

**WRITTEN TESTIMONY OF
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BEFORE THE
HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND
REGULATORY AFFAIRS
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Chairman Jordan, Ranking Member Cartwright and Members of the Subcommittee, thank you for the opportunity to update you on the work being done by the Internal Revenue Service (IRS) to cooperate with the investigations into the findings by the Treasury Inspector General for Tax Administration (TIGTA) regarding the improper criteria used in processing applications for tax-exempt status under section 501(c)(4) of the Internal Revenue Code. I will also discuss the steps we have taken and continue to take to remedy the issues discussed in the TIGTA report and subsequent hearings.

The IRS has been, and remains, committed to cooperating fully with the pending oversight investigations into the issues raised in TIGTA's May 2013 report. The Service continues to work diligently to provide Congress with the information and documents requested in connection with the investigations, and to work to restore any confidence that might have been lost in the IRS's ability and commitment to administer the nation's tax laws in an unbiased, non-political manner.

To date, the IRS has produced more than one million pages of unredacted documents to the tax-writing committees and more than 810,000 pages of redacted documents to the House Oversight and Government Reform Committee and the Senate Permanent Subcommittee on Investigations in connection with TIGTA's May 2013 report. The difference in the number of pages produced reflects the fact that individual case files, which can be voluminous, may be disclosed only to the tax-writing committees under Internal Revenue Code Section 6103.

For more than a year, the IRS has devoted significant resources to complying with the requests for information from the six investigating entities – transmitting documents and facilitating interviews in an effort to provide complete facts about the determination process for tax-exempt status under section 501(c)(4). More than 250 IRS employees have spent more than 138,000 hours working directly on complying with the investigations, at a cost of approximately \$18 million, which also includes the cost of adding capacity to our information technology systems to accommodate the voluminous information requests.

The IRS's document production work began with an effort to identify the IRS employees from whom emails should be collected, and the search terms that should be used to ensure the agency was collecting relevant information to provide to the investigators. Eventually, the IRS identified and collected information from the custodial accounts of 156 employees who were deemed potentially relevant to the exempt organizations determinations investigation. After further review, the IRS determined that a number of these employees were only tangentially related to the subject of the investigations; accordingly, as we advised the committees, we limited our analysis of emails and other electronic documents to the custodial accounts of 82 employees. (There was one additional employee from whom we collected hard copy documents, including printouts of emails.) We searched these accounts for material responsive to the committees' requests utilizing search terms developed after consultation with the committees' staffs. A list of account custodians and search terms was provided in a letter sent to all six investigating entities in August of last year, and I provided this information as well in response to the Chairman's recent letter to me.

In addition to collecting, redacting, and providing to the six investigating entities all relevant emails from these 82 custodial accounts, our work has also included the production of documents in response to special requests from one or another of the investigating entities. Whenever the information produced for one of these special requests was relevant to the common requests of the investigating entities, we provided that information to all of the entities.

In March of this year, we advised the investigating entities that we had completed the production of all documents that appeared to be relevant to the investigation of the exempt organizations determination process. In response to a request from this Committee, once the production of documents relevant to the investigation was completed, we turned to producing all other emails of Lois Lerner, former Director of Exempt Organizations (who was one of the 82 custodians), that had not previously been produced.

As discussed at some length during a number of hearings this summer, we confirmed and reported in June of this year that Ms. Lerner's hard drive had crashed in June 2011, and that as a result, it appeared that certain emails could not be retrieved from her hard drive, notwithstanding the efforts by IRS technicians to reconstitute Ms. Lerner's data following the June 2011 crash.

One of the limitations on our ability to recover emails from the period covered by Ms. Lerner's hard drive crash is that, as previously explained to the Oversight Committee, disaster recovery tapes containing data for that period no longer existed. Although IRS email servers are backed up on a daily basis for disaster recovery purposes, prior to May 2013, this data was retained on tapes for only six months. After six months, IRS disaster recovery tapes were reused – that is, they were written over with new backup data – until they were no longer capable

of recording, at which time the tapes were recycled. In May 2013, the IRS changed its policy, and since then, it has retained these tapes rather than reusing and recycling them. This means that the IRS has preserved disaster recovery tapes containing information from December 2012 onward, but not information prior to that date.

There have been some confusing press reports that the IRS backs up information by sending it to a government-wide database containing electronic communications. It appears these reports are based on a misunderstanding of an informal conversation by a litigant with an employee of the Department of Justice. There is no system outside the IRS – government or otherwise – that the IRS uses to store emails. Even if such a system existed, the IRS would be prohibited under section 6103 from using such a database for email storage.

Despite the issue with Ms. Lerner's hard drive and our disaster recovery procedures, the IRS identified and reviewed emails to and from Ms. Lerner and the other 81 custodians by searching the emails of those custodians that had been identified using the search terms mentioned above. As a result of these efforts, the IRS identified approximately 24,000 of Ms. Lerner's emails from the period between January 1, 2009 and April 2011 – the period apparently affected by the hard-drive crash – from these other custodian accounts. These emails, along with the 43,000 emails collected from Ms. Lerner's computer and her Microsoft Outlook account, brought the total number of Ms. Lerner's emails produced through August 2014 to 67,000.

As the search for and production of Ms. Lerner's emails was concluding, I asked those working on this matter to determine whether computer systems of any of the other 81 custodians had experienced any similar difficulties. It was subsequently determined that 18 of those custodians experienced computer equipment issues that could potentially have resulted in a loss of emails. After we were able to do a thorough review, we determined that only five of those 18 appeared to have lost some emails, and that the other 13 do not appear to have lost any emails as the result of an equipment failure. We provided greater detail about this review in a report we sent earlier this month to all the investigating entities.

In addition, in June, TIGTA began an investigation of the circumstances surrounding Ms. Lerner's hard drive crash. At their request, we delayed completing our review of the issues regarding other custodians until TIGTA had completed all of its interviews. We have provided our complete support to TIGTA, and I understand they are reviewing a range of tapes and other equipment as part of their investigation. We look forward to their report and any additional recommendations they may have.

I would like to clear up a misunderstanding that has arisen regarding Ms. Lerner's IRS-issued BlackBerry device. It is important to note that an IRS

employee's BlackBerry displays only email that is managed by the employee's Microsoft Outlook mailbox (which is maintained on the IRS's servers), and not emails that an employee has archived on his or her computer hard drive. The IRS BlackBerry configuration does not have a default setting to save copies of inbound or outbound messages to the device. The IRS's standard practice for a BlackBerry when it is replaced, upgraded, repurposed, or taken out of use due to a malfunction, is to erase the information stored on the device. The reason for that is that the BlackBerry could contain sensitive taxpayer information that the IRS must ensure is not disseminated. Ms. Lerner's BlackBerry was replaced in February 2012 with a newer model as part of an ongoing BlackBerry update involving approximately 5,000 IRS employees. Because Ms. Lerner's old BlackBerry was obsolete, it was disposed of under standard IRS recycling procedures. As for the replacement BlackBerry that was issued to Ms. Lerner in February 2012, it currently is in TIGTA's possession.

In addition to the work we have been doing to cooperate with the ongoing investigations, the IRS is continuing the efforts it began in Fiscal Year (FY) 2013 to implement broad managerial and operational improvements in the determination process for tax-exempt status. As of late January 2014, the IRS had completed action on all nine recommendations contained in TIGTA's May 2013 report.

The changes we have made in response to the TIGTA recommendations include:

- Establishing a new process for documenting the reasons why applications are chosen for further review;
- Developing new training and workshops on a number of critical issues, including the difference between issue advocacy and political campaign intervention, and the proper way, under current law, to identify applications that require review of potentially significant political campaign intervention;
- Establishing guidelines for specialists in IRS's Exempt Organizations (EO) division on how to process requests for tax-exempt status involving organizations engaging in potentially significant political campaign intervention; and
- Creating a formal, documented process for EO determinations personnel to request assistance from technical experts.

We have also reduced the inventory of section 501(c)(4) applications, including the group of 145 cases in the "priority backlog" – those that were pending for 120 days or more as of May 2013. As of September 9, 2014, 133 of those cases, or 91 percent, have been closed. Of the closed cases, 102 of them were approved, including 43 organizations that took advantage of a temporary self-certification procedure we offered in summer 2013. Of the remaining 31 closed cases, most were closed without a determination, either because the organization withdrew the application or it failed to respond to our questions. To date, four applications have been denied and the remaining 12 cases are still open. None of these 12

organizations opted to accept the self-certification procedure used by 43 organizations to obtain prompt approval of their applications.

We also have established an agency-wide enterprise risk management program, creating risk management liaisons in each area of our operation and providing for the regular identification and analysis of risks to be eliminated or managed across the agency. We are working to create a culture where employees are encouraged to report any issues or problems that occur. My goal is to have employees understand that the only problems we can't solve are the ones we don't know about. As a corollary to that effort, we are encouraging the flow of information from front line employees up through the organization as well as to the front line from senior managers.

I would also like to describe for the Subcommittee the efforts now underway to revamp the IRS's records retention practices to improve the management and storage of emails that are deemed to be Federal records. We are consulting with the National Archives and Records Administration (NARA) to ensure that the IRS is aligned with the standards set by NARA.

As a first step we will implement an interim policy, which is described more fully below. This interim policy is to be followed by a more fully developed enterprise solution for longer-term storage of emails. We are working to complete the development and implementation of the enterprise solution.

Under the interim policy, we will be providing new instructions to IRS executives for protecting the electronic records they create through emails and calendar invitations. Emails that are sent and received by these senior officials and that are Federal Records will be captured and stored on a secure server. Our next step will be to purchase the necessary equipment and technology to allow us to securely store emails that are Federal records according to the following criteria:

- Email records sent or received by Top Level Officials, also known as Capstone officials in NARA email management guidance, will be captured and preserved as permanent records, which will ultimately be accessioned into the National Archives;
- Email records sent or received by other Executives, Senior Managers and specific policy analysts will be secured and stored for 15 years;
- Email records sent or received by all others will be secured and stored for seven years by the IRS; and
- We will also develop guidance on how to manage non-record and personal email materials consistent with the Federal Records Act.

The IRS will work with NARA to implement a records disposition schedule and the implementing directives to reflect the policy above. We believe this approach will meet or exceed the present NARA standards for managing email records.

Our ultimate goal is to ensure that all email records are not only securely saved and stored, but also easily retrievable. This result would require funds that we do not have, but we continue to look for other solutions, and we are holding discussions with other government agencies that are dealing with similar challenges.

This concludes my testimony. I would be happy to take your questions.