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"IRS Electronic Record Retention Policies: Improving Compliance"

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Chairman Buchanan, Ranking Member Lewis, and Members of the Subcommittee, thank you for the opportunity to testify on the Internal Revenue Service's (IRS) electronic record retention policies and practices.

The Treasury Inspector General for Tax Administration (TIGTA) was created by Congress in 1998 and is mandated to ensure integrity in America's tax system. It provides independent audit and investigative services to improve the economy, efficiency, and effectiveness of IRS operations. TIGTA's oversight activities are designed to identify high-risk systemic inefficiencies in IRS operations and to investigate exploited weaknesses in tax administration. TIGTA plays the key role of ensuring that the approximately 85,000 IRS employees[1] who collected more than $3.3 trillion in tax revenue, processed more than 244 million tax returns, and issued more than $400 billion in tax refunds during Fiscal Year 2016,[2] have done so in an effective and efficient manner while minimizing the risk of waste, fraud, and abuse.

Today's testimony highlights the results of our recently issued report on IRS electronic record retention practices.[3] This report is in response to requests from the Chairman of the House Committee on Ways and Means and the Chairman of the Senate Finance Committee.

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[1] In FY 2016, the IRS employed, on average, approximately 85,000 people, including more than 16,000 temporary and seasonal staff.
[2] IRS, *Management's Discussion & Analysis, Fiscal Year 2016*.
[3] TIGTA, Ref. No. 2017-10-034, Electronic Record Retention Policies Do Not Consistently Ensure That Records Are Retained and Produced When Requested (July 2017)

RESULTS OF REVIEW

TIGTA identified several areas where improvement is needed in IRS electronic record retention policies and practices. Specifically, we found that IRS policies are not in compliance with certain Federal electronic records requirements and regulations.[4] The IRS's current e-mail system and record retention policies do not ensure that e-mail records are saved and can be searched and retrieved for as long as needed. Additionally, repeated changes in electronic media storage policies, combined with a reliance on employees to maintain records on computer hard drives, have resulted in cases in which Federal records were lost or destroyed. Examples from our case reviews show that it is especially difficult for the IRS to retain records from employees who have separated from the IRS.

Our review of Freedom of Information Act (FOIA) requests, congressional committee document requests, and litigation holds also found that, for certain cases, the IRS did not consistently ensure that potentially responsive records were identified and produced. Annually, the IRS responds to thousands of FOIA requests, congressional inquiries, and litigation discovery requests associated with court actions. In response to these external requests, specific offices within the IRS, including the Office of Chief Counsel; the Privacy, Governmental Liaison, and Disclosure (PGLD) office; and the Executive Secretariat Correspondence Office; search for responsive records and provide the records to appropriate parties. Although over 70 percent of FOIA requests are completed timely, we found that some cases were not closed timely. We also found instances in which the search methods used were not properly documented in accordance with IRS policies, did not identify all potential custodians, and erroneously concluded that records associated with separated employees had been destroyed when potentially responsive records were available.

RECORD RETENTION POLICIES

Our audit found that IRS standard policies for disposal of computer devices, including desktops, laptops, computer hard drives, and backup tapes, have been revised and reversed several times since May 2013. Specifically, during a period of less than three years, retention policies for computer devices changed from saving all devices to erasing and reutilizing some devices and then back to saving all devices. The Code of Federal Regulations (C.F.R.) requires Federal agencies to implement internal controls over Federal records in electronic information systems, ensuring that all

[4] Our audit focused on IRS electronic record retention policies and did not evaluate the various controls that the IRS has in place to retain paper Federal records.

records are retrievable and usable for as long as needed to conduct business.[5] However, the IRS's repeated changes impacted the effectiveness of its record retention. For example, although policy updates were put in place, those policies did not ensure that the hard drives from laptop and desktop computers stored by the IRS were associated with the name of the employee or the laptop from which the hard drive was taken. Without this correlation, successfully completing a search for specific e-mail or other electronic information residing on a stored hard drive would be highly unlikely and could result in destroyed records.

Our audit also found that the IRS's current e-mail system does not meet Federal requirements for storing and managing e-mail messages. Memorandum M-12-18, issued by the Office of Management and Budget and the National Archives and Records Administration (NARA), required that by December 31, 2016, Federal agencies manage both permanent and temporary e-mail records in an accessible electronic format. E-mail records must be retained in an appropriate electronic system with the capability to identify, retrieve, and retain the records for as long as they are needed.

However, as of September 30, 2016, the IRS reported to the NARA that it did not plan to fully deploy its enterprise e-mail solution until September 30, 2017. As previously reported by TIGTA, the delay is due to the IRS's decision in April 2016 to change the type of e-mail system it would implement, after it had already begun efforts to upgrade its enterprise e-mail system in July 2015.[6] Because the IRS did not follow its internal policies or perform the required cost analysis, security assessments, and requirements analysis to implement the purchase of the email software subscriptions, the IRS wasted $12 million on software that was never deployed.

As a result of limitations to the current system, the IRS stores e-mail in multiple locations, including mailbox folders, Exchange servers, network shared drives, hard drives, removable medias, and backup tapes, all of which have limitations in their ability to effectively store e-mail. Due to those limitations, the IRS risks destroying Federal records when user hard drives are erased, lost, or destroyed.

In addition, we found that the IRS instituted an interim policy requiring IRS executives to archive their e-mail to a shared network drive. However, we found that this policy was not implemented effectively because some executives did not properly configure their e-mail accounts to archive e-mail as required, and because the IRS did not have an authoritative list of all executives required to comply with the interim policy.

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[5] 36 C.F.R. § 1236.10, Electronic Records Management (Oct. 2009).
[6] TIGTA, Ref. No. 2016-20-080, Review of the Enterprise E-Mail System Acquisition (Sept. 2016).

Specifically, early in Calendar Year 2015, the Information Technology (IT) organization compiled a list of 278 executives included in the permanent and 15-year retention groups from several executive pay plans based on information provided by the IRS Human Capital Office. Those executives were provided with instructions, training, and support to assist them in enabling the auto-archiving function of their Outlook e-mail accounts. However, there was no independent verification conducted to confirm that the e-mail accounts were actually configured to auto-archive e-mails as instructed. Therefore, all executives in this initial migration were required to self-certify that they had taken the steps, as instructed, to configure their e-mail accounts to auto-archive e-mail to a shared network drive. We tested a judgmental sample of 20 executive e-mail accounts and found that four of the 20 executives did not have Outlook properly configured to archive e-mails to a shared drive as required by the interim policy. We also found that the IRS's list of 278 executives was not complete and was not updated as new executives joined the IRS.

Finally, we found the design of the IRS's policies for preserving Federal records in the possession of separating employees did not ensure that all records were retained. The C.F.R. and the Internal Revenue Manual require that Federal records be preserved for specific retention periods and that the records be searchable, but the IRS could not ensure compliance with these requirements for records associated with separated employees. For example, the IRS policy prior to May 2016 relied on separating employees to print Federal records, including those records contained on employee computer hard drives, before leaving the IRS, rather than storing them electronically. However, the IRS issued interim policies in May 2016, which were subsequently formalized in September 2016, to address some of the identified gaps in retention of records from separating employees. Because these policies were issued during our audit, we were unable to test whether the IRS effectively implemented the changes. Prior to these policy updates, the IRS did not have an effective mechanism for preserving information that may have been contained on separated employees' electronic devices.

RESPONSES TO REQUESTS FOR RECORDS

Our review of a judgmental sample[7] of 35 FOIA requests, two requests from congressional committees, and two court cases that required record production found that, for certain cases, IRS processes in response to requests for records did not consistently ensure that potentially responsive records were searched and produced.

[7] A judgmental sample is a non-statistical sample, the results of which cannot be used to project to the population.

Our review did find that the IRS responded timely to the majority of FOIA requests. Of the almost 50,000 FOIA cases closed during the audit period, IRS records indicate that over 36,000 were closed in 20 business days or less, which is generally the required response time. For the almost 13,000 remaining cases, the average closing time was 51 business days. In reviewing the remaining cases that had much longer processing times, we found that 100 cases took between one and two years to close, and three cases took between two and two and a half years to close. For the FOIA requests that involved longer than normal processing times, the volume of responsive documents can exceed 10,000 pages, and the review process must ensure the redaction of I.R.C Section 6103 information and Privacy Act information as well as information based on FOIA exemptions specifically identified by law.

In addition to the overall analysis of FOIA responses, we also reviewed a judgmental sample of 35 FOIA requests,[8] of which 30 had been closed by the IRS at the time of our review. We found the average time to close the 30 cases was 212 business days, and the records for some requests took over two calendar years to fully produce. However, it should be noted that we selected FOIA cases with longer response times as part of our sample so that we could determine the cause of these delays. Many of the delays we observed related to the time it took for business units to search for, gather, and provide the responses to the PGLD. The five cases open during our audit were awaiting processing by the Office of Chief Counsel, and the average elapsed time was 389 business days.

We also found instances in which the search methods used were not properly documented. For some of the cases we reviewed, the IRS did not document what records were searched and which custodians searched for the records, as required by IRS policy, and in some cases the IRS did not identify all custodians with responsive records. The FOIA requires that an agency make reasonable efforts to search for records that have been reasonably described by the requester. IRS policy requires that PGLD case workers document who searched for the records, the search terms used, the systems searched, and the time expended to search for and retrieve the records. However, for 20 of 30 closed cases reviewed, TIGTA found that the IRS did not document the search efforts as required. Without this information, the PGLD office was unable to document that an adequate search was performed. In addition, our case review found four instances in which the IRS's search efforts did not find all custodians

[8] The 35 FOIA requests were judgmentally selected based on a variety of ranking criteria, including the type of request (individual taxpayer, administrative request, media/external party sensitive request), the disposition of the FOIA request, the complexity of the request, and the seniority of the caseworker assigned to the request.

with responsive records. Specifically, for one case, the PGLD office caseworker did not reach all the custodians who had responsive records because the caseworker did not send the request to all the functional contacts of the business unit identified in the incoming request. Instead, the request was sent only to the revenue agent named in the request. The case later went to litigation, and the judge found an inadequate search effort on the part of the IRS. Additional responsive records were found in other business units after one of the senior Office of Chief Counsel attorneys reviewed the request and expanded the search effort.

Finally, we found weaknesses in the IRS policy regarding searching for responsive records associated with separated employees. Our review found that the IRS did not have a policy regarding when or whether to search for separated employees' records in response to FOIA requests, litigation, and congressional requests. In addition, we received different responses from various business units when we inquired about policies governing the search for records associated with separated employees in response to a FOIA request. In our case reviews, we found that the IRS does not consistently search records of separated employees in response to requests for records. For example, in one of the litigation cases we examined, the IRS did not search for records associated with one of 11 employees who had separated. In October 2014, the Department of Justice, on behalf of the IRS, filed a document with the court stating that 11 former IRS employees' laptop hard drives were "likely unavailable" for electronic discovery of evidence. However, in our search, we found that, according to the IRS inventory system, one hard drive was listed as in-stock at the time the court document was filed, and thus could have been searched to determine if records were still available.

TIGTA RECOMMENDATIONS AND IRS RESPONSE

In total, TIGTA made five recommendations to the IRS on improvements that need to be made to electronic record retention practices. Specifically, we recommended that the IRS:

- Implement an enterprise e-mail solution that enables the IRS to comply with Federal records management requirements;

- Document the methodology for developing one authoritative list of executives to be included in interim e-mail auto-archiving processes and coordinate between PGLD and IT organization personnel to verify that all

identified executive e-mail accounts are properly configured to archive e-mail;

- Ensure that the newly issued policy on the collection and preservation of Federal records associated with separated employees is disseminated throughout the agency;

- Ensure that the policy for documenting search efforts is followed by all employees involved in responding to FOIA requests; and

- Develop a consistent policy that requires Federal records associated with separated employees to be searched as part of the IRS's responses to Federal requests for records.

The IRS agreed with all five recommendations and outlined responsive corrective actions including implementation of a new enterprise e-mail solution that will comply with Federal record retention requirements. However, in response to our draft report, the Director, PGLD, stated that our findings were not accurate in two areas. We have concerns about the accuracy of certain statements in the IRS's response to our draft report.

First, the IRS disagreed with our finding that its record retention policies did not comply with Federal requirements. Specifically, the IRS contended that its policy of printing and filing any electronic record was in compliance with NARA guidelines in place at the time of our audit. As detailed in our report, regulations in place during our audit period stated that agencies must ensure that all electronic records are retrievable and usable for as long as needed. The IRS's ever-changing electronic media storage policies, and the IRS's reliance on employees to store on employee hard drives electronic Federal records contained in e-mail, negatively affected the IRS's ability to comply with Federal requirements. In addition, in a review of IRS record retention practices in June 2015, NARA found that the IRS's e-mail management practices and technologies did not secure all e-mail records against potential loss. Given this finding, the IRS's statement that it was in full compliance with NARA regulations is not factual. Finally, in its response the IRS makes the statement that its print-and-file paper system helps, rather than hinders, Federal record preservation. TIGTA does not agree with that assessment. With tens of thousands of IRS employees creating potentially millions of

Federal records via e-mail, reliance on employees to print and file each record is not a viable option and not one to which the IRS has adhered.

Second, the IRS disagreed with our finding that inadequate search efforts were conducted in response to FOIA requests. Specifically, the IRS stated that, in general, it believes adequate searches took place to facilitate appropriate record production to FOIA requestors. TIGTA's findings of inadequate search efforts relate only to 30 closed FOIA cases reviewed and, as stated in our report, cannot be projected generally to all FOIA cases. However, for 20 of the 30 closed cases we reviewed, the IRS did not follow its own policies that require it to document which employees searched for responsive records and what criteria were used in the search. In four cases, the PGLD caseworker did not follow up with a lead to identify other potential custodians. For two of the four cases, the PGLD caseworker closed the case with a 'No Records' response to the requestor, and in the third case, which was still open at the time we reviewed the file, the IRS was not aware that there was an additional custodian with responsive records until a meeting between TIGTA and IRS Chief Counsel staff working the case was held in November 2016, at which point the case had been open for over 400 days. Lastly, in the fourth case, the PGLD office caseworker did not reach all the custodians who had responsive records because the caseworker did not send the request to all the functional contacts of the business unit identified in the incoming request. The case later went to litigation, and the judge found an inadequate search effort on the part of the IRS. Given these examples, we stand by our finding that some responses to FOIA requests did not ensure that all records were searched and produced.

We at TIGTA take seriously our mandate to provide independent oversight of the IRS in its administration of our Nation's tax system. As such, we plan to provide continuing audit coverage of the IRS's efforts to operate efficiently and effectively and to investigate any instances of IRS employee misconduct.

Chairman Buchanan, Ranking Member Lewis, and Members of the Subcommittee, thank you for the opportunity to share my views.

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Mr. Kutz joined the Treasury Inspector General for Tax Administration (TIGTA) in 2012 and serves as the Assistant Inspector General for Audit, Management Services and Exempt Organizations. Mr. Kutz is responsible for audits of several IRS programs including the Agency-Wide Shared Services, Human Capital, Financial Management, and the Tax Exempt and Government Entities Division. Mr. Kutz is also the Acting Deputy Inspector General for Inspections and Evaluations and has served in this role since November of 2014.

Prior to joining TIGTA, Mr. Kutz served as an executive at the Government Accountability Office (GAO) for over 14 years. At GAO, Mr. Kutz led the GAO audit of the IRS's financial statements from 1997 through 2001. Prior to GAO, Mr. Kutz worked for eight years at KPMG in Washington, D.C. and Tysons Corner, Virginia.

Mr. Kutz is a Certified Public Accountant and was a 2010 Service to America Medals Finalist for Justice and Law Enforcement.