WRITTEN TESTIMONY OF
JOHN A. KOSKINEN
COMMISSIONER
INTERNAL REVENUE SERVICE
BEFORE THE
HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
JUNE 23, 2014

Chairman Issa, Ranking Member Cummings and Members of the Committee, thank you for the opportunity to appear before you this evening to provide you with an update on recent IRS document productions to Congress.

Before discussing this subject, I believe it is important, in regard to the subpoena that I received from the Chairman of this Committee last week to appear at this hearing, to make sure that there is no suggestion in the record that I was unwilling to appear before this Committee to testify on this subject, or to appear at any other time when a request was made for my testimony.

I have testified before Congressional panels, including this Committee, a total of eight times since being sworn in as IRS Commissioner in December. I also testified before Congress numerous times over the years when I held various positions in the public sector, including: Deputy Director for Management at the Office of Management and Budget; Chairman of the President's Council on Year 2000 Conversion; and Deputy Mayor and City Administrator for the District of Columbia. In each instance, I was able to arrange a convenient time for me to appear with the relevant Committee or Subcommittee. There was never a need for a subpoena. In the future, if this Committee would like me to appear, the Committee need only contact my office and I will, as I have always done, be happy to work with you to set up a convenient date and time.

The IRS has over the past year made a massive document production in response to inquiries from Congress and other parties. In March, the IRS advised the House Ways and Means Committee and the Senate Finance Committee that we had completed the production of documents identified as relating to their investigation of the processing and review of applications for tax-exempt status as described in the May 2013 report from the Treasury Inspector General for Tax Administration (TIGTA). Those production efforts included 11,000 emails from Lois Lerner, former director of the IRS Exempt Organizations division. Since then, pursuant to requests from this and other Congressional Committees, the IRS has been producing on a regular basis all additional Lerner-related emails in its custody, regardless of subject matter.

By any measure, this effort has been substantial. More than 250 IRS employees have spent over 120,000 hours working on compliance with several

investigations stemming from last May's TIGTA report. We have responded to hundreds of Congressional requests for information. In so doing, the IRS has incurred a direct cost of nearly $10 million. We have spent an additional $6-8 million to optimize existing information technology systems and ensure a stable infrastructure for the production and required redactions to protect taxpayer information.

This Committee now has received over 600,000 pages of materials redacted to protect taxpayer information. The tax-writing committees have received over 770,000 pages of unredacted materials. As of last Friday, the tax-writing committees already had more than 25,000 emails from Ms. Lerner's computer account and more than 5,000 emails from other custodians' accounts for which Ms. Lerner was an author or recipient. The IRS expects to complete its production of the remaining Lerner emails in unredacted form by the end of the month. As soon as possible thereafter, we will complete redaction of those emails and produce them to this Committee. At that time, this Committee will have all of the emails – 43,000 of them – that we have from Ms. Lerner's computer and email account for the period January 2009 through May 2013. In addition, this Committee will have 24,000 Lerner emails from other custodians' accounts, for a total of 67,000 Lerner emails.

When the IRS production of documents to Congress began last year, we developed with the investigating committees a list of 77 IRS employees, which has since expanded to 83 IRS employees, and specific search terms designed to retrieve all emails of these employees related to the investigation.

We have faced many hurdles along the way in our efforts to produce materials as quickly as possible. For example, in the materials we shared with Congress on June 13, the IRS explained how the structure and age of the IRS's technology systems complicates efforts to recover information.

In the course of responding to Congressional requests, the IRS in February reviewed the email available from Ms. Lerner's custodial computer account (which was date-limited and limited by search terms) and identified the possibility of an issue because the date distribution of the email was uneven. It was not clear whether Lerner emails were overlooked, missing, or had other technical issues involved; IRS information technology professionals identified documents that indicated Ms. Lerner had experienced a computer failure in 2011.

In mid-March 2014, the IRS focused on redacting materials for the non-tax writers and processing the rest of Ms. Lerner's email for production. Fulfilling the request for Lerner emails – regardless of search terms, relevance, or subject matter – required the IRS to load additional email beyond those previously reviewed.

As we reviewed additional emails, the IRS review team learned additional facts regarding Ms. Lerner's computer crash in mid-2011, which occurred before these investigations opened or when the TIGTA review began.

During this review, we learned that, in 2011, the IRS Information Technology (IT) division had tried using multiple processes – at Ms. Lerner's request – to recover the information stored on her computer's hard drive. However, the data stored on her computer's hard drive was determined at the time to be "unrecoverable" by the IT professionals. Any of Ms. Lerner's email that was only stored on her computer's hard drive was lost when the hard drive crashed, so it could not be recovered. A series of emails available after all of Ms. Lerner's email was loaded recounts the sequence of events in 2011.

A front line manager in IT reported to Ms. Lerner in an email on July 20, 2011:

> "I checked with the technician and he still has your drive. He wanted to exhaust all avenues to recover the data before sending it to the 'hard drive cemetery'. Unfortunately, after receiving assistance from several highly skilled technicians including HP experts, he still cannot recover the data."

Ms. Lerner was told by email on August 1, 2011:

> "As a last resort, we sent your hard drive to CI's [the IRS Criminal Investigation Division] forensic lab to attempt data recovery."

In email on August 5, 2011, after three weeks of attempts to retrieve her emails, Ms. Lerner was advised:

> "Unfortunately the news is not good. The sectors on the hard drive were bad which made your data unrecoverable. I am very sorry. Everyone involved tried their best."

It's important to note that an extra step was taken in this process by sending the hard drive to the IRS Criminal Investigation forensics lab. This step is not normally taken when an employee's computer crashes. The experts at the IRS forensics lab are experienced at recovering hard drives, which is part of their work assisting on criminal cases. The Criminal Investigation employees are highly skilled in this area and respected for their work in the greater law-enforcement community.

In light of the hard-drive issue, the IRS took multiple steps over the past months to assess the situation and produce as much email as possible for which Ms. Lerner was an author or recipient.

The IRS:

- Retraced the collection process for Ms. Lerner's computer to determine that all materials available in May 2013 were collected;
- Located, processed, and included in its production email from an unrelated 2011 data collection of Ms. Lerner's email;
- Confirmed that back-up tapes from 2011 no longer exist because they have been recycled (which is not uncommon for large organizations in both the private and public sectors); and
- Searched email from other custodians for material on which Ms. Lerner appears as an author or recipient, then produced such email.

From mid-March to late April, the IRS review team concentrated on loading for review all remaining email from Ms. Lerner's account and then repeating the entire process for quality control and to ensure no new emails had been missed. During this time and into May, we were also identifying and reviewing Lerner emails to and from the other 82 custodians. By mid-May as a result of these efforts, the IRS identified approximately 24,000 Lerner emails between January 1, 2009 and April 2011 from these other custodians' accounts.

As the search for and production of Lerner emails was concluding, I asked those working on this matter to determine whether computer systems of the other 82 custodians had experienced any similar difficulties, especially in light of the aged equipment the IRS has been increasingly using as a result of its budget pressures. After the IRS report was delivered on June 13 to Congress and the Treasury Inspector General for Tax Administration, it was determined last week that seven additional custodians had experienced hard drive failures during the search period. In February 2014, outside the search period, an eighth custodian experienced a hard drive failure. A hard drive failure does not automatically mean that all, or even any, emails have been lost or cannot be reconstituted. We are still assessing what effect, if any, computer failures had on the emails of any of the custodians.

In regard to the retention of official records, questions have been raised as to why the IRS does not have available electronic backups for all emails for IRS employees. It is important to keep in mind that the IRS has approximately 90,000 employees. Due to financial and practical considerations, the IRS has limited the total volume of email stored on its server by restricting the amount of email that most individual users can keep in an inbox at any given time.

According to estimates made two years ago, it would cost more than $10 million to upgrade the IRS's information technology infrastructure in order to begin saving and storing all email sent or received by the approximately 90,000 current IRS employees. In light of declining budget resources available to the IRS, the

decision was made at that time not to proceed with this expenditure. These continuing financial constraints have meant that this fiscal year, the IRS is spending minimal amounts supporting its $1 billion IT infrastructure. For example, the IRS has yet to complete moving all employee computers from Windows XP, which is no longer generally supported by Microsoft, to Windows 7.

Currently, the average individual employee's email box limit is 500 megabytes, which translates to approximately 6,000 emails. Prior to July 2011, the limit was lower: 150 megabytes or roughly 1,800 emails. The IRS does not automatically delete email in its employees' email accounts to meet these limits; rather, each employee is responsible for managing and prioritizing the information stored within his or her email box.

Historically, the email of IRS employees is stored in two locations: email in an individual's active email box is saved on the IRS's centralized network, and archived email is saved on the individual employee's computer hard drive. If an email user's mailbox gets close to capacity, the system sends a message to the user noting that soon the mailbox will become unable to send additional messages.

When a user needs to create space in his or her email box, the user has the option of either deleting emails (if they do not qualify as official records) or moving emails out of the active email box (inbox, sent items, deleted items) to an archive. In addition, if an email qualifies as an official record, per IRS policy, the email must be printed and placed in the appropriate file by the employee. Archived email is moved off the IRS email server and onto the employee's hard drive on the employee's individual computer. As a result, these IRS employees' emails no longer exist in the active email box of the employee and are not backed up as part of the daily backup of the email servers. Email moved to a personal archive of an employee exists only on the individual employee's hard drive. An electronic version of the archived email would not be retained if an employee's hard drive is recycled or if the hard drive crashes and cannot be recovered.

In discussing document retention at the IRS, it is important to point out that our email system is not being used as an electronic record keeping system. Furthermore, it should be remembered that not all emails on IRS servers or backup tapes qualify as an "official record," which is defined (in 44 U.S.C. 3301) as any documentary material made or received by an agency under federal law or in connection with the transaction of public business and appropriate for preservation. Accordingly, our agency's email system is not designed to preserve email. Rather, email that qualifies as "records" are printed and retained in compliance with relevant records control schedules. Individual employees are responsible for ensuring that any email in their possession that qualifies as a "record" is retained in accordance with the requirements in the Internal Revenue Manual and Document 12990 (Record Control Schedules).

I would note, however, that since the investigations into the applications process for 501(c)(4) organizations began in May of last year, the IRS has saved backup tapes for all emails on the IRS's servers, which includes tapes for the six months preceding May 2013.

In addition, in late May and early June of 2013 the IRS sent document retention notices to employees who were identified as having documents (including email) potentially relevant to the investigations. These notices instructed employees not to alter or destroy "all communications, documents drafted or reviewed, spreadsheets created or reviewed, notes from meetings, notes relating to specific taxpayers and/or applications, information requests to applicants, training materials, or any other items that relate to the process by which selection criteria were used to identify tax-exempt applications for advocacy organizations for review, including but not limited to Be On the Lookout, from January 1, 2008 to the present." In that timeframe, the IRS sent similar document retention notices to all employees in its Tax-Exempt and Government Entities function and its Chief Counsel counterpart; the IRS Communications and Liaison function; and all employees assigned to respond to the Congressional inquiries.

In conclusion, the IRS has been expending an enormous amount of resources to produce documents related to the investigation related to the May 2013 TIGTA report, including the production of all available Lerner emails. Given the extremely broad scope of this effort, it is not surprising that we would discover that some employees had encountered some technical issues, especially in light of the agency's aging information technology infrastructure. In particular the IRS has described in great detail, in a public report on June 13, its efforts to produce Lerner emails. We are still assessing what effect, if any, hard drive crashes had on the emails of any other custodian. We are committed to working cooperatively and transparently with you, and we will continue to provide you with updates.

Chairman Issa, Ranking Member Cummings and members of the Committee, this concludes my testimony. I would be happy to take your questions.