CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

STATEMENT FOR THE RECORD

COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL, AND ANTITRUST LAW
U.S. HOUSE OF REPRESENTATIVES

September 19, 2014

Hearing on "Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program"

2141 Rayburn House Office Building
Chairman Robert Goodlatte (R-VA) and Subcommittee Chairman Spencer Bachus (R-AL)

Prashant K. Khetan
Senior Counsel

Thank you, Chairman Goodlatte and Subcommittee Chairman Bachus, for the opportunity to submit this statement for the record to the Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, at the U.S. House of Representatives. My name is Prashant K. Khetan and I am a Senior Counsel at Cause of Action, a non-profit, nonpartisan government accountability organization that uses investigative, legal, and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.[1]

Cause of Action is at the forefront of exposing the politicization and malfeasance that has occurred at the Internal Revenue Service (the "IRS"). From our legal efforts to prevent the IRS from finalizing widely-criticized proposed rules affecting 501(c)(4) social welfare organizations,[2] to exposing the White House's highly politicized policy to review and advise agencies (including the IRS) as to which documents to produce to Congress and the public,[3] we are committed to oversight of the federal government in an effort to improve its broken components.

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[1] CAUSE OF ACTION, *available at* www.causeofaction.org.
[2] *Cause of Action Sues IRS Over Proposed Regulations Affecting Nonprofits*, CAUSE OF ACTION, http://causeofaction.org/cause-action-sues-irs-proposed-regulations-affecting-nonprofits/ (last visited Sept. 16, 2014);
[3] *Cause of Action Sues a Dozen Federal Agencies for Allowing the White House to Obstruct Transparency*, CAUSE OF ACTION, http://causeofaction.org/cause-action-sues-dozen-federal-agencies-allowing-white-house-obstruct-transparency/ (last visited Sept. 16, 2014); *White House "Equities" in FOIA Requests*, CAUSE OF ACTION, http://causeofaction.org/our-work/white-house-equities-in-foia-requests/ (last visited Sept. 16, 2014).

1919 Pennsylvania Ave, NW
Suite 650
Washington, DC 20006
www.CauseOfAction.org
Ph: 202.499.4232

Relevant to this Hearing, Cause of Action has experience with the IRS in connection with requests under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), investigations and litigation that relate to uncovering the full ramifications of the allegedly lost emails of Lois Lerner, former director of the Internal Revenue Service's Exemption Organizations Unit.[4] Specifically, our work confirms that the Department of Justice ("Justice") has failed to fulfill its responsibilities in handling this matter, including in investigating potential violations of federal law.

The IRS Appears to Have Violated the Federal Records Act

Every federal agency, including the IRS, is required to preserve its electronic records in accordance with applicable statutes, regulations, and agency policies. The Federal Records Act ("FRA"), which establishes the framework for records management throughout the federal government, requires the head of every agency to "establish safeguards against the removal or loss of records." 44 U.S.C. § 3105.[5] The National Archives and Records Administration ("NARA"), which is the primary agency for records management oversight, is responsible for assisting agencies in maintaining satisfactory documentation of agency policies and transactions.

When agency records are unlawfully or accidentally removed, defaced, altered, or destroyed, the custodial agency must "promptly" notify NARA and produce a comprehensive report. 36 C.F.R. § 1230.14. Moreover, the head of the custodial agency must collaborate with the Archivist of the United States to "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed." 44 U.S.C. § 3106. If an agency does not contact the Attorney General within a reasonable period of time, the Archivist is required to do so on his own, while simultaneously notifying Congress that "such a request has been made." *Id.*

The Archivist, David Ferriero, testified before Congress that the IRS failed to notify NARA about the loss of Lois Lerner's emails and, as such, "did not follow the law."[6] This would appear to represent a violation of the FRA, which would have obligated the Commissioner of the IRS to report the loss of the records contained on Lois Lerner's hard drive to NARA, and then to contact the Attorney General. The Archivist has not publicly confirmed whether he has independently requested that the Attorney General undertake any action to recover the lost emails, or whether he has reported the matter to Congress, as required by the FRA. *See* 44

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[4] Cause of Action has submitted numerous FOIA requests to the IRS and others in its investigation of Ms. Lerner's lost emails. *See, e.g.*, *FOIA Request to the IRS Regarding Policies and Practices Concerning Applications for 501c4 Status*, CAUSE OF ACTION, http://causeofaction.org/foia-request-to-the-irs-regarding-policies-and-practices-concerning-applications-for-501c4-status/(last visited September 16, 2014). On June 23, 2014, Cause of Action and Tea Party Patriots submitted a FOIA request for various records pertaining to the Lerner emails, including the IRS's records management practices. *FOIA Request to IRS regarding IRS Targeting and Records Management*, CAUSE OF ACTION, http://causeofaction.org/foia-request-irs-regarding-irs-targeting-records-management/ (last visited September 16, 2014). To date, the IRS has refused to produce a single document in response to this request, despite repeated efforts to work with the IRS regarding the scope of the search for and production of responsive documents.

[5] *See generally Competitive Enterprise Inst. v. EPA*, No. 13-1532, 2014 U.S. Dist. LEXIS 122907 (D.D.C. Sept. 4, 2014) (discussing Federal Records Act).

[6] *E.g.*, Rachel Bade, *Archivist: IRS Did Not Follow Law On Lost Emails*, POLITICO (June 24, 2014), *available at* http://www.politico.com/story/2014/06/irs-lost-emails-archivist-108242.html.

U.S.C. § 3106.[7] Regardless, it is clear that the Attorney General is a necessary participant in the investigation of these lost or destroyed records.

The Loss of the Lerner Emails May Have Violated Other Laws

The loss of Ms. Lerner's emails may have violated criminal laws as well.[8] Specifically, the IRS might have criminally obstructed Congress by failing to preserve Ms. Lerner's emails. The Antitrust Civil Process Act prohibits the obstruction of congressional or federal administrative proceedings, and defines three essential elements for this crime. 18 U.S.C. § 1505. First, there must be an inquiry or investigation by either the House of Representatives or the Senate, or any congressional committee or joint committee. *Id.* Second, the defendant must be aware of the pending proceeding. *Id.* And third, the defendant must have intentionally endeavored, among other things, to withhold or destroy documentary evidence, or to corruptly endeavor to influence, obstruct, or impede the pending proceeding. *Id.* The term "'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." *Id.* § 1515(b).

By letter dated June 3, 2011, Congressman Dave Camp, Chairman of the U.S. House Committee on Ways and Means, requested then-IRS Commissioner Douglas Shulman to produce various information about the IRS's unusual scrutiny of 501(c)(4) organizations and their donors.[9] Although the IRS responded to Chairman Camp by letter dated July 1, 2011 – stating "that the IRS's actions in this area were in no way influenced by political considerations" – it noted in several instances that the agency was still "in the process of performing an electronic search of files of individuals involved in this matter."[10] This is significant because on June 13, 2011 – only *ten days after* Chairman Camp's request – Ms. Lerner's computer allegedly crashed, resulting in the loss of all the emails that Ms. Lerner had sent and received between January 2009 and April 2011.[11] Thus, a sufficient basis exists to allege that IRS officials are criminally liable for obstructing a congressional investigation.[12]

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[7] Cause of Action has submitted a FOIA request seeking records of any communications between the Archivist and Congress, the Attorney General and the President in connection with Ms. Lerner's lost emails, as contemplated by the law. Letter from Cause of Action to Gary M. Stern, Chief FOIA Officer, National Archives and Record Administration (Sept. 17, 2014) (on file with Cause of Action).

[8] *See, e.g.*, 18 U.S.C. § 2071 ("Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record . . . filed or deposited . . . in any public office . . . shall be fined . . . or imprisoned not more than three years, or both." The same punishment may be applied to whomever "willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same," while having the records under his possession, and with the additional punishment that he "shall forfeit his office and be disqualified from holding any office under the United States."); 18 U.S.C. § 641 ("Whoever . . . without authority . . . disposes of any record . . . of the United States or of any department or agency thereof . . . shall be fined under this title or imprisoned not more than ten years.").

[9] Letter from Hon. Dave Camp, Chairman, U.S. House Comm. on Ways & Means, to Hon. Douglas H. Shulman, Comm'r, IRS (June 3, 2011), *available at* http://waysandmeans.house.gov/uploadedfiles/non_6103_ltr_final.pdf.

[10] Letter from Deputy Comm'r Steven T. Miller, IRS, to Hon. Dave Camp, Chairman, U.S. House Comm. on Ways & Means (July 1, 2011), *available at* http://waysandmeans.house.gov/uploadedfiles/july_1_2011.pdf.

[11] *See* Megan McArdle, *Missing E-Mail Is the Least of the IRS's Problems*, Bloomberg View (June 17, 2014), *available at* http://www.bloombergview.com/articles/2014-06-17/missing-e-mail-is-the-least-of-the-irs-s-problems.

[12] *See, e.g.*, *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002) (affirming Section 1505 conviction for tampering with evidence before the EPA), *overruled in part on other grounds*, *United States v.*

In the past few months, the IRS asserted first, that it had recovered approximately 24,000 Lerner-related emails and second, that there may be hard drives with additional recoverable emails.[13] But even if the IRS recovers *all* of the emails in question, that would not preclude an allegation of a Section 1505 violation. Rather, such a violation occurs if an effort was made to accomplish "the evil purpose" outlawed by the statute, regardless of whether the defendant succeeds in his endeavor to obstruct.[14] Moreover, to bring a charge against the IRS, "[c]ircumstantial evidence alone is sufficient . . . and such evidence need not remove every reasonable hypothesis except that of guilt."[15]

In addition, the White House may have played a role in improperly disposing of records. Under the Presidential Records Act, the President may "dispose of . . . records that no longer have administrative, historical, informational, or evidentiary value if – (1) the President obtains the views, in writing, of the Archivist . . . and (2) the Archivist states that he does not intend to take any action under subsection (e)." 44 U.S.C. § 2203(c). Subsection (e), in turn, requires the Archivist to "request the advice of [various committees with] respect to any proposed disposal of Presidential records whenever he considers that – (1) these particular records may be of special interest to the Congress; or (2) consultation with the Congress regarding the disposal of these particular records is in the public interest." If the President at any time possessed the Lerner emails and disposed of such emails, he could have done so lawfully *only* with the consent of the Archivist *and* in consultation with Congress. Thus, if Ms. Lerner's emails were in the possession of White House officials, but can no longer be found, the Administration also may have violated federal records laws.[16]

Contreras, 593 F.3d 1135 (9th Cir. 2010). The theory underlying Section 1505 is similar to that of the "litigation hold" concept requiring parties to preserve materials relevant to a litigation. *See, e.g., Zhi Chen v. District of Columbia,* 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (noting that "[a] party has a duty to preserve potentially relevant evidence . . . once [that party] anticipates litigation") (internal citations omitted). Once Chairman Camp sent his June 3, 2011 letter, the IRS was on notice and required to retain any relevant documents. *See, e.g., Ashland Oil v. FTC*, 548 F.2d 977 (D.C. Cir. 1976).

[13] *See* Letter from Leonard Oursler, National Director for Legislative Action, to Sens. Ron Wyden, Chairman, and Orrin Hatch, Ranking Member, Committee on Finance (June 13, 2014), *available at* http://www.irs.gov/PUP/newsroom/IRS%20Letter%20to%20Senate%20Finance%20Committee.pdf; Frank Thorp V, *GOP Investigators: Lerner Hard Drive Was Only 'Scratched'*, NBC News (July 22, 2014), *available at* http://www.nbcnews.com/politics/congress/gop-investigators-lerner-hard-drive-was-only-scratched-n162336.

[14] *See, e.g., United States v. Sprecher*, 783 F. Supp. 133, 163-64 (S.D.N.Y 1992) (in finding Section 1505 violation, noting that "intent may be inferred from proof that the defendant knew that his corrupt actions would obstruct justice"); *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (discussing rebuttable presumption of unfavorable evidence where bad faith destruction of evidence occurred).

[15] *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006) (finding sufficient evidence to conclude that defendant intended to obstruct an SEC proceeding); *see also United States v. Mitchell*, 877 F.2d 294, 300-01 (4th Cir. 1989); *United States v. Tallant*, 407 F. Supp. 878, 888 (N.D. Ga. 1975).

[16] At the very least, evidence suggests that the White House knew about the missing emails at least two months before the IRS informed Congress and may have been communicating with Treasury officials regarding the lost emails. *See* Josh Hicks, *IRS chief's legal adviser spread word of missing e-mails to Treasury lawyer*, Wash. Post (Sept. 9, 2014), *available at* http://www.washingtonpost.com/blogs/federal-eye/wp/2014/09/09/irs-chiefs-legal-adviser-spread-word-of-missing-e-mails-to-treasury-lawyer/.

As set forth above, ample grounds exist for Justice to investigate various federal officials for potential violations of the law.[17] To date, however, Justice has given no indication that it intends to do so in any meaningful manner.[18] It is for these reasons and others that Cause of Action encourages the Committee to recommend the appointment of a special independent counsel to investigate all matters related to Ms. Lerner's lost emails.

Thank you for your consideration of our views. We would be pleased to provide the Committee with any further information the Committee needs or to answer any questions raised by this Statement.

Sincerely,

PRASHANT K. KHETAN
SENIOR COUNSEL

[17] The IRS also has abused its authority in interpreting other laws (unrelated to losing emails). For example, 26 U.S.C. § 6103 ("Section 6103") protects confidential taxpayer returns and return information from unauthorized disclosure except in a limited number of statutorily prescribed circumstances. Section 6103(g) permits the President to request in writing, and by his own signature, the tax return and return information of any individual taxpayer. *Id.* § 6103(g)(1). Concerned by the prospect that the White House contravened the processes delineated by Section 6103(g), Cause of Action sent a FOIA request to the IRS to determine whether the President had, in fact, sought to access tax return information in an unauthorized manner. Letter from Cause of Action to Ava Littlejohn, Public Liaison, Internal Revenue Serv. (Oct. 9, 2012), *available at* http://causeofaction.org/assets/uploads/2013/05/2012-10-9-IRS-WH-FOIA-Request.pdf. In its response, the IRS stated that the only responsive records it could locate were records of "tax checks," which are requests by the Administration for return information provided on a voluntary basis by taxpayers pursuant to Section 6103(c). Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Dec. 11, 2012), *available at* http://causeofaction.org/assets/uploads/2013/06/Exhibits-for-TIGTA-Appeal.pdf. The IRS refused to release these records, however, claiming that "tax checks" were categorically "return information" and could be withheld regardless of the IRS's ability to segregate and release non-personally-identifying information. *Id.* This interpretation, however, is inconsistent with the law. *See* 5 U.S.C. § 552(b) (requiring an agency to produce any "reasonably segregable portion" of responsive records after deleting exempt portions); *see also Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 611 (D.C. Cir. 1997) (IRS has duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records). Moreover, this response shows that the IRS will choose when and how Section 6103 applies based on the level of interest in keeping the subject matter of requested records hidden from scrutiny.

[18] Reports from earlier this year indicated that the FBI does not expect any criminal charges to emerge from its investigation of IRS targeting. *See* Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, Wall St. J. (Jan. 13, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584. *Cf.* Jonathan Strong, *Letter: Holder Aide Accidentally Calls Issa Staff For Help Spinning IRS Scandal*, Breitbart (Sept. 9, 2014), *available at* http://www.breitbart.com/Big-Government/2014/09/09/Letter-Holder-Aide-Accidentally-Calls-Issa-For-Help-Spinning-IRS-Scandal (reporting on call by senior Justice aide seeking help to "spin" the IRS scandal).