC.[154] By definition, digital currencies, such as a CBDC, rely solely on

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[150] Choe, *supra* note 17, at 367–68 (noting that minimum balance requirements, poor credit histories, or monthly fees can deter low-income people from opening bank accounts).

[151] Choe, *supra* note 17, at 367–68.

[152] Martin Zwilling, *Ten Most Common Business Models to Make a Profit*, INC. (Nov. 17, 2017), https://www.inc.com/martin-zwilling/10-most-common-business-models-to-make-a-profit.html.

[153] BUS. STRATEGY HUB, *How Does PayPal Make Money?* (2020), https://bstrategyhub.com/how-does-paypal-make-money/ (last updated May 23, 2020).

[154] *See* MIT DIGITAL CURRENCY INITIATIVE, *Building a Hypothetical Central Bank Digital Currency*, https://dci.mit.edu/building-a-hypothetical-cbdc (last visited Oct. 22, 2021) (discussing the CBDC pilot project between the Federal Reserve Bank of Boston and MIT's Digital Currency Initiative); DIGIT. DOLLAR FOUND. & ACCENTURE, THE DIGITAL DOLLAR PROJECT: EXPLORING A US CBDC (2020), https://static1.squarespace.com/static/

electronic accounts, and like EESAs, one of the arguments in favor of a CBDC is that it could attract unbanked people into the financial system by lowering barriers to entry, such as transaction fees.[155] In conjunction with long-standing trends towards electronic banking and digital currencies, therefore, EESAs should be designed from the outset as electronic vehicles for savings that can easily integrate into any potential CBDC system of the future.

B. *Summary Table*

The table below summarizes key components of the EESA proposal outlined above.

EESA Feature	Description
Account structure	Individually owned (like IRAs) and portable, even if employer sponsored
Annual contributions	Low contribution amount (e.g., $100 monthly target equates to a $1,200 annual cap)
Tax deductions	Available in either a pre-tax (i.e., traditional) format or an after-tax (i.e., Roth) structure
Withdrawal rules	Flexible and fast withdrawals; expenses must be incurred within a short time frame after withdrawal (e.g., 30 days); owner must certify emergency use on tax return
Matching tax credits	50 percent tax credit for all individual EESA contributions; fully refundable through matching payments deposited directly and electronically into EESA
Employer contributions	50 percent tax credit for contributions on behalf of low-income employees; standard deduction for all other employer contributions

5e16627eb901b656f2c174ca/t/5ecfc542da96fb2d2d5b5f15/1590674759958/Digital-Dollar-Project-Whitepaper_vF.pdf (exploring the design and potential of a CBDC).

[155] Michelle Price, *Digital Dollar Project to Launch Five U.S. Central Bank Digital Currency Pilots*, REUTERS (May 3, 2021), https://www.reuters.com/business/finance/digital-dollar-project-launch-five-us-central-bank-digital-currency-pilots-2021-05-03/ (noting that "[a] digital dollar could also boost financial inclusion in the United States, where transaction fees impede the access of many Americans to mainstream financial services . . . ").

EESA Feature	Description
Eligibility for federal assistance programs	Threshold amount (e.g., $25,000) excluded from benefits eligibility calculation
Corporate partnerships	Launch EESAs with the collaboration of internet banking firms that make money through online advertising revenue (not traditional bank fees) and whose business models allow them to offer free accounts without a credit history check
Government promotion	Market EESAs to low-income and unbanked people using framing effects (i.e., nudges)
Private employer nudge	Employers may, but are not required to, nudge employees to participate in EESAs by setting default rules to automatic participation and automatic contribution levels, with matching employer contributions (e.g., 5 percent of earnings are automatically contributed to an EESA, along with a matching employer contribution)

V. CONCLUSION

The COVID-19 emergency revealed many Americans' serious lack of emergency savings. Congress' response so far has focused on emergency stimulus measures, which is a worthy and understandable immediate goal. But a longer-term strategy to increase Americans' emergency savings is also important, and that is the hope this Article's proposal aims to fulfill.

This Article contends that Congress should create Emergency Electronic Savings Accounts ("EESAs"). EESAs should provide a tax-favored, easily-accessible, electronic path for people to save a relatively low amount of money (e.g., $100 per month) to prepare for future emergency expenses before they arise. EESAs should be structured to include refundable tax credits paid as matching savings funds deposited directly into EESAs, like employers' matching investments deposited directly into employees' 401(k) accounts. But whereas 401(k) accounts are more prevalent among higher-income people, EESAs should be designed with the dual goal of serving low- to middle-income earners and attracting unbanked people into mainstream banking relationships.