

*United States Senate*

***PERMANENT SUBCOMMITTEE ON INVESTIGATIONS***

***Committee on Homeland Security and Governmental Affairs***

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*Carl Levin, Chairman*

*John McCain, Ranking Minority Member*

**IRS AND TIGTA MANAGEMENT FAILURES  
RELATED TO 501(c)(4) APPLICANTS  
ENGAGED IN CAMPAIGN ACTIVITY**

**MAJORITY STAFF REPORT  
WITH  
MINORITY STAFF DISSENTING VIEWS**

**PERMANENT SUBCOMMITTEE  
ON INVESTIGATIONS  
UNITED STATES SENATE**



**September 5, 2014**

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**SENATOR JOHN McCAIN**  
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**AHMAD SARSOOR**  
Detailee

**HENRY J. KERNER**  
Staff Director and Chief Counsel to the Minority  
**MICHAEL LUEPTOW**  
Counsel to the Minority  
**ELISE MULLEN**  
Research Assistant to the Minority

**MARY D. ROBERTSON**  
Chief Clerk  
**ADAM HENDERSON**  
Professional Staff Member

**Former Subcommittee Staff Who Contributed**

**LAURA E. STUBER**  
Senior Counsel  
**HEIDI KELLER**  
Congressional Fellow  
**MOHAMMAD ASLAMI**  
Law Clerk  
**BENJAMIN DRISCOLL**  
Law Clerk  
**KATHERINE ERNST**  
Law Clerk  
**THARUNI JAYARAMAN**  
Law Clerk  
**REBECCA PSKOWSKI**  
Law Clerk  
**JACOB ROGERS**  
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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

September 5, 2014

The Honorable Thomas R. Carper  
The Honorable Tom Coburn  
Committee on Homeland Security and Governmental Affairs  
Washington, D.C. 20510

Dear Chairman and Ranking Member:

Today, after more than a year of work, the Permanent Subcommittee on Investigations is releasing this report summarizing the Subcommittee's bipartisan investigation into problems with how the Internal Revenue Service (IRS) has processed applications for tax exempt status under Section 501(c)(4) of the tax code. The Subcommittee Majority staff report is entitled, "IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity." The Subcommittee Minority staff, which did not join the Majority staff report, has filed dissenting views entitled, "IRS Targeting Tea Party Groups." In connection with the report, the Subcommittee is also releasing over 1,700 pages of documents from the IRS and Treasury Inspector General for Tax Administration (TIGTA), including emails, correspondence, memoranda, charts, handwritten notes, reports, and analyses.

We hope this report and the accompanying documents provide useful information. Although the Majority and Minority were unable to reach agreement on an analysis of the issues, the Subcommittee maintained its tradition of bipartisan fact-finding throughout the investigation, conducting joint interviews, performing detailed document reviews, and engaging in productive consultations to advance the Subcommittee's oversight work.

Sincerely,



John McCain  
Ranking Minority Member  
Permanent Subcommittee on Investigations



Carl Levin  
Chairman  
Permanent Subcommittee on Investigations

# **IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY**

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# **IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY**

## **I. EXECUTIVE SUMMARY**

On May 10, 2013, the Internal Revenue Service (IRS) apologized for having used the phrase, “Tea Party,” to identify 501(c)(4) applications filed by organizations involved with campaign activities and then subjecting those applications to heightened scrutiny. That apology triggered a firestorm of criticism of the IRS centered on a concern that the IRS might have shown political bias in selecting groups for review. An audit report released by the Treasury Inspector General for Tax Administration (TIGTA) a few days later intensified that criticism by reporting that the IRS had used “inappropriate criteria” in selecting applications for review and otherwise mismanaged the 501(c)(4) program. In response, President Obama required the Acting IRS Commissioner to resign, and replaced the leadership of the IRS division handling Exempt Organizations.

For over a year, the U.S. Senate Permanent Subcommittee on Investigations has conducted an investigation into the facts that led to widespread condemnation of how the IRS handled 501(c)(4) applications. That work came on top of a Subcommittee review, already underway, into how the IRS was generally enforcing the law pertaining to groups claiming tax exempt status under Section 501(c)(4) of the tax code.

The Subcommittee investigation has reached many of the same conclusions as the TIGTA audit of the 501(c)(4) application process. The Subcommittee investigation found that the IRS used inappropriate screening criteria when it flagged for increased scrutiny applications based upon the applicants’ names or political views rather than direct evidence of their involvement with campaign activities. The Subcommittee investigation also found significant program mismanagement, including years-long delays in processing 501(c)(4) applications; inappropriate, intrusive, and burdensome questioning of groups; and poor communication and coordination between IRS officials in Washington and Cincinnati. At the same time, like TIGTA, the Subcommittee investigation found no evidence of IRS political bias in selecting 501(c)(4) applications for heightened review, as distinguished from using poor judgment in crafting the selection criteria. Based on investigative work that went beyond what TIGTA examined, the Subcommittee investigation also determined that the same problems affected IRS review of 501(c)(4) applications filed by liberal groups.

In addition, the Subcommittee investigation found that, by focusing exclusively on how the IRS handled 501(c)(4) applications filed by conservative groups and excluding any comparative data on applications filed by liberal groups, the TIGTA audit produced distorted audit results that continue to be misinterpreted. The TIGTA audit engagement letter stated that the audit’s “overall objective” was to examine the “consistency” of IRS actions in identifying and reviewing 501(c)(4) applications, including whether “conservative groups” experienced “inconsistent treatment.” Instead, the audit focused solely on IRS treatment of conservative groups, and omitted any mention of other groups. For example, while the TIGTA report criticized the IRS for using “Tea Party,” “9/12,” and “Patriot” to identify applications filed by

conservative groups, it left out that the IRS also used “Progressive,” “ACORN,” “Emerge,” and “Occupy” to identify applications filed by liberal groups. While the TIGTA report criticized the IRS for subjecting conservative groups to delays, burdensome questions, and mismanagement, it failed to disclose that the IRS subjected liberal groups to the same treatment. The result was that when the TIGTA audit report presented data showing conservative groups were treated inappropriately, it was interpreted to mean conservative groups were handled differently and less favorably than liberal groups, when in fact, both groups experienced the same mistreatment. By excluding any analysis of how liberal groups were handled and failing to provide critical context for its findings, the TIGTA audit inaccurately and unfairly damaged public confidence in the impartiality of the IRS.

The Subcommittee investigation also determined that, by using a “facts and circumstances” test to evaluate 501(c)(4) applications for excessive campaign involvement, the IRS relied upon a time-consuming, case-by-case, non-transparent, subjective, and unpredictable method of evaluation that not only confused and delayed IRS processing of individual applications, but also invited public suspicion that IRS decisionmaking may have been influenced by politics. An overarching problem was the IRS’ ongoing failure to enforce the law’s requirement that tax-exempt 501(c)(4) groups be operated “exclusively for the promotion of social welfare.” To restore compliance with the law as well as public confidence in the impartial resolution of requests for tax exempt status, the IRS needs to establish a more objective and transparent set of standards for evaluating 501(c)(4) applications filed by groups engaged in campaign activities.

## **A. Subcommittee Investigation**

In accordance with its longstanding rules and traditions, the Subcommittee conducted a bipartisan investigation into the 501(c)(4) application process, with joint interviews and document analysis. The Subcommittee collected and reviewed over 800,000 pages of documents produced by the IRS and TIGTA, including emails, correspondence, memoranda, and analyses. It also reviewed relevant IRS regulations, revenue rulings, private letter rulings, court proceedings, and a number of publicly available Form 1024 applications and Form 990 tax returns filed by 501(c) organizations involved with campaign activities. The Subcommittee also obtained information from the IRS in response to a series of detailed letter requests by Senator Levin, the Subcommittee chairman, and through multiple briefings. In addition, the Subcommittee received a detailed briefing from the Federal Election Commission (FEC) and reviewed FEC regulations and filings, including some independent expenditure and electioneering communication reports filed by 501(c) groups.

During the course of the investigation, the Subcommittee conducted 22 interviews of current and former IRS and TIGTA personnel. The Subcommittee also spoke with and reviewed materials provided by representatives of the FEC and a range of nonprofit groups, as well as academics and other experts in campaign finance, election law, and nonprofit tax requirements. IRS, TIGTA, and FEC personnel, as well as other parties contacted during the course of the investigation, generally cooperated with Subcommittee requests for information.



The Subcommittee investigation proceeded under one key restriction. Unlike the Senate Finance Committee, the Permanent Subcommittee on Investigation does not have statutory authority to view tax return information related to specific taxpayers. For that reason, both the IRS and TIGTA removed from the documents they produced to the Subcommittee all taxpayer-specific return information, requiring the Subcommittee to review documents that included redactions. In addition, the Subcommittee was not permitted to review the actual 501(c)(4) applications selected by the IRS for heightened scrutiny and was also, at times, unable to determine how certain applications were finally resolved. The Subcommittee's inability to get actual taxpayer submissions to the IRS did not, however, preclude the Subcommittee from reviewing hundreds of thousands of IRS documents, including emails, correspondence, memoranda, and analyses; identifying and evaluating the criteria used by the IRS to select applications for heightened review; and examining and evaluating the steps taken by the IRS to manage its review of the 501(c)(4) applications.

On April 30, 2013, as part of its investigation, the Subcommittee conducted a bipartisan, wide-ranging, six-hour inquiry into various aspects of the 501(c) application process with a team of eight IRS employees specializing in issues related to groups seeking tax exempt status. The IRS team was led by Exempt Organizations head Lois Lerner. During that briefing, Ms. Lerner did not mention the audit then underway by the Treasury Inspector General for Tax Administration (TIGTA) or the upcoming TIGTA audit report that would be released two weeks later. Ms. Lerner also failed to disclose or downplayed the many substantive and administrative problems plaguing the 501(c)(4) application process. After the TIGTA report was released in May 2013, Subcommittee Chairman Levin and Ranking Member McCain sent a letter to the IRS calling for Ms. Lerner's immediate suspension from office due to her failure to disclose "crucial information ... leading to an incomplete account of the full operations of her unit."<sup>1</sup> When the Subcommittee later requested an interview to examine her role in the 501(c)(4) review process, Ms. Lerner asserted her rights under the Fifth Amendment of the U.S. Constitution not to answer questions. The requested interview did not take place. For that reason, the Subcommittee's investigation was unable to obtain Ms. Lerner's testimony about key events, and its investigative results do not reflect any information she might have provided through interviews.

In June 2014, the IRS disclosed that, in the course of producing emails sent to or by Ms. Lerner from 2009 to 2014, the agency discovered that an unknown additional number of Lerner mails over a two-year period from June 2009 to June 2011 – including the period from February 2010 to May 2011 when Tea Party applications were being flagged for review – may have been lost due to a failure of Ms. Lerner's computer hard drive.<sup>2</sup> Since then, an intensive effort has been undertaken by multiple parties to understand how Ms. Lerner's hard drive failed in June 2011, what efforts were made by the IRS at the time to recover emails from her failed hard drive, how the IRS disposed of the hard drive, whether the agency's backup tapes had been recycled and erased the emails, and whether the emails could be recovered in some other manner.<sup>3</sup> In

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<sup>1</sup> 5/23/2013 letter from Subcommittee Chairman Levin and Ranking Member McCain to Acting IRS Commissioner Daniel Werfel.

<sup>2</sup> See, e.g., 6/30/2014 letter from IRS Commissioner John Koskinen to the Subcommittee, with attachment entitled, "Description of IRS Email Collection and Production," at 7. The Subcommittee has already received and reviewed more than 67,000 Lerner emails produced by the IRS to date.

<sup>3</sup> See, e.g., 7/9/2014 letter from IRS Commissioner John Koskinen to the House Committee on Ways and Means, with a copy to the Subcommittee (describing IRS and TIGTA investigations and multiple Congressional hearings);

July 2014, TIGTA informed the Subcommittee that it had located several backup tapes that may contain the emails, and that a forensic analysis of those tapes was underway.<sup>4</sup> In addition, the IRS was able to recover many of the Lerner emails from other IRS personnel who had sent or received them.

Because resolution of the issues related to Ms. Lerner's emails is likely to require additional months to resolve, the Subcommittee has already reviewed over 67,000 Lerner emails, and the Subcommittee investigation provides information relevant to an ongoing IRS effort to issue revised regulations for evaluating 501(c)(4) applications filed by groups engaged in campaign activities, Senators Levin and McCain have jointly determined to release this Report, together with the Minority Staff's Dissenting Views, at this time.

## **B. Investigation Overview**

Using documents and interviews, the Subcommittee has conducted an extensive examination of the actions taken by the IRS to review and resolve 501(c)(4) applications filed by groups engaged in political campaign activities. The IRS flagged the first Tea Party application in February 2010. For the next three years, the IRS used a series of screening criteria to identify similar applications from both conservative and liberal groups, subjected those applications to individualized reviews, and determined whether the groups should be granted tax exempt status despite their involvement with campaign activities.

During the first half of that three-year period, the screening criteria used to select applications for heightened review used key phrases taken from the names of some of those organizations or from materials indicating their political views, rather than direct indicators of the groups' involvement with campaign activities. From February 2010 to May 2011, the cases selected for heightened review were referred to as "Tea Party" cases; beginning in June 2011, at the direction of IRS officials in Washington, the name of the category of cases was changed to "advocacy" cases. During both phases, the IRS subjected not only conservative groups with "Tea Party," "9/12," or "Patriot" in their names to heightened scrutiny, but also liberal groups with "Progressive," "Progress," "ACORN," "Emerge," or "Occupy" in their names. The evidence also shows that, from 2010 to mid-2013, more conservative groups than liberal groups applied for tax exempt status, underwent IRS scrutiny, and ultimately won tax exempt status.

All of the cases were handled by the IRS Exempt Organizations Determinations (EOD) Unit in Cincinnati, where IRS agents reviewed the applications to determine whether they should be approved, denied, or suspended pending receipt of more information. Work to resolve the applications was often interrupted, delayed, or halted, while senior IRS Determinations personnel sought guidance from the Exempt Organizations Technical (EOT) Unit in Washington, D.C. about how to handle the cases. Guidance was sought, because EOD personnel were uncertain about how to apply the required "facts and circumstances" test, which mandated consideration of all relevant, material factors to determine whether an applicant was engaged primarily in social

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IRS declarations filed in True The Vote, Inc. v United States, Civil Action No. 1:13-cv-00734-RBW (USDC DC), "Federal Defendants' Notice of Filing the Declarations of Timothy P. Camus, Stephen L. Manning, and Todd O. Egaas," (filed on 7/18/2014).

<sup>4</sup> 7/29/2014 briefing by TIGTA of Congressional staff.

welfare activities. Despite constant pressure for additional guidance, EOT personnel took more than three years to resolve two test cases and drafted, but never finalized, additional guidance on how to screen, develop, and evaluate the applications.

While awaiting the promised EOT guidance, the backlog of 501(c)(4) cases awaiting IRS action grew to about 320 cases. The affected groups could and generally did continue to operate while awaiting disposition of their applications, but they were forced to act without certainty over their tax exempt status, sometimes for years. While waiting for an IRS decision on their tax exempt status, some of the groups had difficulty obtaining contributions from donors or lost funding opportunities, many spent funds on legal representation, and all were unable to exercise appeal rights to advance their cases. When in December 2011, almost two years after the first case was flagged, a newly appointed advocacy case coordinator approved sending out “development letters” to obtain additional information needed to apply the facts and circumstances test, some of the recipients objected to some of the questions as inappropriate, burdensome, or intrusive. Some critics also complained that the letters singled out Tea Party groups for heightened scrutiny. Negative media reports and Congressional inquiries followed. In response, in the first quarter of 2012, the IRS established a special “bucketing” process intended to reduce the backlog of cases, but a year later hundreds of cases remained unresolved.

**TIGTA Audit.** The audit conducted by the Treasury Inspector General for Tax Administration (TIGTA) was initiated in March 2012, in the midst of the negative media reports about IRS treatment of 501(c)(4) applications filed by organizations engaged in campaign activity, in particular groups aligned with the Tea Party. TIGTA’s Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform. The work was conducted over the following year, and a final audit report was issued in May 2013.

The official TIGTA audit engagement letter stated that the audit’s “overall objective” was to “assess the consistency of the Exempt Organizations function’s identification and review of applications for tax-exempt status involving political advocacy issues.” It also stated: “Several accusations of inconsistent treatment towards conservative groups have been made.” Despite being charged with examining the “consistency” of the IRS’ actions, TIGTA auditors examined how the IRS handled applications filed by conservative groups, but did not perform any comparative analysis of how the IRS handled applications filed by liberal groups. In response to later media inquiries about why information about liberal groups was excluded, a TIGTA spokeswoman initially said, “we were asked to narrowly focus on Tea Party organizations,” but later indicated she had been given incorrect information.

During the audit, TIGTA auditors focused on actions taken by IRS screeners to identify applications filed by groups whose names or application materials contained the phrases, “Tea Party,” “9-12,” or “Patriot,” noting that the selection criteria focused on the groups’ names or political views, rather than on their participation in campaign activities. The TIGTA auditors also focused on a single entry in a broader “Be-on-the-Lookout” (BOLO) list whose wording changed over time, moving from language which urged IRS personnel to identify applications filed by groups affiliated with the “Tea Party movement,” to language urging them to identify applications containing “indicators of significant amounts of political campaign intervention.”

While the IRS admitted the earlier selection criteria were inappropriate, IRS personnel also attempted to demonstrate the criteria were not the result of political bias, by showing TIGTA that the IRS used similar BOLO listings for liberal groups, with screening criteria using the phrases “progressive,” “ACORN,” and “Occupy” to identify applications of interest. Despite the IRS’ repeatedly drawing attention to those BOLO entries, the TIGTA auditors failed to examine either how the IRS used those BOLO entries or how the IRS handled 501(c)(4) applications filed by liberal groups in comparison to applications filed by conservative groups.

In February 2013, after receiving an allegation that an IRS email had directed IRS employees to “target” Tea Party groups, the Assistant Inspector General responsible for exempt organization issues, Gregory Kutz, asked the TIGTA Office of Investigations to conduct an email search of certain IRS employees. The Office of Investigations then searched over 2,200 emails and other documents from the email accounts of five IRS employees involved with processing 501(c)(4) applications. The Office of Investigations concluded that the 2,200 IRS emails and other documents contained “no indication” that the pulling of Tea Party applications for additional scrutiny by IRS personnel was “politically motivated,” advising that the IRS actions were instead the result of inadequate guidance on how to process the applications. Even though that finding by the TIGTA Office of Investigations analysis directly addressed the central issue TIGTA was auditing, whether there was political bias at the IRS, the documentary analysis performed by the Office of Investigations was not included in TIGTA’s audit report.

In February 2013, the audit team submitted a draft audit report to the TIGTA Chief Counsel and Office of Audit head. The Chief Counsel suggested removing the word “targeted” from the report, because “targeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report.” The audit team removed the word from the report except when describing the allegations that led to the audit. Later that month, TIGTA provided a draft of the report to the IRS.

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having the head of the Exempt Organizations division, Lois Lerner, disclose the audit before it was released and apologize for the agency’s conduct during a conference she was scheduled to address. On May 10, 2013, at the Acting IRS Commissioner’s direction and in response to a planted question, Ms. Lerner apologized for the IRS’ having used “Tea Party” to identify 501(c)(4) applications subjected to heightened review. Her apology triggered a public firestorm centered on the allegation that the IRS had shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner and other senior IRS officials were required to resign.

The apology generated intense interest in the TIGTA audit report which was released the following week, on May 14, 2013. The audit report found that the IRS had used “inappropriate criteria” to flag 501(c)(4) applications for heightened review, and “ineffective management” had caused delays and subjected applicants to burdensome information requests. TIGTA Inspector General George was asked to testify at multiple Congressional hearings about the audit findings. When pressed about whether the IRS had unfairly targeted conservative groups, Mr. George testified that TIGTA had found no sign of political bias at the IRS, but offered as evidence only the denials of the IRS officials involved. He made no mention of the email review conducted by

the TIGTA Office of Investigations or its conclusion that the documents contained “no indication” that the IRS’ actions were “politically motivated,” even though that investigative finding directly addressed the issue of political bias at the IRS. Mr. George told the Subcommittee that he did not mention the Office of Investigations’ finding, because no one on his staff had told him about it. On June 6, 2014, Mr. George confirmed in a letter to the Subcommittee that the TIGTA audit had “found no evidence of political bias,” also stating “it is important to note that the matter is being further reviewed.”

On May 21, 2013, the night before the third Congressional hearing at which the Inspector General testified about the audit, the TIGTA Chief Counsel decided to review the IRS BOLOs before providing copies to Congress. During his review, he saw, for the first time, BOLO entries naming two liberal groups, ACORN and Occupy. He promptly informed Inspector General George and Assistant Inspector General Kutz, both of whom told the Subcommittee they had previously been unaware of any BOLO listings for liberal groups, even though the IRS had provided copies and repeatedly informed the TIGTA audit team about them. Even after learning about them, the senior TIGTA officials remained silent for weeks about the BOLO entries for liberal groups, and provided incomplete and inaccurate testimony about them at Congressional hearings. When the BOLO listings for liberal groups were finally disclosed by Members of Congress and the media, senior TIGTA officials insisted that the IRS had not disclosed those listings during the TIGTA audit, despite ample evidence to the contrary.

During their Subcommittee interviews, Mr. George and Mr. Kutz indicated they had since reconsidered how the TIGTA audit report treated 501(c)(4) applications filed by liberal groups. Mr. George told the Subcommittee that the audit report should have acknowledged the existence of the BOLO entries that named liberal groups and that TIGTA auditors should have looked into those other groups. Mr. Kutz indicated TIGTA potentially should have included the BOLO listings for progressive, ACORN, and Occupy groups in its analysis, although he thought it might have delayed completion of the audit for another year. TIGTA has since initiated an audit into how those and other BOLO entries were used, but has put that audit on hold pending other law enforcement investigative efforts related to Lois Lerner and IRS.

## C. Findings and Recommendations

**Findings.** The Subcommittee investigation makes the following findings of fact.

- (1) **IRS Management Failures.** From 2010 through 2013, the IRS mismanaged the 501(c)(4) applications process for both conservative and liberal groups engaged in campaign activities, using inappropriate selection criteria based on the applicants’ names or policy views to flag applications for heightened review, subjecting some applicants to burdensome questions, and delaying disposition of some applications for years.
- (2) **Inadequate Guidance.** The IRS provided insufficient guidance and training to IRS personnel on how to process 501(c)(4) applications filed by groups engaged in campaign activities, and failed to finalize a proposed set of

guidesheets with additional guidance for IRS personnel despite nearly one year of work on the project.

- (3) **Flawed Test.** The facts and circumstances test used by the IRS was criticized as difficult to administer by every IRS official interviewed, from most to least senior; it required IRS agents to ask wide ranging and intrusive questions, slowed the processing of 501(c)(4) applications, and produced subjective and inconsistent decisions on applications.
- (4) **No Political Bias.** A review of nearly 800,000 pages of documents and the conduct of nearly two dozen IRS and TIGTA employee interviews produced no evidence of political bias by the IRS against conservative groups that filed 501(c)(4) applications, a finding which is consistent with TIGTA's June 2014 letter stating that the TIGTA audit "found no evidence of political bias."
- (5) **Flawed Audit Report.** The TIGTA audit report presented a distorted description of how the IRS handled 501(c)(4) applications, by omitting TIGTA's determination that the audit had "found no evidence of political bias"; by restricting its analysis to conservative groups and omitting comparative data for nonconservative groups; by failing to disclose the BOLO listings for liberal groups; and by omitting mention of the email review by the TIGTA Office of Investigations which, after conducting a thorough review of over 2,200 emails and other documents, found "no indication" that IRS actions in pulling Tea Party applications for heightened scrutiny were politically motivated.
- (6) **TIGTA Management Failures.** TIGTA management failed to adequately supervise and ensure a balanced audit process, excluded key information from the audit report, omitted the key determination that the audit had "found no evidence of political bias," and inaccurately and unfairly damaged public confidence in the impartiality of the IRS.
- (7) **TIGTA Failure to Disclose.** After TIGTA senior officials learned that the audit report omitted important information about IRS BOLO listings for liberal as well as conservative groups, TIGTA failed to disclose the new information for weeks, even though it was directly relevant to TIGTA's audit objective and could have helped alleviate public concern about potential IRS political bias.

**Recommendations.** Based upon the Subcommittee's investigation, the Report makes the following recommendations.

- (1) **Restore Statutory Standard.** The IRS should revise its rules to comply with the statutory requirement that 501(c)(4) organizations engage "exclusively" in social welfare activities, including by applying an "insubstantial" test to limit other activities, similar to the one already applied to 501(c)(3) charities, and by applying a percentage test to ensure campaign activities comprise no more than an insubstantial portion of a tax-exempt social welfare organization's activities.

- (2) **Replace Facts and Circumstances Test.** The IRS should replace the “facts and circumstances test” with objective standards and bright line rules that would produce more consistent, timely, transparent, and predictable treatment of 501(c)(4) applications filed by groups that engage in campaign activities.
- (3) **Use FEC Data.** The IRS should require 501(c)(4) groups to provide a copy of any FEC filing within a few days of submitting it to the FEC, and use the FEC data to help identify 501(c)(4) groups warranting heightened review for campaign activity, since the FEC data provides direct evidence of campaign involvement.
- (4) **Improve FEC Forms.** The FEC should amend its forms to include the filer’s 501(c) status, including whether it has been approved by the IRS for tax exemption under a specific 501(c) subsection or has a pending application.
- (5) **Amend TIGTA Report.** To provide a more complete and balanced analysis of how the IRS identified and reviewed 501(c)(4) applications for groups engaged in campaign activities, TIGTA should amend its audit report to include its determination that the audit “found no evidence of political bias” and add information about IRS BOLO entries and IRS processing of applications filed by groups with “Progressive,” “Progress,” “ACORN,” “Occupy,” or “Emerge” in their names.

## II. BACKGROUND

Section 501(c) of the U.S. tax code exempts from taxation over two dozen types of nonprofit organizations, including charities, social welfare groups, business associations, and labor unions.<sup>5</sup> The tax code also exempts from taxation “political organizations,” such as campaign committees, under Section 527.<sup>6</sup> Today, within the United States, about 1.6 million tax exempt organizations report about \$2.4 trillion in assets.<sup>7</sup>

### A. IRS Organizational Responsibilities

Tax-exempt organizations, under both Section 501(c) and Section 527, are overseen by a number of offices and organizations within the IRS. The following chart depicts the key IRS offices involved with overseeing 501(c) applications and organizations.<sup>8</sup>

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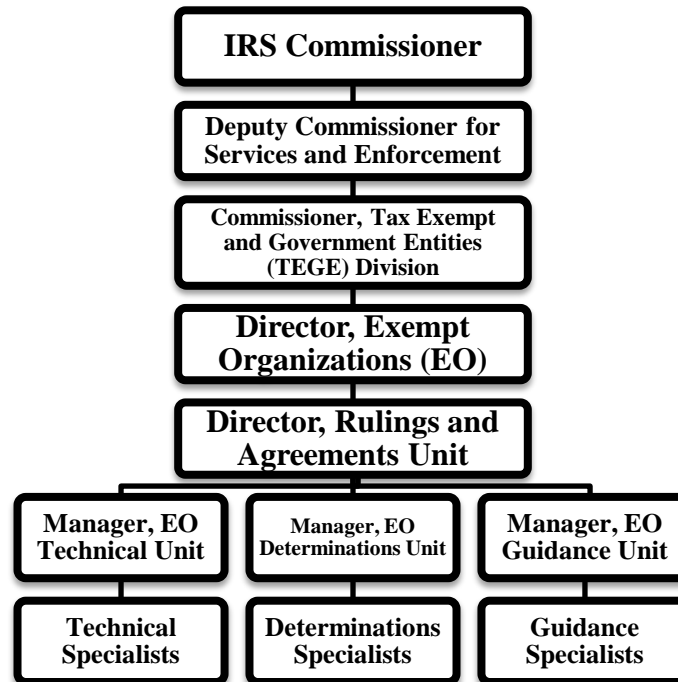
<sup>5</sup> Charities are exempt from taxation under Section 501(c)(3), social welfare organizations under Section 501(c)(4), labor unions under Section 501(c)(5), and business groups under Section 501(c)(6). More specifically, Section 501(c)(3) exempts “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” 26 U.S.C. § 501(c)(3) (2012). Section 501(c)(4) exempts “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.” Id. at 501(c)(4)(A). Section 501(c)(5)(a)(2) exempts labor, agricultural, and horticultural organizations that “have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.” 26 C.F.R. § 1.501(c)(5)-1(a)(2) (2012). Section 501(c)(6) exempts “[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.” 26 U.S.C. § 501(c)(6) (2012).

<sup>6</sup> Section 527(e)(1) defines a political organization as a “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” Section 527(e)(2) defines an “exempt function” as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.” Unlike 501(c) organizations, Section 527 organizations must disclose “[t]he name and address ... of all contributors which contributed an aggregate amount of \$200 or more to the organization during the calendar year and the amount and date of the contribution.” Section 527(j)(3)(B).

<sup>7</sup> “Tax Exempt & Government Entities Division At-a-Glance,” IRS (2/21/2014), <http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance>.

<sup>8</sup> This chart, which was prepared by the Subcommittee, is based upon an organizational chart and other information supplied by the IRS. See, e.g., IRS chart, [http://www.irs.gov/pub/irs-news/irs\\_org\\_chart\\_2012\\_.pdf](http://www.irs.gov/pub/irs-news/irs_org_chart_2012_.pdf); undated “FY 2012 Annual Report & FY 2013 Workplan,” IRS Exempt Organizations, at 2, [http://www.irs.gov/pub/irs-tege/FY2012\\_EO\\_AnnualRpt\\_2013\\_Work\\_Plan.pdf](http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf). See also 5/14/2013 TIGTA Audit Report, at 29; “Tax Exempt & Government Entities Division At-a-Glance,” prepared by IRS (2/21/2014), <http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance>, reprinted in “IRS Org Chart Puts Ingram, Lerner at Center of Power,” Breitbart, Wynton Hall (5/23/2013), <http://www.breitbart.com/Big-Government/2013/05/23/EXCLUSIVE-IRS-Org-Chart-Puts-Ingram-and-Lerner-At-Center-of-Power>.





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The lead organization is the IRS Tax Exempt and Government Entities (TEGE) Division, which oversees all “Exempt Organizations.”<sup>9</sup> The head of the TEGE Division reports to the Deputy Commissioner for Services and Enforcement who, in turn, reports to the IRS Commissioner. From 2004 to 2009, the TEGE Division head was Steven T. Miller. When he was promoted in 2009, he was replaced by Sarah Hall Ingram.<sup>10</sup> In December 2010, after Ms. Ingram was also promoted, she was replaced by her deputy Joseph Grant who served as the Acting and then full TEGE Commissioner until May 2013, when he retired. Mr. Grant was replaced by Acting Commissioner Michael Julianelle, who was, in turn, replaced in December 2013, by the current TEGE Commissioner Sunita Lough.

Within the TEGE Division, a subdivision called Exempt Organizations (EO) is charged with handling all entities claiming tax exempt status.<sup>11</sup> The EO mission statement requires it to help exempt organizations “to understand and comply with applicable tax laws, and to protect the public interest by applying the tax law with integrity and fairness to all.”<sup>12</sup> Its responsibilities include overseeing the disposition of applications for tax exempt status, and

<sup>9</sup> “Tax Exempt & Government Entities Division At-a-Glance,” prepared by IRS, <http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance>. The TEGE Division was established in late 1999, as part of an IRS modernization effort, replacing a group headed by an Assistant Commissioner for Employee Plans and Exempt Organizations, established in 1974. *Id.* It also oversees “Employee Plans” and “Government Entities.” *Id.*

<sup>10</sup> In April 2009, Mr. Miller was promoted to Commissioner of the Large and Mid-Sized Business division; in September 2009, he was promoted to Deputy Commissioner for Services and Enforcement, where he remained until appointed Acting IRS Commissioner in November 2012.

<sup>11</sup> “Tax Exempt & Government Entities Division At-a-Glance,” prepared by IRS, <http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance>. EO oversees organizations exempt from income tax under Section 501, Section 527, and other tax code provisions. *Id.*

<sup>12</sup> *Id.*

overseeing existing tax-exempt organizations to ensure ongoing compliance with the legal requirements for tax exemption. From 1999 to 2004, the EO Director was Steven Miller, who served in that position until he was promoted to TEGE Commissioner. In 2006, Lois Lerner was appointed EO Director and served in that post until May 2013, when she was replaced by Acting Director Ken Corbin.<sup>13</sup> In December 2013, Mr. Corbin was replaced by Tamera Ripperda, the current EO Director.

Within the EO, the Rulings and Agreements Unit has “jurisdiction over processing determination letters and ruling letters on applications for recognition of tax exempt status under sections 501(a) and 521.”<sup>14</sup> From 2006 to December 2010, the Acting and then full Director of the Rulings and Agreements Unit was Robert Choi. In January 2011, he was promoted and replaced by Holly Paz.<sup>15</sup> Ms. Paz held that position until June 2013, when she was placed on administrative leave,<sup>16</sup> and Karen Schiller became the Acting Director. In December 2013, Ms. Schiller was replaced by Stephen Martin who is the current Acting Director of the Rulings and Agreements Unit.<sup>17</sup>

Within the Rulings and Agreements Unit, the EO Determinations Unit is responsible for the initial handling of tax exempt applications.<sup>18</sup> Each year, the IRS receives approximately 70,000 applications from groups seeking tax exempt status under Section 501(c), most of which are filed by Section 501(c)(3) applicants.<sup>19</sup> From 2005 until 2013, the head of the EO

<sup>13</sup> Ms. Lerner retired from the IRS in September 2013. See, e.g., “Lois Lerner still Hill’s favorite piñata,” Politico, Lauren French, (9/23/2013), <http://www.politico.com/story/2013/09/lois-lerner-retires-irs-97217.html>.

<sup>14</sup> Internal Revenue Manual, § 7.20.1.1 (12-20-2012), Part 7. Rulings and Agreements, IRS, [http://www.irs.gov/irm/part7/irm\\_07-020-001.html](http://www.irs.gov/irm/part7/irm_07-020-001.html).

<sup>15</sup> Prior to becoming Rulings and Agreements Director, Ms. Paz worked in the EO Technical Unit. At the request of Mr. Choi, she became Acting Director in charge of EO Technical in September 2009, and then, a year later in September 2010, she had become the full Director. In January 2011, she was promoted to Acting Director of Rulings and Agreements, taking over from Mr. Choi. In May 2012, she became the permanent Director of Rulings and Agreements. In June 2013, she was placed on administrative leave pending an investigation into the matters covered by this Report. Subcommittee interview of Holly Paz, IRS (10/30/13).

<sup>16</sup> 4/23/2012 email from Kim Barczak to IRS Staff (Executives All), “Executive Announcement,” TIGTA Bates No. 012554.

<sup>17</sup> “About Exempt Organizations,” IRS (3/27/2014), <http://www.irs.gov/Charities-&-Non-Profits/About-IRS-Exempt-Organizations>.

<sup>18</sup> “2012 Annual Report & 2013 Work Plan,” IRS (2013), [http://www.irs.gov/pub/irs-tege/FY2012\\_EO\\_AnnualRpt\\_2013\\_Work\\_Plan.pdf](http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf).

<sup>19</sup> “SOI Tax Stats – Annual Extract of Tax-Exempt Organization Financial Data,” prepared by IRS, <http://www.irs.gov/uac/SOI-Tax-Stats-Annual-Extract-of-Tax-Exempt-Organization-Financial-Data;5/15/2013> “Questions and Answers on 501(c) Organizations,” IRS, [http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501\(c\)-Organizations](http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501(c)-Organizations) (stating EO Determinations “receives approximately 70,000 applications for tax-exempt status of all kinds each year”). The following is a statistical breakdown of 501(c) applications, including for 501(c)(4) tax exempt status, the IRS received over 7 fiscal years. **Fiscal Year 2007 Applications:** Section 501(c) total applications = 91,689; Social welfare applications = 1,867; **Fiscal Year 2008 Applications:** Section 501(c) total applications = 84,180; Social welfare applications = 1,492; **Fiscal Year 2009 Applications:** Section 501(c) total applications = 77,221; Social welfare applications = 1,922; **Fiscal Year 2010 Applications:** Section 501(c) total applications = 65,548; Social welfare applications = 1,741; **Fiscal Year 2011 Applications:** Section 501(c) total applications = 60,980; Social welfare applications = 1,777; **Fiscal Year 2012 Applications:** Section 501(c) total applications = 60,780; Social welfare applications = 2,774; **Fiscal Year 2013 Applications:** Section 501(c) total applications = 53,179; Social welfare applications = 2,253. 6/4/2012 letter from the IRS responding to the Subcommittee, prepared by the IRS, PSI-IRS-02-000001 - 026, at 022 -026 (providing the 2007 to 2011 statistical breakdown); “2012 IRS Internal Revenue Service Data Book, prepared by the IRS, (October 1, 2011 to September

Determinations Unit was Program Manager Lucinda (Cindy) Thomas. Ms. Thomas was located at an IRS office in Cincinnati which housed the EO Determinations Unit, and reported to the Director of Rulings and Agreements who was located in Washington, D.C. In August 2013, Ms. Thomas became a senior technical adviser to the EO Director. The position of EO Determinations head is currently vacant.

From 2008 to November 2012, the IRS Commissioner was Douglas H. Shulman. After he completed his five-year term, Mr. Shulman was replaced by Steven Miller who served as the Acting IRS Commissioner until his resignation in May 2013. Mr. Miller was replaced by Acting IRS Commissioner Daniel Werfel until, on December 20, 2013, John Koskinen was confirmed by the Senate as the new IRS Commissioner and sworn into office a few days later.

## B. Social Welfare Groups

Within Section 501(c), which grants tax exempt status to a variety of organizations and entities, Section 501(c)(4) focuses on civic groups dedicated to the “promotion of social welfare.” Since the law permits but does not require social welfare groups to obtain prior IRS approval before holding themselves out as tax exempt, the IRS does not have a comprehensive list of all 501(c)(4) organizations.<sup>20</sup> As of 2013, the total number of tax-exempt social welfare groups was estimated to exceed 82,000 organizations.<sup>21</sup>

**History of Tax Exemption.** The origins of Section 501(c)(4) date back to the Revenue Act of 1913, which created the modern Federal income tax system.<sup>22</sup> The 1913 provision granted tax exempt status to “civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.”<sup>23</sup> Those same words remain in the law today. In 1986, Section 231(8) was re-designated Section 501(c)(4) as part of a comprehensive tax

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30, 2012), at 55, <http://www.irs.gov/pub/irs-soi/12databk.pdf> (providing the 2012 statistical breakdown); “SOI Tax Stats – Closures of Applications for Tax-Exempt Status –IRS Data Book,” prepared by the IRS, <http://www.irs.gov/uac/SOI-Tax-Stats-Closures-of-Applications-for-Tax-Exempt-Status-IRS-Data-Book-Table-24> (providing the 2013 statistical breakdown). See also Subcommittee interview of John Shafer, IRS (1/17/2013).

<sup>20</sup> See “Contributions to Organization with IRS Application Pending,” IRS (4/18/2014), <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Contributions-to-Organization-with-IRS-Application-Pending>.

<sup>21</sup> “Number of Nonprofit Organizations in the United States, 2003 – 2013,” National Center for Charitable Statistics, <http://nccsweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=CO>.

<sup>22</sup> See Revenue Act of 1913, also known as the Underwood Tariff Act of 1913, ch. 16, § II (G)(a), 38 Stat. 114 (1913); “501(c)(4) Organizations,” IRS, John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, at 2 (2003), <http://www.irs.gov/pub/irs-tege/eotopici03.pdf>. The Committee Reports for the 1913 Revenue Act do not discuss the reason behind providing tax exempt status to civic leagues. See also “Social Welfare: What Does it Mean? How Much Private Benefit is Permissible? What is Community?” IRS, at 1, <http://www.irs.gov/pub/irs-tege/eotopicg81.pdf>. Some commentators suggest that the section was designed to address organizations which did not qualify based on religious, educational, or charitable grounds, but still provided benefits to the public. See “The History of the 501(c)(4) Exemption,” *Wall Street Journal*, Jacob Gershman, (11/26/2013), <http://blogs.wsj.com/law/2013/11/26/the-history-of-the-501c4-exemption/> (quoting “Exempt Organizations Advocacy: Matching the Rules to the Rationales,” 63 Ind. L. Rev. 201, 290, Laura B. Chisolm (1988)).

<sup>23</sup> Revenue Act of 1913, ch. 16, § II (G)(a), 38 Stat. 114 (1913). In 1924, the provision was amended to add certain local associations of employees, but retained the same wording for civic leagues and organizations. See Revenue Act of 1924, ch. 234, § 231(8), 43 Stat. 253 (1924).

reform bill enacted that year.<sup>24</sup> In 1996, the statutory provision was amended by adding a clarification that a social welfare organization's net earnings may not inure to the benefit of private shareholders or individuals.<sup>25</sup>

**Promoting Social Welfare.** The initial implementing regulations did not explain the meaning of the phrase “promotion of social welfare.”<sup>26</sup> In 1924, revised regulations explained that organizations seeking exemption under Section 501(c)(4)'s predecessor section were required to operate “exclusively for purposes beneficial to the community as a whole,” and included “organizations engaged in promoting the welfare of mankind.”<sup>27</sup> Those regulations remained substantially unchanged until 1959, when they were revised again. The 1959 regulations stated for the first time that an organization “is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community,” including organizations operated “primarily for the purpose of bringing about civic betterments and social improvements.”<sup>28</sup> A 1973 IRS Revenue Ruling explained that an organization which is “operated essentially for the benefit of its members” does not promote social welfare.<sup>29</sup>

Over time, a small group of court cases have applied the statutory and regulatory provisions to specific organizations and further addressed their meaning. One case held that “the organization must be a community movement designed to accomplish community ends.”<sup>30</sup> Others explained that organizations do not qualify for tax exemption under Section 501(c)(4) if they provide primarily a private benefit, even in instances where such private benefits contribute substantial benefits to the public.<sup>31</sup>

**Exclusively v. Primarily.** A second key issue is the extent to which a social welfare organization may engage in unrelated activities and still retain its tax exempt status. Section 501(c)(4) states: “Civic leagues or organizations not organized for profit but operated

<sup>24</sup> See Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2085 (1986); Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, at 71535 (2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf> (describing history of Section 501(c)(4)).

<sup>25</sup> See Taxpayer Bill of Rights II, P.L. 104-168, 110 Stat. 1452, § 1311(a) (1996), <http://www.irs.gov/pub/irs-utl/doc7394.pdf>. See also Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, at 71535 (2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf>.

<sup>26</sup> See Regulations 33 (Rev.), art. 67 (1918) (cited in 11/29/2013 “Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities,” Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, <http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf>).

<sup>27</sup> Treas. Reg. 65, Art. 519, T.D. 3640, 26 Treas. Dec. Int. Rev. 745. 897 (1924).

<sup>28</sup> Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(i).

<sup>29</sup> Rev. Rul. 73-306, 1973-2 C.B., <http://www.irs.gov/pub/irs-tege/r73-306.pdf>.

<sup>30</sup> Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963).

<sup>31</sup> See, e.g., Commissioner v. Lake Forest, Inc., 305 F.2d 814, 818 (4th Cir. 1962) (denying tax exempt status to an organization which was a “public-spirited but privately devoted endeavor” and provided only incidental benefits to the community); Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d. 684, 687 (2d Cir. 1974), cert. denied, 419 U.S. 827 (1974) (determining that the “substantial and different benefits to both the public and its private members” meant the cooperative was not primarily devoted to the common good, and was therefore excluded from tax-exempt status).

**exclusively** for the promotion of social welfare” are exempt from taxation.<sup>32</sup> However, the 1959 implementing regulation states: “An organization is operated **exclusively** for the promotion of social welfare if it is **primarily** engaged in promoting in some way the common good and general welfare of the people of the community.”<sup>33</sup> The 1959 regulation essentially substituted the word “primarily” for the word “exclusively,” contrary to the plain wording of the statute and the plain meaning of the word “exclusively.” This mismatch between the statute and regulation has been the subject of debate within the IRS for decades.<sup>34</sup> Despite the clear contradiction, the IRS regulation has been upheld in court.<sup>35</sup>

An internal IRS analysis also highlights a difference between the implementing regulations for 501(c)(4) and 501(c)(3) organizations.<sup>36</sup> Although both statutory provisions require covered organizations to be engaged “exclusively” in a specified activity, and both regulations then replace “exclusively” with “primarily,” the 501(c)(3) regulation goes on to impose a restriction that the 501(c)(4) regulation does not. It states that a 501(c)(3) organization “will not be so regarded *if more than an insubstantial part* of its activities is not in furtherance of an exempt purpose.”<sup>37</sup> The courts have interpreted this regulatory provision to bar 501(c)(3) charities from engaging in a “substantial non-exempt purpose.”<sup>38</sup> In contrast, the IRS has determined that 501(c)(4) social welfare organizations “may engage in more non-exempt activity than (c)(3) organizations ... reasoning that the §501(c)(4) regulations lack the ‘insubstantial part’ language that is present in the §501(c)(3) regulations.”<sup>39</sup> It concludes that a “§501(c)(4) exempt organization may engage in substantial non-exempt activities,”<sup>40</sup> and may engage in “as much non-exempt activity as it wants so long as it is ‘short of being the organization’s primary activity.’”<sup>41</sup>

<sup>32</sup> 26 U.S.C. § 501(c)(4) (2012) (emphasis added).

<sup>33</sup> 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012) (emphasis added).

<sup>34</sup> See, e.g., undated legal analysis entitled, “Exclusively Standard Under § 501(c)(4),” prepared by IRS, IRSR0000410696 - 711, circulated with a 3/21/2012 email from Justin Lowe to David Fish, “c4 history,” IRSR0000410695 (hereinafter “Exclusively Standard Under § 501(c)(4)”) (citing, among other materials, a 3/31/1978 Interpretative Division Memorandum that “prompted a reexamination of a perennially troublesome question: Should the Regulations implementing 501(c)(4) be changed?” because the regulatory language (‘primarily’) differs from the statutory language (‘exclusively’).”).

<sup>35</sup> See, e.g., Democratic Leadership Council, Inc. v. United States, 542 F. Supp.2d 63, 69 (D.D.C. 2008) (“Federal courts have long interpreted the statute consistently with the regulations: a § 501(c)(4) organization must *primarily* operate to bring about social improvements. ... Though the Supreme Court has not explicitly held that the somewhat counterintuitive definition of ‘exclusively’ as ‘primarily’ is permissible, the parties agree that this is the applicable definition.” (emphasis in original)); Vision Serv. Plan v. United States, 96 A.F.T.R.2d 2005-7440 (E.D. Cal 2005), aff’d 265 Fed. Appx. 650 (9<sup>th</sup> Cir. 2008) (“Although the words ‘exclusively’ and ‘primarily’ have different meanings, courts interpret the word ‘exclusively’ to mean ‘primarily.’”). See also “Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare,” 36 Seattle U. L. Rev. 1337, 1346, Terence Dougherty (2013).

<sup>36</sup> See “Exclusively Standard Under § 501(c)(4),” prepared by IRS, IRSR0000410696 - 711.

<sup>37</sup> Id. at 1-2, citing Treas.Reg. § 1.501(c)(3)-1(c)(1) (emphasis in original).

<sup>38</sup> Id. at 4-9, citing among other cases, Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d. 684 (2d Cir. 1974), cert. denied, 419 U.S. 827 (1974) (“the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes”).

<sup>39</sup> Id. at 10.

<sup>40</sup> Id.

<sup>41</sup> Id. at 12.

The 1959 regulation did not define either “exclusively” or “primarily,” and neither term has been defined by the IRS since then, despite debate on the topic within the IRS over the years.<sup>42</sup> Instead, the IRS engages in a “facts and circumstances test” in order to determine whether an organization is engaged primarily in social welfare activities.<sup>43</sup> Under that test, the IRS considers multiple factors in assessing an organization’s activities, and “no one factor is determinative.”<sup>44</sup> Factors considered by the IRS include the “manner in which the organization’s activities are conducted; resources used in conducting such activities, such as buildings and equipment; the time devoted to such activities (by volunteers and employees); the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities.”<sup>45</sup>

**Percentage Test.** One recurrent issue is whether the IRS uses a “percentage test” to determine whether an organization is engaged primarily in social welfare activities. Under this approach, the IRS would determine the percentage of an organization’s funds or resources spent on social welfare activities and, if that percentage were to exceed a specified level, would then find the organization to be engaged primarily in social welfare activities.

The IRS informed the Subcommittee that it does not use a percentage test: “The IRS has taken no position on a fixed percentage or any one factor in precedential guidance.”<sup>46</sup> At the same time, the investigation uncovered several internal documents suggesting that the IRS has, at least at times, used a 50% or 51% test.<sup>47</sup> In addition, several senior IRS officials told the

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<sup>42</sup> See, e.g., undated “Proposals to Alter the 501(c)(4) Regulations,” prepared by the IRS, IRSR0000508181 (citing G.C.M. 32395 (1962); G.C.M. 33495 (1967); and G.C.M. 38215 (1979)).

<sup>43</sup> See, e.g., Rev. Rul. 68-45, 1968-1 C.B. 259 (ruling that the principal source of income does not determine an organization’s primary activity under § 501(c)(4); all facts and circumstances must be considered).

<sup>44</sup> 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000008. See also 4/20/2012 email from Lois Lerner to Nalee Park, [no subject line], IRSR0000411359.

<sup>45</sup> Priv. Ltr. Rul. 201224034 (3/21/2012), prepared by IRS. See also Rev. Rul. 74-361, 1974-2 C.B. 159; Rev. Rul. 68-45, 1968-1 C.B. 259.

<sup>46</sup> 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 008. The IRS cited a number of sources supporting its position:

“Treas. Reg. § 1.501 (c)(4)-1 (a)(2) (No percentage test established). Rev. Rul. 68-45, 1968-1 C.B. 259 (Principal source of income does not determine an organization’s primary activity under § 501 (c)(4); all the facts and circumstances are considered). See, generally *Haswell v. United States*, 500 F.2d 1133, 1142, 1147 (Ct. Cl. 1974) (“A percentage test ... is not appropriate. Such a test obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances in the context of the totality of the organization.”). See, *Contracting Plumbers v. United States*, 488 F.2d 684, 686 (2d Cir. 1973) (multiple factors relevant in applying this standard, including formative history, stated purposes, and actual operations). See generally *Seasongood v. Commissioner*, 227 F.2d 907, 909, 912 (6th Cir. 1955) (expenditures, employees, and organization’s time and effort considered).”

Id. at footnote 12. See also *Exclusively Standard Under § 501(c)(4)*, prepared by IRS, at 14 (“The IRS has not published a precise method of measuring exempt activities or purposes in any of its published guidance, though three revenue rulings have stated that all of the organization’s activities must be considered and that there is no pure expenditure test.”).

<sup>47</sup> See, e.g., 7/2009 “Instructor Guide, Exempt Organizations Determinations Unit 1b,” prepared by IRS, IRSR0000540412 - 545, at 436 (stating “exclusively only means primary for (c)(4) and primary is generally understood to mean 51%”); 7/28/10 “Screening Workshop Notes,” prepared by IRS, IRSR0000006723 (including a

Subcommittee that the IRS uses a percentage test.<sup>48</sup> Many in the tax exempt community have also indicated that they view “primarily” to mean the organization’s social welfare activities must consume at least 50% of its spending and resources.<sup>49</sup>

Over the years, some courts have interpreted the terms “exclusively” and “primarily,” but those cases have not been dispositive with respect to social welfare organizations.<sup>50</sup> Most of the court decisions have interpreted the law with respect to 501(c)(3) charities as opposed to social welfare organizations, or examined the term “exclusively” in other contexts.<sup>51</sup>

**Social Welfare v. Campaign Activities.** A third key issue, which has gained urgency in recent years, is distinguishing between social welfare activities and campaign activities which do not qualify an organization for tax exempt status under Section 501(c)(4). The law’s 1959 implementing regulations state: “[T]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”<sup>52</sup> The provision makes it clear that participating in political campaigns on behalf of or against a candidate is not considered a social welfare activity.

The wording of Section 501(c)(4)’s regulatory restriction on campaign activities is similar to the wording of a statutory restriction on Section 501(c)(3) charitable organizations, which states that a tax exempt charity may “not participate in, or intervene in (including the

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presentation indicating that if an organization engaged in “more than 50% political” activity, it might be a political action committee, rather than a social welfare organization).

<sup>48</sup> Subcommittee interviews of Steven Miller, IRS (12/11/2013) (indicating it was common knowledge at the IRS that a 501(c)(4) organization was permitted to engage in campaign activities up to 49% of its total expenditures) and Cindy Thomas, IRS (11/13/2013) (indicating the IRS used a 51% test to establish whether an organization was engaged primarily in social welfare activities).

<sup>49</sup> See, e.g., 5/25/2004 letter from Richard Shaw to IRS Commissioner Mark Everson, IRSR0000507273; 5/25/2004 “Comments of the Individual Members of the Exempt Organizations Committee’s Task Force on Section 501(c)(4) and Politics,” Greg Colvin and Miriam Galston, IRSR0000507274, at 307 - 309, “501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Laws,” Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 5 (5/17/2013).

<sup>50</sup> See, e.g., People’s Educ. Camp Society, Inc. v. Commissioner, 39 T.C. 756, 768 (1963) (applying an unrelated Supreme Court interpretation of “exclusively” as lacking any other substantial purpose to 501(c)(4) status determination). See also G.C.M. 33495 (1967); “Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s,” 53 Exempt Org. Tax Rev. 165, Miriam Galston (2006).

<sup>51</sup> See, e.g., Better Business Bureau v. United States, 326 U.S. 279, 283 (1945) (the Supreme Court, when asked to determine whether an organization was operating “exclusively” as required by a provision in the Social Security Act, wrote that the exclusivity requirement “plainly means that the presence of a single [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purpose”). Several courts have analyzed the meaning of the word “substantial” and “insubstantial” in the context of Section 501(c)(3) charities which may lose their tax exempt status “if a substantial part of [their] activities is attempting to influence legislation (commonly known as lobbying).” IRS document entitled, “Lobbying,” on IRS website, <http://www.irs.gov/Charities-%26-Non-Profits/Lobbying>. Case law has determined that lobbying activities may be treated as “insubstantial” if they use no more than 5 to 15% of the charitable organization’s expenditures. See, e.g., Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (spending between 16.6% and 20.5% of an organization’s time on lobbying is substantial); Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955) (devoting less than 5% of activities to lobbying is not substantial). See also “501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Laws,” Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 3-4 (5/17/2013).

<sup>52</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>53</sup> Section 501(c)(3) imposes a complete statutory ban on charities participating in campaign activities. Section 501(c)(4)’s regulation appeared to have attempted to impose the same ban on social welfare groups by stating that campaign activities do not qualify as social welfare activities. But because of the regulation’s substitution of the word “primarily” for “exclusively,” the end result has been that the IRS has allowed social welfare organizations to engage in campaign activities while retaining their tax exempt status, so long as the organization remained engaged “primarily” in social welfare activities.<sup>54</sup>

Determining when an organization is engaged in social welfare versus campaign activity can be difficult, since some educational and issue advocacy activities that might qualify as promoting social welfare could also be seen as advocating for a particular candidate or party.<sup>55</sup> The IRS has issued several revenue rulings that provide limited guidance on identifying campaign activities.<sup>56</sup> A June 2013 report by the IRS after a review of 501(c)(4) tax-exempt applications concluded: “One of the significant challenges with 501(c)(4) review process has been the lack of clear and concise definition of ‘political campaign intervention.’”<sup>57</sup>

In the past, the IRS has denied tax exempt status to organizations that have an explicit partisan purpose and engage in openly partisan activities, holding that their activities seek to benefit a private group – the favored political party – rather than the broader community. A 1997 letter denying tax exempt status under Section 501(c)(4) for the National Policy Forum

<sup>53</sup> 26 U.S.C. § 501(c)(3) (2012). See also 26 C.F.R. § 1-501(c)(3) - 1(b)(3)(ii) (2008).

<sup>54</sup> See Rev. Ruling 81-95, 1981-1 C.B. 332 (“[A]n organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote the social welfare.”). See also Rev. Rul. 2007-41, 2007-25 I.R.B. (describing activities that qualify as intervening on behalf of or in opposition to a specific candidate); 1995 “Political Organizations and IRC 501(c)(4),” IRS, Raymond Chick and Amy Henchey, <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf> (stating that “an organization exempt under IRC 501(c)(4) may engage in political activities if those activities are not the organization’s primary activity.”).

<sup>55</sup> See, e.g., 6/24/2013 “Charting a Path Forward at the IRS: Initial Assessment and Plan of Action,” issued by Acting IRS Commissioner Daniel Werfel, at 28, <http://www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf>; 1995 “Political Organizations and IRC 501(c)(4),” prepared by IRS, Raymond Chick and Amy Henchey, <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf> (providing additional information about political versus educational activities by 501(c)(4) organizations); Priv. Ltr. Rul. 20044008E (12/2/2003), prepared by IRS (discussing prior revenue rulings and private letter rulings on what activities qualify as social welfare activities).

<sup>56</sup> See, e.g., Rev. Ruling 2004-6, 2004-1 C.B. 328, [http://www.irs.gov/irb/2004-04\\_IRB/ar10.html](http://www.irs.gov/irb/2004-04_IRB/ar10.html) (discussing whether certain activities qualify as political campaign activities); Rev. Ruling 81-95, 1981-1 C.B. 332. Another revenue ruling provides guidance in the context of Section 501(c)(3) charitable organizations, but is generally viewed as also applying to 501(c)(4) organizations. See Rev. Rul. 2007-41, 2007-1 C.B. 1421. See also “Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare,” 36 Seattle U. L. Rev. 1337 Terence Dougherty (2013), <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2182&context=sulr> (providing an analysis of IRS revenue rulings and private letter rulings); 1995 “Political Organizations and IRC 501(c)(4),” prepared by IRS, Raymond Chick and Amy Henchey, <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf> (“IRC 501(c)(4) does not define political campaign activities; instead, the definition and interpretation of terms used has occurred principally under IRC 501(c)(3).”).

<sup>57</sup> 6/24/2013 “Charting a Path Forward at the IRS: Initial Assessment and Plan of Action,” prepared by Acting IRS Commissioner Daniel Werfel, at 20, <http://www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf>. See also 11/29/2013 “Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities,” Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230.



explained: “partisan political activity does not promote social welfare as defined in section 501(c)(4),” because it “benefit[s] select individuals or groups, instead of the community as a whole.”<sup>58</sup> In reaching its decision, the denial letter noted that the National Policy Forum’s Articles of Incorporation stated that the organization intended to encourage the development of ideas through forums and exchanges with the public, and to develop a “national Republican policy agenda.”<sup>59</sup> The letter also noted partisanship elements in the composition of the organization’s board members; the organization’s participants and speakers at forums; publications that the organization disseminated or distributed; and the financial support it received; concluding that the National Policy Forum was a “partisan issues-oriented organization.”<sup>60</sup> In 2011, the IRS made a similar decision, discussed in more detail below, to deny tax exempt status to organizations associated with Emerge America, a group dedicated to training Democratic women candidates to run for elective office.<sup>61</sup> Today, however, many 501(c)(4) applicants do not engage in openly partisan activities, making it more difficult for the IRS to determine when organizations are seeking to intervene on behalf or in opposition to particular candidates.

**Facts and Circumstances Test.** To resolve questions about whether a particular activity qualified as a social welfare versus campaign activity, and whether an organization was engaged primarily in social welfare activities, the IRS elected to use a “facts and circumstances” test. That test required IRS personnel to consider all relevant material facts when making a determination and to refrain from treating any one factor as determinative.<sup>62</sup> Due to its fact-specific nature, the facts and circumstances test required IRS personnel to gather detailed information about each 501(c)(4) applicant, so that all relevant material factors could be identified and evaluated.<sup>63</sup>

At the same time, the IRS provided few objective standards or bright line rules, and little written guidance to its agents to address common fact patterns.<sup>64</sup> For example, the IRS did not instruct its agents to treat all candidate contributions as campaign activity; instead, agents were required to make an individualized analysis of each contribution.<sup>65</sup> While federal campaign law treated television advertisements that mentioned a candidate and were broadcast to the candidate’s electorate within 30 days of a primary or 60 days of a general election as electioneering communications, IRS agents were not allowed to use those same objective criteria to reach a decision about whether a television advertisement constituted campaign activity;

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<sup>58</sup> 2/21/1997 National Policy Forum Denial Letter, PSI-IRS-01-000001 - 013, at 010 - 012.

<sup>59</sup> Id. at 001.

<sup>60</sup> Id. at 010 - 013.

<sup>61</sup> See, e.g., 5/26/2011 email from Siri Buller to Jason Kall, “Referral to ROO,” IRSR0000196739 - 758, at 039, (“Recently, we denied the 1024 applications of three state chapters of ... a Democratic candidate training school for women. We denied the applications on the basis that their primary activity confers a private benefit to a political party.”).

<sup>62</sup> See, e.g., 6/4/2012 IRS letter from the IRS responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 008.

<sup>63</sup> See, e.g., 4/30/2013 “Memorandum for Deputy Inspector General for Audit,” from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43-44.

<sup>64</sup> Id. at 44 (“There are no bright line tests for what constitutes political campaign intervention (in particular, the line between such activity and education) or whether an organization is primarily engaged in social welfare activities.”).

<sup>65</sup> See, e.g., 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 009-010 (indicating, when asked whether a cash contribution to a political organization would be considered campaign activity, that all the facts and circumstances would have to be considered).

instead, each agent was required to develop the facts and then evaluate the timing, audience, wording, and context of each televised advertisement on a case-by-case basis.<sup>66</sup> The IRS also provided little training to agents handling 501(c)(4) applications on how to apply the facts and circumstances test.<sup>67</sup>

The result was that IRS personnel were required to ask detailed questions about many aspects of a group's organization and activities, and spend long hours analyzing the information. Critics complained that the IRS inquiries were inappropriate, burdensome, and intrusive. In addition, the IRS analysis took place in a nontransparent setting, leading to complaints about how particular facts were treated. In addition, because the analysis was so fact specific and required consideration of all relevant material facts, it produced case-by-case determinations with limited precedential effect. Moreover, because the IRS provided few objective standards, bright line rules, or detailed guidance, IRS agents were put in the position of having to make essentially subjective determinations about how individual applications should be viewed. Hesitancy about making those determinations led to inaction on many 501(c)(4) applications, some of which sat unresolved for years at a time.<sup>68</sup>

**Proposed Rulemaking.** In an attempt to address these and related problems, in November 2013, in response to a recommendation in the audit report by the Treasury Inspector General for Tax Administration, the Treasury Department and IRS issued a Notice of Proposed Rule Making with proposals for clarifying what activities qualified as “candidate-related campaign activities” under Section 501(c)(4).<sup>69</sup> One of the goals of the proposed rule was to reduce IRS reliance on the inherently time-consuming, non-transparent, and subjective facts and circumstances test and instead move towards more objective standards and bright line rules. As IRS Commissioner John Koskinen put it, the proposed rule would benefit the agency by taking it out of any “political judgment position.”<sup>70</sup> The IRS Commissioner also stated:

“[E]veryone would gain and we would avoid issues that we’ve had in the past if it were clearer what the definition of political activity is and how much of it [organizations] are allowed to engage in with as much clarity as possible and if it was clearer to whom those rules apply.”<sup>71</sup>

<sup>66</sup> See, e.g., Rev. Rul. 2007-41; 4/25/2012 draft guide sheet, “Reviewing Section 501(c)(3) and 501(c)(4) Exemption Applications (Political Campaign Intervention and Lobbying),” PSI-TIGTA-01-000146 - 199, at 160 (“Guide Sheet 4: Issue Advocacy vs. Political Campaign Intervention”).

<sup>67</sup> Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013). See also 5/14/2013 TIGTA Audit Report, at 11, 17 (recommending increased training).

<sup>68</sup> 5/14/2013 TIGTA Audit Report, at 14 (stating that “[m]any organizations waited much longer than 13 months for a decision,” with several cases that experienced delays of “more than 1,000 calendar days”).

<sup>69</sup> 11/29/2013 “Proposed Guidance for Tax-Exempt Social Welfare Organizations On Candidate-Related Political Activities,” Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230. The NPRM was undertaken in response to a TIGTA recommendation that the Treasury Department place a priority on developing 501(c)(4) guidance. See 5/14/2013 TIGTA Audit Report, at 17.

<sup>70</sup> 1/6/2014 “New IRS Chief Sees End to Tea Party Investigation,” *USA Today*, Kendall Breitman, <http://www.usatoday.com/story/news/politics/2014/01/06/irs-commissioner-koskinen-tea-party/4344465/>.

<sup>71</sup> *Id.*

The proposed IRS rule generated over 150,000 comments and is now under review.<sup>72</sup> The IRS has indicated that it is likely to revise the proposed rule and will hold a public hearing on it.<sup>73</sup>

### C. IRS Oversight of Section 501(c)(4) Organizations

IRS oversight of the 501(c)(4) tax exempt community relies principally upon two sets of documents, applications filed by organizations seeking IRS approval of their tax exempt status and tax returns filed annually by existing 501(c)(4) organizations. While organizations are not required to do so, many choose to file applications with the IRS to obtain official recognition of their tax exempt status. To maintain their tax exemption, all 501(c)(4) organizations must also file an annual tax return. The IRS reviews all submitted applications to determine whether an applicant meets the legal requirements for social welfare organizations. It also reviews some annual tax returns and uses other means to monitor existing 501(c)(4) organizations' ongoing compliance with the tax code.

**Self-Declared Tax Exempt Organizations.** Neither the tax code nor the IRS requires 501(c)(4) social welfare organizations to file a formal application or obtain prior IRS approval before holding themselves out as tax exempt.<sup>74</sup> Any group may simply declare its tax exempt status and initiate operations. In instances where an organization does not file an application prior to claiming tax exempt status, the IRS categorizes these entities as “non-declaring” or “self-declaring” social welfare organizations.<sup>75</sup>

**1024 Applications.** Despite the absence of any statutory or regulatory requirement, many organizations choose to file a Form 1024 application with the IRS to obtain official recognition as a tax exempt 501(c)(4) social welfare organization.<sup>76</sup> The IRS notes several reasons why organizations may decide to file an application: to obtain public recognition of its tax exempt status, assure donors of the group's tax exempt status, and gain “exemption from certain state taxes.”<sup>77</sup>

<sup>72</sup> See, e.g., “IRS Update on the Proposed New Regulation on 501(c)(4) Organizations,” IRS press release, (5/22/2014), [http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501\(c\)\(4\)-Organizations](http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations) (“The proposal generated over 150,000 written comments — the most comments ever received by Treasury and IRS on a proposed tax regulation.”).

<sup>73</sup> Id.

<sup>74</sup> See, e.g., 5/17/2013 “501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws,” Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 2; 5/20/2013 “FAQs on 501(c)(4) Social Welfare Organizations,” prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 2, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>75</sup> See, e.g., 5/20/2013 “FAQs on 501(c)(4) Social Welfare Organizations,” prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 2, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>76</sup> See “Application for Recognition of Exemption,” IRS Form 1024, <http://www.irs.gov/pub/irs-pdf/f1024.pdf>. See also 5/20/2013 “FAQs on 501(c)(4) Social Welfare Organizations,” prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 3, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>77</sup> See “Instructions for Form 1024,” IRS publication, <http://www.irs.gov/pub/irs-pdf/i1024.pdf>.

To apply for formal tax-exempt recognition under section 501(c)(4), an organization must request a federal Tax Identification Number and fill out an application on IRS Form 1024.<sup>78</sup> Form 1024 requests basic identification information as well as specific information designed to help IRS personnel determine whether the group qualifies for tax exemption. For example, the form asks the organization to list its activities, the percentage of time devoted to each activity, its sources of income, and other financial information.<sup>79</sup> With respect to campaign activity, Form 1024 asks:

“Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, state, or local public office or to an office in a political organization?”<sup>80</sup>

When filed, 1024 applications are sent to a centralized IRS Submission Processing Center, entered into an IRS database for exempt organizations, and then forwarded to the IRS Exempt Organizations Determinations Unit in Cincinnati, Ohio, for further processing.<sup>81</sup> The review process is detailed below. At the conclusion of the review process, the application is either approved or denied.

An organization whose application is denied is given an “adverse determination” letter. According to the IRS, “[a]n adverse determination is a written ruling denying tax-exempt status to an organization that has applied for tax exemption, but has failed to meet the applicable requirements.”<sup>82</sup> The IRS also told the Subcommittee that, in many cases, if an organization perceives that its application may be denied, it will withdraw the application prior to denial and determine later whether to resubmit a modified version.<sup>83</sup>

If an application is actually denied, the applicant can seek review from the IRS Office of Appeals, an independent office within the IRS which will review the administrative record associated with the organization, and make an independent determination on whether the organization meets the requirements for tax exempt status.<sup>84</sup> If the Appeals Office approves the application, the organization is officially designated as tax exempt. If the Appeals Office agrees that the application should be denied, the applicant can challenge that determination in court.<sup>85</sup>

According to the IRS, from 2007 to 2012, it issued ten adverse determination letters to 501(c)(4) applicants which denied them tax exempt status due to involvement with campaign activities.<sup>86</sup> Since September 2012, the IRS has indicated that it has issued nine additional adverse determinations to organizations applying for 501(c)(4) status, but some of those denials

<sup>78</sup> “Exempt Organizations – Exempt Application,” prepared by IRS, <http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organization-Exemption-Application>.

<sup>79</sup> See “Form 1024—Application for Recognition of Exemption Under Section 501(a),” IRS form, <http://www.irs.gov/pub/irs-pdf/f1024.pdf>.

<sup>80</sup> *Id.*, at 4, Part II, line 15.

<sup>81</sup> 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 – 026, at 002.

<sup>82</sup> 3/15/2013 letter from IRS responding to Subcommittee, PSI-IRS-08-000001 – 010, at 001.

<sup>83</sup> 4/30/2013 briefing by IRS of Subcommittee.

<sup>84</sup> 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 – 026, at 003.

<sup>85</sup> *Id.*

<sup>86</sup> 11/23/2012 letter from IRS responding to Subcommittee, PSI-IRS-07-000001 - 119, at 002 - 003.

may not have involved campaign activities.<sup>87</sup> Organizations that receive an adverse determination letter can voluntarily surrender their tax exempt status, dissolve, invoke another type of tax exemption, reorganize, or take other action.

**990 Tax Returns.** Whether or not a tax exempt social welfare organization files a Form 1024 application, it is required to file an annual tax return using IRS Form 990, “Return of Organization Exempt for Income Tax.”<sup>88</sup> This tax return must be filed by all organizations claiming tax exemption under Section 501(c). It is the key mechanism used by the IRS to monitor tax exempt organizations and determine whether they continue to comply with the legal requirements for tax exemption, including in the case of 501(c)(4) organizations that they continue to be engaged primarily in social welfare activities.<sup>89</sup>

Form 990 requires organizations to provide basic identification and financial information about their operations during the covered period. It requires, for example, information about the number of individuals employed by the group, the number of volunteers employed, and any contributions or grants. With respect to campaign activity, Form 990 asks the following question: “Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office?”<sup>90</sup> If an organization provides an affirmative response, it is required to provide additional information on “Schedule C.”

Form 990 has several Schedules that may need to be completed, depending on the applicant’s finances and activities. For any donation of \$5,000 or more, Schedule B requires the recipient organization to disclose the donor’s name, address, and the type and amount of the contributions.<sup>91</sup> While tax exempt organizations are required to provide copies of their 990 tax returns to the public upon request, the release of Schedule B donor information is optional and is generally not made publicly available.<sup>92</sup> Schedule C requires the organization, if it has provided an affirmative response to the question about political campaign activities, to provide additional information about those activities. The IRS established Schedule C in 2008, as a part of a significant revision of Form 990 to ensure better “tax compliance, accountability, and transparency.”<sup>93</sup> It requires organizations to answer questions about the direct and indirect

<sup>87</sup> 4/22/2014 letter from IRS responding to Subcommittee, PSI-IRS-50-000001 - 002.

<sup>88</sup> “Form 990 – Return of Organization Exempt from Income Tax,” IRS form, <http://www.irs.gov/pub/irs-prior/f990-2012.pdf>.

<sup>89</sup> See, e.g., 5/17/2013 “501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws,” Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 7.

<sup>90</sup> “Form 990 – Return of Organization Exempt from Income Tax,” IRS form, at 3, Part IV, line 3, <http://www.irs.gov/pub/irs-prior/f990-2012.pdf>.

<sup>91</sup> “Form 990 – Schedule of Contributors (Schedule B),” IRS form, <http://www.irs.gov/pub/irs-prior/f990ezb-2012.pdf>. See also 5/20/2013 “FAQs on 501(c)(4) Social Welfare Organizations,” prepared by Donald Tobin, Ohio State University – Moritz College of Law, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>92</sup> See Treas. Reg. 1.6104(b)-1(b), allowing Schedule B to be withheld from the public. See also 5/20/2013 “FAQs on 501(c)(4) Social Welfare Organizations,” prepared by Donald Tobin, Ohio State University – Moritz College of Law, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>93</sup> 5/17/2013 “501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws,” Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 10.

campaign activities of the group, any campaign expenditures made by the group, and the number of volunteer hours related to carrying out campaign activities.<sup>94</sup>

A major concern related to the 990 tax returns involves the long period of time before they have to be filed and the difficulty of using the returns to obtain timely information about an organization's activities. Organizations are required to file the return by the 15th day of the fifth month following the close of an organization's taxable year.<sup>95</sup> An organization may obtain an automatic three month extension from the initial due date by filing Form 8868, "Application for Extension of Time to File an Exempt Organization Return." The organization may request a second extension for another three months by filing a second Form 8868 and explaining why more time is needed.<sup>96</sup> If a newly formed organization uses the full time permitted to file the 990 return, its first tax return may be filed 22.5 months after its creation.<sup>97</sup> An organization may time its formation to enable it to engage in campaign activities prior to an election, and not file a 990 return disclosing its activities until after the election has concluded.<sup>98</sup>

**Ongoing IRS Oversight and Enforcement.** To conduct ongoing oversight of tax exempt groups' compliance with the tax code, the IRS has instituted several methods to monitor existing tax exempt organizations, including social welfare groups.

One option is for an EO unit called Review of Operations (ROO) to conduct a review of an existing tax exempt organization to determine whether it is in compliance with the law.<sup>99</sup> A so-called "ROO review" is not an audit, and the tax exempt entity is not contacted when the IRS conducts the evaluation.<sup>100</sup> Applications are either randomly selected or referred by other IRS offices to determine if an organization has complied with its stated exempt purpose, and the ROO specialist typically assesses the organization's latest Form 990, website, and publicly available information.<sup>101</sup> When a ROO review determines that an organization may be out of

<sup>94</sup> "Form 990 – Political Campaign and Lobbying Activities (Schedule C)," Internal Revenue Service, <http://www.irs.gov/pub/irs-prior/f990sc--2012.pdf>.

<sup>95</sup> Treas. Reg. § 1.6033-1(3). See also "501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Law," at 10. See also 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>96</sup> "Exempt Organizations Filing Requirements: Extending Due Date for Form 990," prepared by IRS, <http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Exempt-Organization-Filing-Requirements---Extending-Due-Date-for-Form-990>.

<sup>97</sup> See 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, [http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501\(c\)\(4\)%20Social%20Welfare%20Organizations%20v.6.pdf](http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf).

<sup>98</sup> See, e.g., 5/17/2013 "501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 7.

<sup>99</sup> See "IRS Exempt Organizations FY 2012 Annual Report and FY 2013 Workplan," prepared by IRS, at 12, [http://www.irs.gov/pub/irs-tege/FY2012\\_EO\\_AnnualRpt\\_2013\\_Work\\_Plan.pdf](http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf).

<sup>100</sup> 8/4/2012 letter from IRS to Subcommittee, PSI-IRS-04-000001 – 008, at 004.

<sup>101</sup> Id.

compliance with the tax code, it typically refers the organization to examinations personnel for an audit.<sup>102</sup>

A second option involves “Compliance Checks.” A compliance check is an IRS review of an entity’s filing information and tax returns, which the filer permits on a voluntary basis.<sup>103</sup> An IRS specialist initiates a compliance check by issuing a letter to the tax exempt entity, typically after IRS personnel discover an error in a tax return, or determine the IRS needs to obtain clarification with respect to an issue of importance.<sup>104</sup> Compliance checks provide a more limited review than an audit, and are typically restricted to verifying the timely, complete, and accurate filing of tax return documents and deposits.<sup>105</sup> After reviewing the tax information, cases are either closed or recommended for further examination, which requires approval from a Field Manager.<sup>106</sup>

The third option is a traditional examination or audit. Section 7602 of the tax code authorizes the IRS to conduct an audit to determine whether an organization still qualifies for tax exempt status.<sup>107</sup> The IRS conducts two types of audits of tax exempt entities. In a “Field Examination,” an EO revenue agent will “perform the work at the organization’s place of business.”<sup>108</sup> In a “Correspondence Examination,” the revenue agent asks the organization to send documents to the agent’s location, where they are reviewed.<sup>109</sup>

If, after an examination, the IRS determines that a tax exempt organization is out of compliance with the law, the agency can issue the organization a “revocation notice,” revoking its tax exempt status. According to the IRS, “[a] revocation notice is a written notice that tax exempt status is being revoked, as a result of an examination.”<sup>110</sup> In a letter to the Subcommittee, the IRS reported that, from 2007 to 2014, it issued 42 revocation notices to 501(c)(4) organizations for involvement with campaign activities, five of which were not sustained on appeal.<sup>111</sup> The IRS also told the Subcommittee that, from 2007 to 2012, it sent 18 written advisories to 501(c)(4)s citing “irregularities.”<sup>112</sup>

<sup>102</sup> Id. Since mid-July 2012, ROO examination recommendations must also be reviewed by the Political Activities Referral Committee, an IRS unit which makes the final determination on whether an examination is warranted.

<sup>103</sup> See IRM 4.90.3.2 (2/1/2008) (“A compliance check is a contact with the customer that involves a review of filed information and tax returns of the entity. A compliance check is NOT an examination and the customer may legally choose not to participate. A compliance check does not directly relate to determining a tax liability for any particular period. The check is a tool to help educate government entities about their reporting requirements and increase voluntary compliance.”).

<sup>104</sup> IRM 4.90.3.4 (12/16/2011); 8/24/2012 letter from IRS responding to Subcommittee, PSI-IRS-04-000001 - 008, at 004.

<sup>105</sup> The Internal Review Manual identifies a limited list of documents that should be reviewed during the compliance check: Forms 941, 945, W-2, W-3, W-4, W-9, 1099, 1096, 1042, 1042-S, or others as applicable. IRM 4.90.3.5 (12/16/2011).

<sup>106</sup> IRM 4.90.3.7 (12/16/2011); IRM 4.90.3.12.1 (2/21/2013).

<sup>107</sup> See “IRS Exempt Organizations FY 2012 Annual Report and FY 2013 Workplan,” prepared by IRS, [http://www.irs.gov/pub/irs-tege/FY2012\\_EO\\_AnnualRpt\\_2013\\_Work\\_Plan.pdf](http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf).

<sup>108</sup> Id. at 5. In fiscal year 2012, over three-fourths of the IRS examinations were field examinations. Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> See 11/23/2012 letter from IRS responding to Subcommittee, PSI-IRS-07-000001 - 004. See also 4/22/2014 letter from IRS to Subcommittee, PSI-IRS-50-000001 - 002 (indicating that 5 of the 42 revocations were not sustained on appeal and, in addition, from October 2012-February 2014, the IRS revoked the tax exempt status of 5

When the IRS revokes an organization's 501(c)(4) tax exempt status, the organization can voluntarily surrender its tax exempt status, dissolve, invoke another type of tax exemption, reorganize, or take other action.

#### **D. Federal Election Law and Increased 501(c)(4) Campaign Involvement**

Over the last decade, 501(c)(4) organizations have become increasingly involved with campaign activities, and some have incurred filing obligations under the Federal Election Campaign Act (FECA).

The FECA, first enacted in 1971, and subsequently amended in 1974, 1976, and 1979, “remains the foundation of the nation’s campaign finance law.”<sup>113</sup> Among other provisions, it created the Federal Election Commission (FEC), and imposed a set of detailed disclosure requirements for candidates, parties, and others involved with federal elections. The FEC is an independent federal regulatory agency tasked with administering and enforcing the FECA. It maintains the law’s campaign finance disclosure systems, accepts and reviews all FECA filings, and enforces compliance with the law’s disclosure obligations.

The FEC requires persons involved with campaign activities to file periodic reports. Candidate political committees, political action committees, and political parties must disclose their campaign contributions and expenditures on Form 3, while non-candidate organizations – including 501(c)(4) groups – are required to disclose any independent expenditures on Form 5, and any electioneering communications expenditures on Form 9.<sup>114</sup>

Although the FEC filings provide direct evidence of the involvement of a 501(c)(4) group in campaign activity, contain information supplied directly by the filing group under penalty for submitting false information, and do not require any intrusive inquiries by the IRS, the FEC told the Subcommittee that it was unaware of the IRS making routine use of the filings to screen or evaluate 501(c)(4) applications.<sup>115</sup> The FEC also told the Subcommittee that the IRS had not asked the FEC to include Taxpayer Identification Numbers or 501(c) status information on the

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additional 501(c)(4) organizations for a variety of reasons, which could have included political activity). For a set of revocation letters to 10 groups, with the names redacted, see attachments to 11/23/2012 IRS letter, PSI-IRS-07-000005 - 119.

<sup>112</sup> See 11/23/12 IRS letter responding to the Subcommittee, PSI-IRS-07-000001 - 004, at 003.

<sup>113</sup> 4/22/2014 “The State of Campaign Finance Policy: Recent Developments and Issues for Congress,” Congressional Research Service, R. Sam Garrett, at 4.

<sup>114</sup> An independent expenditure is “an expenditure by a person – (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2012). “Electioneering communications” are communications which are broadcast within 30 days of a primary or 60 days of a general election and mention a clearly identified candidate to the electorate. 2 U.S.C. § 434(f)(3) (2012).

<sup>115</sup> 6/12/2013 briefing by the FEC of the Subcommittee.



FECA filing forms, even though that information would increase the forms' usefulness to the IRS and the IRS had a statutory role in developing those FEC forms.<sup>116</sup>

The IRS told the Subcommittee that, while it used FEC filings in its 501(c)(4) oversight work, including when evaluating 501(c)(4) applications, it did not have a system that formally tracked FEC filings made by 501(c)(4) organizations.<sup>117</sup> In addition, the IRS indicated that it did not make routine use of FEC filings to identify 501(c) applications of groups involved with campaign activities.<sup>118</sup> The IRS explained that its rules require it to use the facts and circumstances test to evaluate each electioneering communication or independent expenditure made by a 501(c)(4) organization, which meant that the organization's FEC filings were not dispositive evidence of its involvement with campaign intervention activities.<sup>119</sup>

**2010 Citizens United Decision.** In January 2010, in the landmark Citizens United v. Federal Election Commission case, the U.S. Supreme Court authorized political action committees (PACs) for the first time to accept unlimited contributions from donors, including businesses, unions, and individuals, as long as they made independent campaign expenditures that were not coordinated with any candidate.<sup>120</sup> PACs which determined to make such independent expenditures became known as "Super PACs," due to their ability to accept unlimited donations and engage in massive campaign spending.<sup>121</sup> At the same time Super PACs began to operate, according to the Center for Responsive Politics, the number of tax-exempt groups engaged in campaign spending also increased, including Section 501(c)(4) social welfare groups.<sup>122</sup>

Senior officials at the IRS were aware that the Citizens United case could affect tax-exempt groups, including 501(c)(4) organizations, some of which had already increased their campaign activities.<sup>123</sup> On January 22, 2010, soon after the Citizens United decision, Lois Lerner, head of Exempt Organizations, sent an email to senior IRS officials, including then TEGE Commissioner Steven Miller, with the following observation:

"I'm sure you've heard about the S. Ct.'s decision in Citizen's United that corporations have first amendment rights and the prohibitions on corporate spending in elections are unconstitutional. While I don't think that changes our legal position—that tax-exemption

<sup>116</sup> Id. See also 2 U.S.C. § 438(f)(requiring the FEC and IRS to "consult and work together to promulgate rules, regulations, and forms which are mutually consistent").

<sup>117</sup> See 3/15/2013 IRS letter responding to Subcommittee, PSI-IRS-08-000001-108, at 009.

<sup>118</sup> 4/30/2013 IRS briefing of the Subcommittee.

<sup>119</sup> See 3/15/2013 IRS letter responding to Subcommittee, PSI-IRS-08-000001-108, at 009.

<sup>120</sup> Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

<sup>121</sup> The FEC also refers to them as independent-expenditure-only committees (IEOCs). See "Quick Answers to PAC Questions," Federal Election Commission, [http://www.fec.gov/ans/answers\\_pac.shtml](http://www.fec.gov/ans/answers_pac.shtml).

<sup>122</sup> See "Outside Political Spending Surging in 2010 Midterms," Center for Responsive Politics OpenSecrets Blog, David Levinthal (10/14/2010), <http://www.opensecrets.org/news/2010/10/outside-political-spending-skyrocke.html>; "Outside Spending: Frequently Asked Questions About 501(c)(4) Groups," Center for Responsive Politics, <https://www.opensecrets.org/outsidespending/faq.php>.

<sup>123</sup> See, e.g., "The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds," 147 University of Pennsylvania Law Review 971, Robert Paul Meiart (1999), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3414&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3414&context=penn_law_review).

is a privilege and if you want the privilege you have to play by the rules, I do think we need to be prepared to respond to inquiries about c3 and c4 spending in elections.”<sup>124</sup>

Ms. Lerner also stated: “I know this is a very sensitive issue.”<sup>125</sup> Despite this acknowledgement of the likely impact of the Citizens United decision in 2010, the IRS did not put any new procedures or safeguards in place at the time to identify, evaluate, or resolve questions about 501(c) applicants planning to engage or engaged in campaign spending.

**Increased 501(c)(4) Campaign Involvement.** Since the 2010 Citizens United decision, it has become common for a Super PAC to have an affiliated 501(c)(4) organization which, under the tax code, can accept unlimited contributions from all types of donors, including businesses, unions, and individuals, and can engage in campaign activity as long as it is not the organization’s primary activity.<sup>126</sup> In addition, unlike Super PACs, 501(c)(4) organizations are not legally obligated to publicly disclose the names of their donors or the amounts of the donations, although all donations over \$5,000 must be reported confidentially to the IRS on Schedule B of their annual 990 tax returns.<sup>127</sup> The ability of 501(c)(4) groups to keep donor information confidential has, in some cases, made those groups attractive to donors interested in financing campaign activities without publicly disclosing their identities. Some 501(c)(4) organizations have used confidential donations to directly fund campaign activities.<sup>128</sup> Others have contributed donated funds to other 501(c)(4) organizations, Super PACs, or other political organizations involved with campaign activities, without disclosing the names of the donors who originated the funds.<sup>129</sup>

<sup>124</sup> 1/22/2010 email from Lois Lerner to Sarah Ingram, Steven Miller, and Nancy Marks, IRSR0000444375 - 377.

<sup>125</sup> Id.

<sup>126</sup> See, e.g., “American Crossroads/Crossroads GPS,” FactCheck.org (2/7/2014), <http://www.factcheck.org/2014/02/american-crossroadscrossroads-gps-2/> (American Crossroads, a Republican leaning Super PAC that is affiliated with Crossroads GPS, a 501(c)(4) group, raised a combined \$325 million in the 2012 election); “Priorities USA/Priorities USA Action,” FactCheck.org (3/3/2014), <http://www.factcheck.org/2014/03/priorities-usapriorities-usa-action-3/> (Priorities USA Action, a Democrat leaning Super PAC affiliated with Priorities USA, a 501(c)(4) group, raised a combined \$88 million in the 2012 election). See also “Crossroads GPS and Priorities USA were created for the purpose of hiding donors,” Washington Post, Dylan Matthews (5/15/2013), [http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/15/wonkbook-all-the-latest-on-all-the-scandals/?tid=up\\_next](http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/15/wonkbook-all-the-latest-on-all-the-scandals/?tid=up_next).

<sup>127</sup> See “Form 990 – Schedule of Contributors (Schedule B),” IRS form, <http://www.irs.gov/pub/irs-prior/f990ezb--2012.pdf>. Schedule B is not released by the IRS to the public.

<sup>128</sup> For more information about these activities, see Report section on Deepening Campaign Involvement, below.

<sup>129</sup> See, e.g., Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, <https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html> (referencing a settlement between the California Fair Political Practices Commission (FPPC) and the California Attorney General on one side with two 501(c)(4) organizations on the other side that received \$15 million in donations from undisclosed donors and contributed the same amount to political action committees involved with campaign activities); 10/24/2013 “FPPC Announces Record Settlement in \$11 Million Arizona Contribution Case,” California Fair Political Practices Commission Press Release, [http://www.fppc.ca.gov/press\\_release.php?pr\\_id=783](http://www.fppc.ca.gov/press_release.php?pr_id=783). See also, e.g., “Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch,” Fox News, (7/19/2012), <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/> (describing a letter alleging that a 501(c)(3) ACORN successor group had collected \$640,000 in donations from undisclosed donors and funneled the money to a related 501(c)(4) ACORN successor group which was using the funds to support a Democratic candidate for the Texas legislature).

Campaign spending data corroborates increased campaign involvement by 501(c)(4) groups. According to the Center for Responsive Politics, in 2010, a federal election year, 501(c) organizations, including social welfare, business, and labor groups, spent about \$170 million on independent campaign expenditures and electioneering communications that required filings with the FEC; in 2012, the next federal election year, that number nearly doubled to \$336 million.<sup>130</sup> The growth in campaign spending by social welfare groups alone has reportedly been even more explosive, rising 80 fold over the last decade.<sup>131</sup>

According to the IRS, from 2010 to 2012, the number of applications filed to obtain 501(c)(4) status nearly doubled, from about 1,700 in 2010, to more than 3,300 in 2012.<sup>132</sup> In addition, from 2008 to 2010, the same year the Citizens United decision was issued, the number of 501(c)(4) groups reporting campaign activities to the IRS doubled, while the amount of campaign-related expenditures during that period almost tripled.<sup>133</sup> The IRS also reported that while all 990 tax returns for 2012 were not yet in, “large 501(c)(4)s with political campaign activities expenditures in TY 2010 reported a large increase in spending to the FEC between 2010 and 2012.”<sup>134</sup> At the same time, the IRS reported receiving “numerous referrals from the public, media, watchdog groups, and members of Congress alleging that specific section 501(c)(4) organizations were engaged in political campaign activity to an impermissible extent.”<sup>135</sup> Former IRS Commissioner Steven Miller, in handwritten notes, commented on the increased levels of campaign spending as follows: “Then along came a wave of cash – unleashed by Citizens’ United and that cash chose a favorable port due to disclosure and underenforced gift tax rules.”<sup>136</sup>

**More Conservative Groups.** The evidence also indicates that, from 2010 to mid-2013, more conservative groups than liberal groups filed applications for 501(c)(4) tax exempt status, underwent scrutiny by the IRS during the application process, and won tax exempt status. For example, when the House Committee on Ways and Means reviewed 298 501(c)(4) cases that had been provided to TIGTA, it determined that, as of September 2013, 111 “right-leaning” groups had received tax exempt status, while only 20 “left-leaning” groups did, meaning more than five

<sup>130</sup> See undated graph, “Political Nonprofits,” prepared by the Center for Responsive Politics, [http://www.opensecrets.org/outsidespending/nonprof\\_summ.php](http://www.opensecrets.org/outsidespending/nonprof_summ.php).

<sup>131</sup> See 12/5/2013 “IRS Targets Money Transfers In Social-Welfare Politicking,” National Public Radio, <http://www.npr.org/2013/12/05/248934819/irs-targets-money-transfers-among-politically-active-groups> (“The IRS is taking aim at the growing political role of tax-exempt social welfare groups. It’s a category of American politics where spending has increased 80-fold in the last decade.”).

<sup>132</sup> See 6/3/2013 testimony of Acting IRS Commissioner Daniel Werfel before House Appropriations Subcommittee on Financial Services and General Government, “Oversight Hearing – Internal Revenue Service,” 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, (6/3/2013), 219-284 at 263; 5/14/2013 TIGTA Audit Report, at 3.

<sup>133</sup> See 5/7/2013 “Updated Baseline Analysis of 501(c)(4) Form 990 Filers with Political Campaign Activities,” prepared by the IRS, IRSR0000507010 - 044, at 013. The analysis of 501(c)(4) groups also states: “For filers with Political Campaign Activities, those with over \$10M in revenue represent 95% of total expenses (by filers with PCA) and present a small universe to explore.” Id. at 015.

<sup>134</sup> Id. at 020. According to the IRS, a large 501(c)(4) is one with revenue of over \$10 million.

<sup>135</sup> 4/30/2013 “Memorandum for Deputy Inspector General for Audit,” from Joseph H. Grant, Acting IRS Commissioner for Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43.

<sup>136</sup> 5/9/2013 handwritten notes of Steven Miller, ABA Closed Door, IRSR0000506548. See also 1/28/14 letter from the IRS National Director for Legislative Affairs to the Subcommittee, PSI-IRS-40-000001 - 002 (noting that Steven Miller is the custodian of the ABA Closed Door document).

times as many conservative as liberal groups had gained tax exemption.<sup>137</sup> Rather than demonstrate IRS favoritism of conservative groups, however, those disparate numbers likely reflect the fact that many more conservative than liberal groups had requested tax exempt status.

Similarly, when the IRS released a list of 176 501(c)(4) organizations that had been approved for tax exempt status from 2010 through May 2013,<sup>138</sup> an analysis of those organizations by Tax Analysts, a publication specializing in tax issues, found that just over two-thirds were associated with conservative groups, while nearly one-third were not.<sup>139</sup> The analysis determined that, of the 176 groups approved for tax exempt status from 2010 to 2013, 46 had Tea Party, Patriot, or 9/12 in their names; 76 were associated with other conservative organizations; 48 were non-conservative organizations; and 6 were organizations about which no determination could be made.<sup>140</sup> In addition, the analysis showed that the IRS had granted tax exempt status to twice as many conservative groups as other groups during that time period, while also indicating that groups across the political spectrum obtained exemptions.<sup>141</sup>

Consistent with the data from the list of 176 groups released by the IRS, IRS employees told the Subcommittee that, from 2010 to 2013, the IRS saw a surge in tax exempt applications filed by conservative groups.<sup>142</sup> Spending data in FEC filings also showed that, in the election years of 2010 and 2012, conservative 501(c)(4) groups spent almost ten times as much as liberal 501(c)(4) groups, suggesting that conservative groups may have outnumbered their liberal counterparts during that time period.<sup>143</sup> In addition, media reports depicted conservative groups

<sup>137</sup> See Opening Statement of Congressman Boustany, “Internal Revenue Service’s Exempt Organizations Division,” hearing before House Committee on Ways and Means (9/18/2013), <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>.

<sup>138</sup> See 5/15/2013 “Approved Tax-Exempt Applications For Advocacy Organizations through May 9, 2013,” prepared by IRS, <http://www.irs.gov/PUP/newsroom/Approved%20Tax%20Exempt%20Applications%20For%20Advocacy%20Organizations%20through%20May%209%202013.pdf>. The IRS has interpreted the law as allowing it to release the names of 501(c) applicants that have been approved for tax exempt status, but not the names of those denied a tax exemption.

<sup>139</sup> See “Substantial Minority of Scrutinized EOs Were Not Conservative,” Tax Analysts, Martin Sullivan, (5/30/2013), <http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAF7A9085257B7B004C0D90?OpenDocument> (“[T]he list suggests that the majority of groups selected for extra scrutiny probably matched the political criteria the IRS used and backed conservative causes, the Tea Party, or limited government generally. But a substantial minority – almost one-third of the subset – did not fit that description.”).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* Similarly, a list of about 160 organizations whose 501(c) applications were undergoing review in November 2011, allegedly compiled by the IRS and leaked to USAToday two years later, also indicated that more applications had been filed by conservative groups than other groups. See “IRS list reveals concerns over Tea Party ‘propaganda,’” USAToday, Gregory Korte (9/17/2013), <http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-propaganda/2825003/> (attaching list of 160 organizations with pending applications as of November 16, 2011).

<sup>142</sup> See, e.g., Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/2013).

<sup>143</sup> An analysis conducted by the Center for Responsive Politics found, for example, that in 2010, conservative 501(c)(4) spending was \$115.2 million (88.1%), liberal 501(c)(4) spending was \$10.7 million (8.2%) and “other” spending was \$4.8 million (3.6%). In 2012, the Center determined that conservative 501(c)(4) spending was \$265.2 million (85.3%), liberal spending was \$34.7 million (11.2%) and “other” spending was \$10.9 million (3.5%). “2010 Outside Spending, by Group,” and “2012 Outside Spending, by Group,” Center for Responsive Politics,

as the leaders in the 501(c)(4) area at the time, with liberal groups working to catch up.<sup>144</sup> Together, the evidence indicates that more conservative than liberal groups filed for 501(c)(4) tax exempt status from 2010 to 2013, underwent IRS scrutiny, and ultimately won tax exempt status.

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<http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U>, and <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>.

<sup>144</sup> See, e.g., 11/6/2013 “Secret Persuasion: How Big Campaign Donors Stay Anonymous,” National Public Radio, Peter Overby, Viveca Novak and Robert Maguire, <http://www.npr.org/2013/11/06/243022966/secret-persuasion-how-big-campaign-donors-stay-anonymous> (“So far, conservatives have predominated in social welfare politics. In the 2012 federal campaigns, 20 groups on the right ran up a million dollars or more in disclosed spending, compared with seven on the left. Now liberals are working to catch up.”).

### III. IRS 501(C)(4) SCREENING

The IRS identified the first application for 501(c)(4) tax exempt status from a group affiliated with the Tea Party in February 2010. For the next three years, the IRS used a series of screening criteria to identify similar applications from both conservative and liberal groups, subject those applications to heightened scrutiny, and determine whether the groups should be granted tax exempt status despite their involvement with campaign activities.

During the first half of that three-year period, to identify applications of interest, the IRS employed screening criteria that used key phrases from the names of some organizations and from materials indicating their political views, rather than any direct indicators of the groups' involvement with campaign activities. From February 2010 to May 2011, the cases were referred to as "Tea Party" cases; beginning in June 2011, at the direction of IRS officials in Washington, the name of the category of cases was changed to "advocacy" cases. During both phases, the IRS subjected not only conservative groups with "Tea Party," "9/12," or "Patriot" in their names to heightened scrutiny, but also liberal groups with "progressive," "ACORN," "Emerge," "or Occupy" in their names.

All of the cases were handled by the IRS Exempt Organizations Determinations (EOD) Unit in Cincinnati, where IRS agents reviewed the applications to determine whether they should be approved, denied, or suspended pending receipt of more information. Work to resolve the applications was often interrupted, delayed, or halted, while senior Determinations personnel sought guidance from the Exempt Organizations Technical (EOT) Unit in Washington, D.C. about how to handle the cases. Guidance was sought, because EOD personnel were uncertain how to apply the required "facts and circumstances" test, which mandated consideration of all relevant, material factors to determine whether an applicant was engaged primarily in social welfare activities. Despite constant pressure for additional guidance, EOT personnel took more than three years to resolve two test cases and drafted, but never finalized, additional guidance on how to screen, develop, and evaluate the applications.

While awaiting the promised EOT guidance, the backlog of 501(c)(4) cases awaiting IRS action grew to about 320 cases. The affected groups could and generally did continue to operate while awaiting disposition of their applications, but they were forced to act without certainty over their tax exempt status, sometimes for years. While waiting for an IRS decision on their tax exempt status, some of the groups had difficulty obtaining contributions from donors or lost funding opportunities, many spent funds on legal representation, and all were unable to exercise appeal rights to advance their cases. When, in December 2011, almost two years after the first case was flagged, a newly appointed case coordinator approved sending out "development letters" to obtain additional information needed to apply the facts and circumstances test, some of the recipients criticized some of the questions as inappropriate, burdensome, or intrusive. Some critics also complained that the letters singled out Tea Party groups for heightened scrutiny. Negative media reports and Congressional inquiries followed. In response, in the first quarter of 2012, the IRS established a special "bucketing" process which reduced the backlog of cases, but a year later still left hundreds of cases unresolved.

## A. Screening 501(c) Applications Generally

In recent years, of the 70,000 applications filed each year by groups seeking tax exemption under Section 501(c), between 1,700 and 2,700 – less than 5% of the total – were filed each year by applicants seeking tax exempt status under Section 501(c)(4).<sup>145</sup> Each of those applications had to be assigned, screened, and evaluated by IRS revenue agents assigned to the Exempt Organization Determinations Unit. Key mechanisms used by the Determinations Unit to resolve the 501(c) applications included a general screening group, specialty groups focused on particular categories of applications, a general inventory of cases awaiting determination, and Be-on-the-Lookout (BOLO) lists to flag applications raising particular concerns.

During the three-year period reviewed by the Subcommittee, from 2010 to 2013, all 501(c) applications were filed with a centralized IRS Submission Processing Center in Kentucky, entered into an IRS database for exempt organizations, and then forwarded to the EO Determinations Unit in Cincinnati, Ohio.<sup>146</sup> Generally, each application was assigned to a Determinations Unit revenue agent who could seek more information from the applicant, approve the application, or deny it with the concurrence of a manager.<sup>147</sup> According to the head of the EO Screening Group, in recent years, about 30% to 40% of the of the 501(c) applications were quickly approved or denied; about 40% to 50% of the cases required some additional information, such as missing documentation, before they could be processed; and about 20% were assigned to a specialty group for more indepth scrutiny.<sup>148</sup>

**Screening Group.** The typical first stop for 501(c) applications sent to the Cincinnati EOD Unit was the “Screening Group.” According to the Screening Group’s manager, John Shafer, the IRS formed the Screening Group in 2003, to centralize and standardize the screening

<sup>145</sup> See 3/21/2014 “SOI Tax Stats – Closures of Applications for Tax-Exempt Status – IRS Data Book Table 24,” prepared by the IRS, <http://www.irs.gov/uac/SOI-Tax-Stats-Closures-of-Applications-for-Tax-Exempt-Status-IRS-Data-Book-Table-24>. The IRS data shows that, over a four-year period from 2010 through 2013, 501(c)(4) applications filed with the IRS increased by at least 25%: in 2010, the IRS received 1,741 501(c)(4) applications; in 2011, the IRS received 1,777; in 2012, the IRS received 2,774; and in 2013, the IRS received 2,253. *Id.*

<sup>146</sup> 6/4/2012 IRS letter to the Subcommittee, PSI-IRS-02-000001 – 026, at 002; Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also Internal Revenue Manual, Part 7, Rulings and Agreements, §7.21.3.3.1 (8/01/2003), “Exemptions and Determinations,” [http://www.irs.gov/irm/part7/irm\\_07-021-003.html](http://www.irs.gov/irm/part7/irm_07-021-003.html) (“Organizations seeking exemption (including group exemptions) from Federal income tax must submit an application for recognition of exemption to the Cincinnati Submission Processing Center (CSPC).”). The CSPC was located in Kentucky. See Internal Revenue Manual, Part 7, Rulings and Agreements, §7.20.2.1 (8/24/2012), “Determination Letter Processing Overview,” [http://www.irs.gov/irm/part7/irm\\_07-020-002r.html#d0e11](http://www.irs.gov/irm/part7/irm_07-020-002r.html#d0e11) (“[A]pplications for tax exempt status under sections 501 and 521 (Forms 1023, 1024, and 1028), as well as group exemption requests (controlled as Form 1026), are submitted to the Cincinnati Submission Processing Center (CSPC), PO Box 12192, Covington, KY.”).

<sup>147</sup> See, e.g., Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>148</sup> Subcommittee interview of John Shafer, IRS (1/17/2014). TIGTA referenced similar percentages in an internal summary of an early meeting with IRS personnel about the 501(c) applications process. See 5/1/2012 “Review of [IRS]’s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4) - (6) Organizations,” prepared by TIGTA, PSI-TIGTA-05-000892 – 898, at 897 (indicating that the IRS told TIGTA that about 35% of the screened cases were “closed on merit”; about 45% required limited additional information; and about 20% required “full development”). The TIGTA audit report also stated that, in fiscal year 2012, “70% of all closed applications for tax-exempt status were approved during an initial review with little or no additional information from the organizations.” See 5/14/2013 TIGTA Audit Report, at 1.

process for 501(c) applications.<sup>149</sup> Mr. Shafer served as the Screening Group’s head from its inception in 2003 until 2013.<sup>150</sup> He explained that revenue agents assigned to the Screening Group were called “screeners” and used a screening guide sheet, called a “Be-on-the-Lookout” (BOLO) List, to identify 501(c) applications requiring heightened scrutiny.<sup>151</sup> As the screeners completed work on incoming applications, they were supposed to inform the group manager who would then provide them with new applications as they came in, typically sent in hard copy form from the processing center in Kentucky.<sup>152</sup>

According to the Screening Group manager, the training for the screeners consisted of instructing them about the applications and relevant tax code sections, and providing them with guidance from more senior personnel.<sup>153</sup> He explained that most of the screeners were “senior people” who had worked at the IRS for 10 to 30 years.<sup>154</sup> He indicated that, when a new agent joined the Screening Group, that person received training from a more senior screener who then reviewed the new person’s work until the new screener was comfortable with the process.<sup>155</sup>

Mr. Shafer said that the Screening Group typically had about a dozen screeners at a time, together with an administrative assistant and a secretary.<sup>156</sup> According to Gary Muthert, a senior revenue agent who worked in the Screening Group and served at times as the acting manager, the group manager assigned the incoming applications on an electronic, random basis to screeners requesting new cases.<sup>157</sup> He explained that, once a screener received a new application, the screener made one of six initial determinations:

- 1) If the application was covered by a specialty group, the screener was unable to work on it and was required to send it to the specialty group in charge of those cases.
- 2) If the application was not subject to a specialty group and the screener found the case file to be complete, the screener could immediately approve it, or could recommend denial of the application and submit the case to the group manager for review. The manager then reviewed the application and, if appropriate, could concur in the denial, completing the application process.
- 3) If the application was not subject to a specialty group and the case file was incomplete, the screener could send the application back to the applicant with a request for the missing documentation. The applicant was generally given 90 days to respond.
- 4) If the application was very close to being complete but missing only one or two items, the screener could send it to the Accelerated Processing (AP) group.
- 5) If the application was too large for the AP group or needed information beyond one or two items, the screener could send it to the Intermediate Processing (IP) group.

<sup>149</sup> Id. Mr. Shafer told the Subcommittee that the idea to centralize the screening process had been his.

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Subcommittee interview Stephen Soek, IRS (11/22/2013).

<sup>153</sup> Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id.

<sup>157</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).



- 6) If the application did not fall into any of the above five categories and the screener was unsure how to process it, the screener could send it to what was called “general inventory.” The application then remained in general inventory until it was assigned to an EOD revenue agent for review.<sup>158</sup>

Each EO group outside of the Screening Group also had what was called a “secondary screener” who doublechecked that the first screener had made the correct determination in sending the application to the group; if the secondary screener determined that the application should not have been sent to the group, that screener returned it to the Screening Group for further processing.<sup>159</sup>

Whether an application was sent to a specialty group, AP, IP, or general inventory, it was reviewed by an EO revenue agent, called a “determinations specialist.” During the review process, the determinations specialist was required to consider the facts and circumstances depicted in the information contained in the application, as well as any applicable precedent for how the group should be handled.<sup>160</sup> If an application presented questions that required further development, the determinations specialist was authorized to engage in a dialogue with the applicant to obtain additional information.

**Specialty Groups.** During the time period reviewed by the Subcommittee, the Exempt Organizations (EO) group had about 12 specialty groups reviewing 501(c) applications, each of which was assigned to evaluate certain types of applications.<sup>161</sup> In a 2011 email to a colleague, the head of the Determinations Unit, Cindy Thomas, described some of the specialty groups as well as the reasoning behind establishing them:

“In fact, most of the groups have more than one category of cases assigned to them. For example, one group works charter schools and farmers’ co-ops, another group works foreclosure assistance/downpayment assistance/credit counseling cases, another group works potential emerging issues and potential auto revocation cases, another carbon credit cases/VEBAs/foreign organizations, and on and on. The reason we took this step was to improve quality, decrease time per case, improve customer satisfaction, and

<sup>158</sup> Id. See also 6/4/2012 letter from IRS to Subcommittee, PSI-IRS-02-000001 - 026, at 002 - 003; Internal Revenue Manual, § 7.20.2.3.2, [http://www.irs.gov/irm/part7/irm\\_07-020-002r.html#d0e4446](http://www.irs.gov/irm/part7/irm_07-020-002r.html#d0e4446), (providing a description of how cases are screened).

<sup>159</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013). The recent TIGTA audit found that the EO screeners were not always accurate; they forwarded to specialists some 501(c) applications that had no “indications of significant political campaign intervention,” and failed to forward other applications with “evidence of significant political campaign intervention.” 5/14/2013 TIGTA Audit Report, at 5.

<sup>160</sup> 6/4/2012 letter from IRS to Subcommittee, PSI-IRS-02-000001 - 026, at 002.

<sup>161</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Some of the cases handled by the EOD specialty groups were applications filed by credit counseling groups; groups handling health care issues such as hospital status requests and community service centers for pregnant or parenting teenagers; groups handling anti-terrorism matters; hedge funds; medical marijuana groups; groups handling carbon credits; donor advised funds; groups involved with conservation easements; foreign organizations; housing down payment groups; partnerships; and school-charter groups. See, e.g., 9/30/2013 “Memorandum For All Employees – Exempt Organizations Determinations Unit,” prepared by IRS, <http://www.irs.gov/pub/foia/ig/spder/TEGE-07-0913-15%5b1%5d.pdf> (listing case categories).

improve employee/manager satisfaction so that everyone did not need to be a technical expert in every area.”<sup>162</sup>

Applications subject to specialty group review were required to be evaluated by the relevant EOD group and generally were not supposed to be resolved outside of it.<sup>163</sup>

**General Inventory.** If a case wasn’t within the subject matter of any specialty group, but could not be quickly resolved, a screener could assign the case to “general inventory.”<sup>164</sup> “General inventory” was not the name of a review group, but referred to cases that had been assigned to sit in a queue until an EOD revenue agent became available to review them. Any EOD manager of a group could assign cases from the general inventory to the agents within the manager’s group if they had time to work on the cases.

**EO Technical.** If an application raised issues for which there was no established precedent and involved concerns that could produce inconsistent outcomes, the EOD Unit could refer the case to the EO Technical (EOT) Unit.<sup>165</sup> EOT is an Exempt Organizations subdivision whose personnel work in Washington, D.C. It is staffed with higher graded tax law specialists who work with the IRS Office of Chief Counsel to interpret and provide guidance on the law governing tax exempt entities; provide technical advice on complex issues affecting the tax exempt community; and assist EO revenue agents with spotting issues and handling cases in a consistent manner.<sup>166</sup> EOT specialists had the authority to review applications and seek additional information from applicants to complete the administrative record.<sup>167</sup> If, upon review, an EOT specialist concluded that an applicant did not meet the requirements for tax-exempt status, the specialist could issue a proposed denial explaining why and provide a copy to the applicant. The applicant could then request a “conference of right” to address the issues. Following the conference, the EOT specialist typically issued a final determination. “If the application is approved, the administrative record is made publicly available” for inspection.<sup>168</sup> If the application is denied, the applicant may challenge that determination in court.

**501(c) BOLOs.** One of the key issues confronting the IRS was screening and categorizing the 70,000 501(c) applications that were filed each year so that similar groups were handled in a consistent manner, including, if appropriate, by being assigned to the proper specialty group. The Subcommittee was told that, in recent years, a key mechanism used by the Exempt Organizations Determinations (EOD) Unit to help with those tasks involved the development of “Be-On-the-Lookout” Lists, referred to as “BOLOs.”

BOLOs represented an IRS effort to identify and aggregate groups of similar 501(c) applications that required special scrutiny and to subject them to a more standardized process of

<sup>162</sup> 3/16/2011 email from Cindy Thomas to Holly Paz, “TAG info,” IRSR0000008593.

<sup>163</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>164</sup> Id.

<sup>165</sup> 6/4/2012 IRS letter to the Subcommittee, PSI-IRS-02-000001 - 026, at 003.

<sup>166</sup> Id. See also Internal Revenue Manual Part 7, Rulings and Agreements, §7.29.1.2 (02-01-2008), “EO Technical Responsibilities,” [http://www.irs.gov/irm/part7/irm\\_07-029-001.html](http://www.irs.gov/irm/part7/irm_07-029-001.html).

<sup>167</sup> See Internal Revenue Manual Part 7, Rulings and Agreements, §7.29.3.2 (07-14-2008), “Processing of Cases by Tax Law Specialists (TLS)”, [http://www.irs.gov/irm/part7/irm\\_07-029-003.html](http://www.irs.gov/irm/part7/irm_07-029-003.html).

<sup>168</sup> 6/4/2012 letter from IRS responding to Subcommittee, at PSI-IRS-02-000001 - 026, at 003.

review.<sup>169</sup> According to the Determinations Unit head, the groups identified on the BOLO lists were generally ones which had raised concerns in the past over whether they qualified for tax exemption, or which IRS employees had reason to believe could raise tax exemption problems in the future.<sup>170</sup> The BOLOs were emailed periodically – usually on a monthly basis – to all EO determination specialists and managers to alert them to the highlighted cases and ensure they were treated in the same way.<sup>171</sup>

The first BOLO was issued by email in August 2010.<sup>172</sup> Prior to that, IRS employees had sent one another email alerts about various types of entities to be aware of when processing applications.<sup>173</sup> According to Determinations head Cindy Thomas, EO personnel had found it too difficult to keep track of the numerous email alerts they were receiving, and the alerts were instead consolidated into a single document, resulting in the “BOLO” list.<sup>174</sup> The BOLO list consisted of a number of spreadsheets circulated as a single document.<sup>175</sup> As one senior EO official explained to another in a 2011 email: “The BOLO spreadsheet is disseminated to managers and specialists so that they have a consolidated list to reference and don’t need to keep individual emails, etc.”<sup>176</sup>

EO determinations specialist Ronald Bell was the keeper of the BOLO lists, from their inception in 2010 through approximately August 2012, and then from approximately April 2013 until the BOLOs stopped being used later that year.<sup>177</sup> He told the Subcommittee that he retained the BOLOs that were sent to him, but generally did not author individual BOLO entries, with one exception explained below.<sup>178</sup> According to the EOT head, for the first two years the BOLOs were issued, the process for adding new entries to the BOLO list was informal and, at times, entries were added, revised, or updated without the knowledge or participation of senior EO personnel.<sup>179</sup> In May 2012, the process was formalized to require management approval of BOLO revisions and additions.<sup>180</sup> According to the Screening Group manager, the BOLOs were not seen as “a critical part” of the training process for new screeners, and he was unsure to what extent the screeners used the BOLOs.<sup>181</sup> However, one senior screener told the Subcommittee that he used the BOLOs extensively and always checked to see if he had any cases on the BOLO list.<sup>182</sup>

<sup>169</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; 2/18/2011 email from Holly Paz to Cindy Thomas, “TAG info,” IRSR0000008593 - 602, at 595.

<sup>172</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013); 5/14/2013 TIGTA Audit Report, at 6. The TIGTA audit report stated that the Determinations Unit first began developing the BOLO list in May 2010. *Id.*

<sup>173</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). The “Touch and Go” or TAG list appears to have been a predecessor to the BOLO list.

<sup>174</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>175</sup> See, e.g., August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 – 515.

<sup>176</sup> 2/18/2011 email from Holly Paz to Cindy Thomas, “TAG info,” IRSR0000008593 - 602, at 595.

<sup>177</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

<sup>178</sup> *Id.*

<sup>179</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>180</sup> *Id.*; 5/14/2013 TIGTA Audit Report, at 41.

<sup>181</sup> Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>182</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

The BOLO list was divided into a handful of subsections that sometimes varied. The subsections typically included these five categories: “TAG,” “TAG Historical,” “Watch List,” “Coordinated Processing,” and “Emerging Issues.”<sup>183</sup> “TAG” stood for “Touch-and-Go,” a term which was used in earlier email alerts about problematic organizations to look for in 501(c) applications and which generally referred to organizations suspected of involvement with tax avoidance, fraud, or terrorism.<sup>184</sup> “TAG Historical” referred to cases that had been historically problematic for the IRS; entries in the section cautioned IRS agents to be on the lookout for related cases. The Subcommittee was told that all screeners and determination specialists were supposed to review the names in the TAG and TAG Historical sections and run searches and check their files for those entities.<sup>185</sup> Applications involving organizations listed in the two sections were supposed to be sent to a TAG specialty group and processed only by that group.<sup>186</sup>

The “Watch List” section was a “general term for issues or cases in need of special handling” such as a request from the IRS Criminal Investigation Division to look for a specific application, or a request from EOT to look for applications filed by certain groups.<sup>187</sup> It was also used to alert IRS agents to problematic applications that were expected, but not yet received.<sup>188</sup>

The “Coordinated Processing” section of the BOLO was used as “the mechanism for promoting uniform case handling by assigning multiple related cases to a particular specialist or group when there is existing precedent and procedures that cover the issues involved.”<sup>189</sup> It was used, for example, to flag applications involving “multiple entities related through a complex business structure such as a senior housing management company and separate senior housing properties.”<sup>190</sup>

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<sup>183</sup> See 5/10/2010 email from Cindy Thomas to Joseph Herr, “Emerging Issue follow-up,” IRSR0000485854 - 860, at 857 - 860. See also 2/18/2011 email from Holly Paz to Cindy Thomas, “TAG info,” IRSR0000008593 - 602, at 595. Some subsections appeared in only a few BOLOs. For example, in the inaugural BOLO list prepared in August 2010, the “Watch List” section was entitled, “BOLO list.” See August 2010 BOLO Spreadsheet, prepared by IRS, IRS0000002503 - 515 (containing sections entitled, “TAG,” “TAG Historical,” “Emerging Issues,” “Coordinated Processing,” and “BOLO List”); June 2012 BOLO Spreadsheet, prepared by IRS, IRS0000001423 - 438 (containing sections entitled, “Potential Abusive Historical,” “Potential Abusive,” “Emerging Issues,” “Coordinated Processing,” and “Watch List”); February 2012 BOLO Spreadsheet, prepared by IRS, IRS0000001500 - 511 and IRSR0000006705 - 709 (containing sections entitled, “Potential Abusive Historical,” “Potential Abusive,” “Emerging Issues,” “Coordinated Processing,” and “Watch List”).

<sup>184</sup> See 5/10/2010 email from Cindy Thomas to Joseph Herr, “Emerging Issue follow-up,” IRSR0000485854 - 860, at 857 - 860. See also undated “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 - 617, at 604 (explaining various BOLO sections).

<sup>185</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>186</sup> Id.

<sup>187</sup> 5/10/2010 email from Cindy Thomas to Joseph Herr, “Emerging Issue follow-up,” at IRSR0000485858.

<sup>188</sup> See undated “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 - 617, at 612-614.

<sup>189</sup> 5/10/2010 email from Cindy Thomas to Joseph Herr, “Emerging Issue follow-up,” at IRSR0000485857 - 858.

<sup>190</sup> Id. at 858. Additional examples included “a break-up of a large group ruling resulting in the subordinates seeking individual exemptions,” and organizations subject to a “change in state law requiring instrumentalities to change their form 990 filing requirement.” Id. See also undated “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 - 617, at 609-610.

Finally, the “Emerging Issues” section of the BOLO was used to flag “an issue identified in a group of cases for which no standard practice for handling has been established.”<sup>191</sup> As one senior EO official explained to a colleague in a 2011 email:

“Most new emerging issues [were] identified by screeners through the initial screening process, for example tea party cases. When these potential emerging issue cases [were] identified, they [were] assigned to the group designated to work emerging issues.”<sup>192</sup>

The Emerging Issues section of the BOLO was used, for example, to flag applications filed by “Tea Party” organizations, “Pension trust 501(c)(2) non-traditional investment” organizations, credit counseling groups, and hedge funds seeking tax exempt status as entities whose applications should be sent to the Emerging Issues specialty group.<sup>193</sup>

The evidence reviewed by the Subcommittee investigation indicates that the IRS used at least three of the BOLO sections to identify 501(c)(4) organizations engaged in campaign or other advocacy activities requiring heightened review. For example, as explained below, the Emerging Issues section led to hundreds of cases being selected for heightened review by EOD personnel, including groups with “Tea Party,” “9/12,” or “Patriot” in their names.<sup>194</sup> In addition, the TAG Historical section included an entry for “Progressive political activities”<sup>195</sup> that, together with the Emerging Issues section, contributed to groups with “Progressive” or “Progress” in their names being subjected to heightened scrutiny for advocacy activities.<sup>196</sup> Further, as explained below, the Watch List section included entries for “ACORN successor” groups<sup>197</sup> and “Occupy” groups<sup>198</sup> which were also identified and subjected to heightened review for their advocacy activities.<sup>199</sup> In June 2012, an Emerging Issues entry was revised to

<sup>191</sup> 5/10/2010 email from Cindy Thomas to Joseph Herr, “Emerging Issue follow-up,” at IRSR0000485857. See also undated “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 – 617, at 605-608.

<sup>192</sup> 2/18/2011 email from Holly Paz to Cindy Thomas, “TAG info,” at IRSR0000008595.

<sup>193</sup> See undated “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 – 617, at 609-610. See also, e.g., November 2010 BOLO spreadsheet, prepared by IRS, IRS0000001349 - 364, at 357.

<sup>194</sup> See TIGTA Audit Report at 10 (“We reviewed all 298 applications that had been identified as potential political cases as of May 31, 2012.”). All of those 298 applications had been identified through the Emerging Issues section of a BOLO. *Id.* at 24; 6/11/2012 email from Holly Paz to Cheryl Medina, “TIGTA request – updated case data,” TIGTA Bates No. 011102 – 103. About one-third of those applications had been filed by groups with “Tea party,” “9/12,” or “Patriot” in their names. TIGTA Audit Report at 8.

<sup>195</sup> See, e.g., August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 – 196; July 2012 BOLO spreadsheet, prepared by the IRS, at IRS000001484 - 499. See also 8/10/2010 email from Elizabeth Hofacre to Cindy Thomas and others, “Watch List Alerts,” IRSR0000014013 - 028, at 018.

<sup>196</sup> See, e.g., an analysis of 501(c)(4) advocacy cases as of 6/5/2012, prepared by the IRS Chief Risk Officer David Fisher (hereinafter “IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012”), PSI-IRS-37-000004 – 19, at 011-012 (listing applications filed by groups with “Progressive” or “Progress” in their names, some of which had been included in lists of Emerging Issues cases and others of which had been otherwise identified); Subcommittee interview of David Fisher, IRS (12/6/2013). See also Report section on Processing Applications from Liberal Groups, below.

<sup>197</sup> See August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 – 196; June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000014253 – 258 (BOLO expanded by the IRS to make it readable for the Subcommittee); 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, “BOLO Tab Update,” IRSR0000410433 – 434.

<sup>198</sup> See January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289, at 285.

<sup>199</sup> See Report section on Processing Applications from Liberal Groups, below.

encompass all of the advocacy groups in a single BOLO entry, combining the Tea Party, ACORN successor, and Occupy groups, among others. At the same time, while the evidence indicates the BOLO listings played a major role in identifying the 501(c)(4) advocacy groups subjected to heightened review, they were not the only way the groups were identified.<sup>200</sup>

## **B. Flagging Tea Party and Other Groups**

In February 2010, an IRS screener working in the Cincinnati office flagged the first application in which the applicant used the phrase “Tea Party” in its name, and asked the head of the Screening Group how to handle the case. The Screening Group head forwarded an email from the screener describing the application to more senior Determinations personnel who alerted the EO Technical Unit to the potentially high profile case. By March, a senior screener had flagged ten similar cases. He also highlighted what he called an “equal Democratic ‘tea party’ type entity, called Emerge” and later suggested flagging applications filed by groups with either “Emerge” or “Progressive” in their names. The head of the EOT agreed to provide technical advice on how to handle the applications and requested two test cases. Also in April 2010, at a regular meeting of IRS screeners to discuss emerging issues, the senior screener gave a presentation about the “Tea Party” category of cases and asked the screeners to send the cases to the Screening Group manager.

**First Tea Party Group Flagged.** In February 2010, Jack Koester, a senior member of the EO Screening Group, reviewed an application for tax exempt status from an organization with the words “Tea Party” in its name.<sup>201</sup> Characterizing the application as a “high profile case” due to “media attention” to those types of organizations, he sent an email to the Screening Group manager, Mr. Shafer, asking him how to handle it.<sup>202</sup> His action was apparently the first to flag a 501(c) application from an organization that included “Tea Party” in its name. Mr. Shafer responded by telling Mr. Koester that he would forward the issue to his supervisor. Mr. Shafer told the Subcommittee that, at the time he received the Koester email, he was not familiar with the Tea Party, but had heard of it and thought it was a conservative group.<sup>203</sup> Mr. Shafer said that he forwarded the Koester email to his supervisor, Sharon Camarillo, who, in turn, forwarded the email to the head of the Determinations Unit, Cindy Thomas.<sup>204</sup>

<sup>200</sup> For example, dozens of 501(c)(4) groups were selected for heightened review before the first BOLO was issued in August 2010, as indicated below. See also 9/8/2008 email from Donna Abner to Cindy Westcott and others, “Political Case Alert,” IRSR0000011493 – 494 (recommending an email alert for Emerge groups). Emerge groups were selected for heightened scrutiny by EOD personnel even though they had no separate BOLO listing and were not identified through the Emerging Issues entry. See Report section on Processing Applications from Liberal Groups, below.

<sup>201</sup> Subcommittee interview of John Shafer, IRS (1/17/2014); 2/25/2010 email from Jack Koester to John Shafer, “Case # [REDACTED BY IRS],” IRSR0000195553 - 554, at 553.

<sup>202</sup> 2/25/2010 email from Jack Koester to John Shafer, “Case # [REDACTED BY IRS],” at IRSR0000195553. (Mr. Koester wrote: “Here is the case number for the ‘Tea Party’ application for 501(c)(4) exemption that we discussed this morning. Recent media attention to this type of organization indicates to me that this is a ‘high profile’ case.”).

<sup>203</sup> Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>204</sup> Id. See also 2/25/2010 email from John Shafer to Sharon Camarillo, “Case # [REDACTED BY IRS],” IRSR0000181003 – 007, at 005; 2/25/2012 email from Sharon Camarillo to Cindy Thomas, “Case # [REDACTED BY IRS],” IRSR0000195549 - 554, at 551 (The email sent by Ms. Camarillo forwarding Mr. Koester’s email to Cindy Thomas included this comment: “Cindy: Please let ‘Washington’ know about this potentially politically

Ms. Thomas sent an email to the acting manager of the EO Technical Unit, Holly Paz, located in Washington, D.C., asking whether “EO Technical wants this case because of recent media attention.”<sup>205</sup> Ms. Paz told the Subcommittee that, according to the Internal Revenue Manual, EO application cases that were without precedent and cases that had national media impact were supposed to be handled by EO Technical.<sup>206</sup> Ms. Paz responded to Ms. Thomas’ inquiry in the affirmative: “I think sending it up here is a good idea given the potential for media interest.”<sup>207</sup> Ms. Paz told the Subcommittee that her plan was to have EOT work on the case and develop a template for how to handle future determinations in the area although, ultimately, no template was developed.<sup>208</sup>

**Ten Cases Flagged.** By mid-March 2010, the Screening Group had identified ten applications that raised issues similar to the application Mr. Koester had flagged in February from the organization with “Tea Party” in its name.<sup>209</sup> Mr. Muthert, a senior revenue agent who worked in the Screening Group and sometimes served as its acting manager, told the Subcommittee that he had found the additional cases by conducting searches of the IRS database, TEDS, using the following words: “Tea Party,” “9-12,” and “Patriot.”<sup>210</sup> He said that he presented the cases to the Screening Group manager, Mr. Shafer.<sup>211</sup>

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embarrassing case involving a ‘Tea Party’ organization. Recent media attention to this type of organization indicates to me that this is a ‘high profile’ case.”).

<sup>205</sup> 2/25/2010 email from Cindy Thomas to Holly Paz, “High Profile Case –Does EO Technical Want It,” IRSR0000195549 - 554, at 551. Ms. Thomas told the Subcommittee that it was not unusual for EOT to take cases from Cincinnati. Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>206</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>207</sup> 2/26/2010 email from Holly Paz to Cindy Thomas, “High Profile Case – Does EO Technical Want It,” IRSR0000195551. See also 4/1/2010 email from Steven Grodnitzky to Donna Elliot-Moore and Ronald Shoemaker, “two cases,” IRSR0000443984 (“These are high profile cases as they deal with the Tea Party so there may be media attention.”).

<sup>208</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>209</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014). See also 5/14/2013 TIGTA Audit Report, at 31.

<sup>210</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014). According to Mr. Muthert, Mr. Shafer did not ask how he found these cases. Id. When asked if he had a negative view of the Tea Party, Mr. Muthert replied: “No, I align with them.” Id. It is also important to note that the term “Patriot” was not used exclusively by conservative groups. In 2010, for example, a 501(c)(4) group called “Patriot Majority USA” began operations, supporting views and candidates affiliated with the Democratic Party. In the 2012 election cycle, the Center for Responsive Politics characterized it as one of the largest spending, Democratic- leaning 501(c)(4) groups. See “2012 Outside Spending, by Group: Non-Disclosing Groups,” prepared by Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>. For more information about Patriot Majority USA, see the Report section on Evaluating Campaign and Social Welfare Activities, below.

<sup>211</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014). Mr. Muthert and Mr. Shafer disagreed on how the ten cases came to be identified. According to Mr. Muthert, in March 2010, Mr. Shafer asked him to find as many Tea Party groups as possible so Mr. Muthert conducted a search and found four applications with Tea Party in the organizations’ names, two of which were open and two of which were closed. Id. Mr. Muthert told the Subcommittee that, about a week later, Mr. Shafer asked him to find ten Tea Party applications which he did by expanding the search terms to also include “Patriot” and “9-12.” Mr. Shafer, however, disputes that he asked Mr. Muthert to look for Tea Party groups. Instead, he contends that Mr. Muthert came to him with a list of ten Tea Party cases; Mr. Shafer told the Subcommittee that he was “surprised [there wer]e so many cases.” Subcommittee interview of John Shafer, IRS (1/17/2014). See also undated “Timeline,” a document prepared by Mr. Muthert, IRSR0000487175 (stating that, from 2/26 to 4/5/2010, “I was asked by John to query our system and find any Tea

On March 16, 2010, Mr. Shafer sent an email to the EO Determinations head, Ms. Thomas, stating: “We have identified a total of 10 Tea Party cases. Three cases have been approved, two 501(c)(4) and one 501(c)(3). I have collected the other cases and will forward them to EO Technical.”<sup>212</sup> Ms. Thomas forwarded Mr. Shafer’s email to the EOT head, Ms. Paz. The next day, March 17, 2010, Ms. Thomas wrote to Ms. Paz: “Did you know about these additional 10 tea party cases? Do you want all of them or do you only want a few and then give us advice as to what to do with the remaining?”<sup>213</sup>

Ms. Paz responded that EOT would take “a few more cases, (I’d say 2) and would ask that you hold the rest until we get a sense of what the issues may be.”<sup>214</sup> In response, Mr. Shafer sent two cases to EOT and held the remaining case files in his office.<sup>215</sup>

**Democratic Equivalents Flagged.** At the same time the Tea Party cases were being presented to the EOT, on March 16, 2010, Mr. Muthert sent an email to Mr. Shafer about what he called “an equal Democratic ‘tea party’ type entity, called Emerge,” and offered to provide information on applications filed by that group as well.<sup>216</sup> Mr. Muthert wrote:

“I just looked at CNN.com. There is a major TEA Party protest in Washington D.C. today. I watched the video. It appears the TEA party is a Republican based entity. I am now a resident expert on the TEA Party. However, that being said, there is also an equal Democratic ‘tea party’ type entity, called ‘Emerge.’ If you want more info, just ask.”<sup>217</sup>

Mr. Shafer replied: “What’s the [REDACTED BY IRS] movement?”<sup>218</sup> The Subcommittee was unable to identify any substantive response made by Mr. Muthert to Mr. Shafer at the time.

As detailed further below, other evidence shows that, by the time of Mr. Muthert’s 2010 email, the IRS had already flagged multiple applications submitted by Emerge groups, which were affiliated with a national organization, Emerge America, dedicated to encouraging and training Democratic women candidates to run for office. Beginning in 2008, the applications had been set aside for heightened review due to their political activities and apparent private benefits for the Democratic Party. According to IRS materials released by the House Committee on Ways and Means, the Emerge groups were the subject of a Significant Case Report in April 2010, the same month a similar report discussed the Tea Party cases; the Emerge cases were

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Party application and similar cases. John asked me to secure 10 Tea Party cases and transfer them to EOT for review. I conducted TEDS research and found 10 TP cases.”).

<sup>212</sup> 3/16/2010 email from John Shafer to Cindy Thomas, “[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS],” PSI-IRS-09-000041.

<sup>213</sup> 3/17/2010 email from Cindy Thomas to Holly Paz, “REDACTED – EO Technical Would Like [REDACTED BY IRS],” PSI-IRS-09-000041.

<sup>214</sup> 3/17/2010 email from Holly Paz to Cindy Thomas, “[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS],” PSI-IRS-09-000040.

<sup>215</sup> See 3/17/2010 email from John Shafer to Cindy Thomas, “[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS],” PSI-IRS-09-000040. (Mr. Shafer: “I will sen[d] [REDACTED BY IRS] to EO Technical, [REDACTED BY IRS]. I can hold the remaining cases in my group ‘75’ number unless you want them held some other place.”); Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>216</sup> 3/16/2010 email from Gary Muthert to John Shafer, “TEA PARTY,” IRSR0000482737.

<sup>217</sup> Id.

<sup>218</sup> 3/16/2010 email from John Shafer to Gary Muthert, “TEA PARTY,” IRSR0000482737.



subjected to the same level of heightened scrutiny, including EOT reviews; and the Emerge groups ultimately were either denied tax exempt status or lost their 501(c)(4) tax exempt status due to engaging in partisan advocacy activities.<sup>219</sup> More information about these cases is provided below.

In addition to conducting searches for Tea Party groups, Mr. Muthert suggested conducting searches using the term “Emerge” and “progressive” to identify other groups warranting heightened review, both before and after the August 2010 BOLO urged screeners to look for those organizations.<sup>220</sup> Mr. Muthert explained to the Subcommittee that “progressive” was one of the entries in the BOLO spreadsheet, in the section called “TAG Historical.”<sup>221</sup> Mr. Muthert told the Subcommittee that all EO screeners were obligated to be on the lookout for groups described in the BOLO TAG Historical section, including by running searches for those entities and checking their files to see if they had any of those cases.<sup>222</sup> Mr. Muthert told the Subcommittee that, just as he did with the Tea Party, he ran electronic queries using the word “progressive” and would have sent any cases he found to the relevant specialty group handling them.<sup>223</sup> According to an analysis by the IRS Chief Risk Officer, over a period running from May 2010 to December 2012, 20 applications were filed by groups with the words “Progressive” or “Progress” in their names, most of which were subjected to heightened scrutiny by the IRS, demonstrating that, at the same time the agency began to focus on Tea Party groups, it also began to examine progressive groups.<sup>224</sup>

**Other Screeners Notified about Cases.** According to Mr. Muthert, he continued to run searches to find “Tea Party” cases and found additional examples which were held within his Screening Group, while awaiting word from EOT on how to handle them.<sup>225</sup> On April 5, 2010, the head of the Determinations Unit, Cindy Thomas, asked Mr. Muthert, then acting manager of the Screening Group while Mr. Shafer was on vacation, to compile a list of the Tea Party cases that had been identified.<sup>226</sup> In response, Mr. Muthert provided a list of 18 organizations, almost double the number from a few weeks earlier.<sup>227</sup>

<sup>219</sup> See, e.g., “3 Groups Denied Break by IRS are Named,” *New York Times*, Stephanie Strom, (7/21/2011), [http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?\\_r=0](http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0).

<sup>220</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014); 7/28/2010 “Screening Workshop Notes,” prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 – 704, at 703 (indicating that at a July 2010 workshop, Mr. Muthert had urged his fellow IRS screeners to flag applications filed by both Emerge and Progressive groups).

<sup>221</sup> See August 2010 BOLO Spreadsheet, prepared by IRS, IRS0000002503 – 515, in TAG Historical section.

<sup>222</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>223</sup> *Id.*

<sup>224</sup> See IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 – 19, at 011-012 (showing that at least 11 groups with “Progressive” or “Progress” in their names had filed 501(c)(4) applications that had been subjected to IRS reviews lasting six months or longer). This evidence shows that from 2010 to 2012, progressive groups were applying for tax exempt status and were being identified and subjected to heightened review by IRS personnel, countering the assertion in the Minority Staff’s Dissenting Views that cases involving progressive groups “were inactive during the time period of the TIGTA audit.” Dissenting Views at 194, 196, 202.

<sup>225</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>226</sup> 4/5/2010 email from Cindy Thomas to Gary Muthert, “Tea Party Cases – ACTION,” IRSR0000443983.

<sup>227</sup> See 4/6/2010 email from John Shafer to Cindy Thomas, “Tea Party Cases – ACTION,” IRSR0000443982 (providing Mr. Muthert’s list of Tea Party cases).

On April 14, 2010, Mr. Muthert gave a presentation on the cases at a routine Screening Group meeting designed to alert screeners to a variety of applications and emerging issues.<sup>228</sup> The minutes from the meeting provided this summary of the presentation:

“Gary Muthert gave a presentation on ‘Tea Party Cases.’ He stated that 3 cases have been approved including one as a 501(c)(3). We are waiting guidance from HQ on these cases. John Shafer is h[o]liding these cases in his office if you identify one. Give case information to Gary Muthert as well.”<sup>229</sup>

Mr. Muthert told the Subcommittee that after giving this presentation, he stopped running electronic searches for the applications, because he believed that the other screeners had been put on notice to look for the cases and would turn them over to Mr. Shafer.<sup>230</sup> Mr. Muthert told the Subcommittee that he did not believe the other screeners had been running queries like he had been doing to find the cases, but were identifying the cases as they came in and were assigned to the screeners for review.

On April 24, 2010, Ms. Thomas sent the list of 18 cases to Steven Grodnitzky, then acting EOT head while Ms. Paz was on maternity leave, and noted: “None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT.”<sup>231</sup> Her email was sent about two months after the first Tea Party application had been flagged by the Screening Group.

### **C. Reviewing Test Cases**

The EO Screening Group sent two “test cases” involving applications filed by Tea Party groups to the EO Technical Unit in early 2010, which left them unresolved for more than three years. The initial EOT specialist assigned to the cases, Carter Hull, took a year to obtain information from the applicants, analyze the issues, and propose how the applications should be handled, recommending that a 501(c)(4) application be approved and a 501(c)(3) application be denied. On the instruction of EO head Lois Lerner, his analysis of the test cases was then forwarded to the Tax Exempt and Government Entities (TEGE) division within the IRS Chief Counsel’s office for analysis and advice. Even though the cases had been pending for over a year and other development letters had been sent, the TEGE legal counsel advised obtaining additional information from the applicants before deciding the cases, including reviewing any campaign activities undertaken in 2010. In response, the EOT specialist drafted a new letter requesting the additional information, but failed to send it after the cases were reassigned to a new EOT specialist in August 2011, about 18 months after the applications were first filed with the IRS. The new EOT specialist, Hilary Goehausen, recommended denying both applications, but those recommendations were not acted on, and both test cases remained unresolved for another two years. During the course of their work, both EOT specialists prepared Significant Case Reports that provided monthly updates on the two test cases to senior EO management.

<sup>228</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>229</sup> 4/14/2010 “Minutes of Group Meeting - Group 7838,” prepared by the IRS, IRSR0000168256 - 257.

<sup>230</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>231</sup> 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, “SCR,” IRSR0000165439 - 440.

**Initial EOT Review of Test Cases.** In late February 2010, Holly Paz, EOT head, told Determinations head Cindy Thomas that it would be a good idea to send the first Tea Party case to EOT for review.<sup>232</sup> In mid-March, Ms. Paz suggesting sending two Tea Party cases to EOT to “get a sense of what the issues may be.”<sup>233</sup> On March 31, 2010, Ms. Paz accepted two “tea party” cases.<sup>234</sup>

In April 2010, Ronald Shoemaker, the manager of EOT Group II, assigned the two Tea Party cases to Carter (Chip) Hull, a senior EOT Tax Law Specialist who had been with the IRS for decades, and told him they were test cases intended to help provide guidance to the Cincinnati office on how to handle those types of applications.<sup>235</sup> Around the same time, Steven Grodnitzky, then acting head of the EOT, asked Mr. Hull to begin preparing “Significant Case Reports” for the test cases, which is a type of monthly report that the IRS uses to monitor cases with significant issues.<sup>236</sup> The report information was provided to senior management, including EO head Lois Lerner.<sup>237</sup>

Mr. Hull told the Subcommittee that, after the two test cases were assigned to him, he read and analyzed the case files, one of which involved a 501(c)(4) organization and the other of which involved a 501(c)(3) organization.<sup>238</sup> He said that the cases fit “broadly” within the Tea Party category but, at the time he was analyzing them, he did not know why they were called Tea Party cases or why the IRS was interested in them.<sup>239</sup> When Ms. Thomas, the head of the Determinations Unit, was asked why the category used for the cases was called “Tea Party,” she explained that the first case involved an organization with Tea Party in its name.<sup>240</sup>

Mr. Hull sent a development letter to the 501(c)(3) applicant, but never received a reply from the group and closed the file.<sup>241</sup> He also sent a development letter to the 501(c)(4)

<sup>232</sup> See 2/26/2010 email from Holly Paz to Cindy Thomas, “High Profile Case – Does EO Technical Want It,” IRSR0000195551 (indicating sending a test case to EOT “is a good idea”).

<sup>233</sup> 3/17/2010 email from Holly Paz to Cindy Thomas, “[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS],” PSI-IRS-09-000040.

<sup>234</sup> See 3/31/2010 email from Donna Elliot-Moore to Steven Grodnitzky, “two cases,” IRSR0000443985 (“Re: Two ‘tea party’ cases .... Holly accepted the cases for EO Technical.”).

<sup>235</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>236</sup> 4/23/2010 email from Steven Grodnitzky to Ronald Shoemaker, “SCR,” IRSR0000165439 - 440 (Mr. Grodnitzky wrote: “Can you or Chip [Carter Hull] make up the SCR [Significant Case Report], and confer with Cindy [Thomas] to include their information in the SCR?”); Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 4/5/2010 email from Steven Grodnitzky to Ronald Shoemaker and Cindy Thomas, “two cases,” IRSR0000443984 (“Can you assign these cases to one person and start an SCR for this month on the cases?”). In some IRS documents, a “Significant Case Report” is referred to as a “Sensitive Case Report.” See also 5/14/2013 TIGTA Audit Report, at 31.

<sup>237</sup> See 5/14/2013 TIGTA Audit Report, at 32 (“Sensitive Case Reports are shared with the Director, Rulings and Agreements, and a chart summarizing all Sensitive Case Reports is provided to the Director, EO.”).

<sup>238</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). See also 4/ 6/2010 email from Carter Hull to Siri Buller, “Political Issues,” IRSR0000012133 (Mr. Hull wrote: “I was just assigned a couple of cases on Tea Party organizations, one seeking exemption under 501(c)(3) and one under 501(c)(4).”).

<sup>239</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). In response to a question, Mr. Hull told the Subcommittee that he had no animosity towards the Tea Party nor did anyone else at the IRS. *Id.*

<sup>240</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>241</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013); 5/17/2011 Significant Case Report, prepared by Carter Hull, IRSR0000165721 - 722. (indicating that, with respect to “Organization (1)” of the Tea Party cases, “closed FTE [Failed to Establish] for failure to respond to a development letter”).

applicant and received the requested information.<sup>242</sup> At some point, Mr. Hull requested another case to take the place of the closed 501(c)(3) case, and Mr. Shoemaker sent him another 501(c)(3) Tea Party case.<sup>243</sup>

In October 2010, Mr. Hull sent a memorandum to Mr. Shoemaker providing an update on the two test cases, explaining that he was working on those as well as other similar applications in coordination with the Cincinnati office.<sup>244</sup> That memorandum was dated about seven months after the test cases had first been referred to EOT. During that period, Mr. Hull had been working with Elizabeth Hofacre, a Determinations specialist who had been tasked with coordinating the Tea Party cases and who had sought his advice with respect to developing the facts associated with those cases while awaiting resolution of the two test cases.<sup>245</sup>

On November 20, 2010, Determinations head Cindy Thomas sent an email to Steven Bowling, head of the EOD group handling Tea Party cases, to update him on the EOT review of the test cases. She wrote:

“I had a discussion with Holly Paz on Wednesday (11/17) afternoon to again discuss the tea party cases. She advised me that we were sending applicable parts of the application package to EOT along with the additional information letter and that based on this information they are finding that not all the tea party cases have the same issues. This is why they have not been able to prepare a template [development] letter with additional questions. EOT is putting together a briefing paper and going to discuss the various issues in these cases with Judy Kindell [Senior Technical Advisor to EO Director]. If Judy does not believe they have a basis for denial for the egregious situations, then they will most likely recommend all cases be approved. In the meantime, the specialist(s) need to continue working the applications as they have and will need to advise applicants that the cases are still under review. If this has not been finalized by 12/13/2010, please follow up with me and I will ask for a status report from Holly.”<sup>246</sup>

In December 2010, the test cases were still unresolved, and Ms. Thomas asked Ms. Paz for an update: “Has there been any update regarding the tea party cases as far as the discussion with Judy Kindell?”<sup>247</sup> Ms. Paz responded:

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<sup>242</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013); 5/17/2011 Significant Case Report, prepared by Mr. Hull, IRSR0000165721 - 722. Mr. Hull told the Subcommittee that the organization requested additional time to respond to the development letter, and he gave the group 30 additional days. He also indicated that the group submitted additional information in response to the letter, but a few items were still missing. He indicated that the group ultimately provided all of the missing information. Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>243</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>244</sup> 10/18/2010 memorandum from Carter Hull, IRS, to Ronald Shoemaker, IRS, “Coordinating Tea Party Cases Update Memorandum,” IRSR0000168087 - 091; Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>245</sup> Subcommittee interviews of Carter Hull, IRS (11/19/2013) and Elizabeth Hofacre, IRS (10/25/2013). Ms. Hofacre eventually had about 40 cases that she was supposed to develop while awaiting resolution of the two test cases, as detailed further below.

<sup>246</sup> 11/20/2010 email from Cindy Thomas to Steven Bowling and Sharon Camarillo, “Political Cases – Information,” IRSR0000014069 – 070, at 070.

<sup>247</sup> 12/13/2010 email exchange between Holly Paz and Cindy Thomas, “Political Cases –Status,” IRSR0000014069 - 070, at 070.

“We will be going to Judy shortly with the proposal to grant exemption to the c4 applicant .... The c3 application is not yet ready for discussion with Judy – TP’s [taxpayer’s] response to development letter is under review. We expect to move that to Judy sometime in January.”<sup>248</sup>

In January 2011, Lois Lerner, head of Exempt Organizations, reviewed a Significant Case Report for that month which included a discussion of the two Tea Party test cases. On February 1, 2011, Ms. Lerner warned Holly Paz, EOT head, about the dangers involved with those cases and suggested the cases should not be left in the Cincinnati office:

“Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen’s United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one .... Cincy [Cincinnati office] should probably NOT have these cases – Holly please see what exactly they have please.”<sup>249</sup>

Ms. Paz responded that the Cincinnati agents were being carefully supervised and were not making any final decisions on the cases until the two test cases were resolved by EOT:

“Cases in Determs are being supervised by Chip Hull at each step – he reviews info from TPs [taxpayers], correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and c4 cases here. I believe the c4 will be ready to go over to Judy soon.”<sup>250</sup>

Ms. Paz told the Subcommittee that, after this email exchange, she communicated Ms. Lerner’s instructions that the two test cases be elevated to Judith Kindell and legal counsel in the Tax Exempt and Government Entities (TEGE) division of the IRS Chief Counsel’s office.<sup>251</sup> Ms. Kindell, along with Siri Buller and Justin Lowe, were then the EOT subject matter experts on political advocacy and campaign issues.<sup>252</sup> The TEGE division was a key source of legal advice on tax exempt issues for EO personnel.

Mr. Hull told the Subcommittee that, at some point in late 2010 or early 2011, he discussed the Tea Party test cases with his “reviewer,” Elizabeth Katzenberg, and she suggested sending the cases to Judith Kindell for her review.<sup>253</sup>

In late 2010 or the first quarter of 2011, Mr. Hull finally reached a decision on how the two test cases should be handled, recommending that tax exemption be approved for the 501(c)(4) group, but denied for the 501(c)(3) group.<sup>254</sup> A later briefing paper prepared for EO

<sup>248</sup> Id.

<sup>249</sup> 2/1/2011 email from Lois Lerner to Holly Paz, “SCR Table for Jan. 2011,” IRSR0000168020 - 023, at 022.

<sup>250</sup> 2/2/2011 email from Holly Paz to Lois Lerner, “SCR Table for Jan. 2011,” IRSR0000168020 - 023, at 021.

<sup>251</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). See also IRS organizational chart for the Chief Counsel office. “Office of the Chief Counsel,” prepared by the IRS, <http://www.irs.gov/irm/part1/30379001.html>.

<sup>252</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>253</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>254</sup> See, e.g., 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350220 - 221.

head Lois Lerner indicated that his favorable recommendation on the 501(c)(4) group was because the group would “conduct advocacy and political intervention, but political intervention will be 20% or less of activities.”<sup>255</sup> The briefing paper indicated that his recommended denial of the 501(c)(3) application was based on the group’s “ties to politically active (c)(4)s and 527s.”<sup>256</sup> The paper also noted: “A proposed denial is being revised by TLS [Tax Law Specialist] to incorporate the org.’s response to the most recent development letter.”<sup>257</sup>

The meeting between Mr. Hull and Ms. Kindell took place on or around April 7, 2011, about two months after it was first proposed and a full year after Mr. Hull first received the test cases;<sup>258</sup> the reason why the meeting was so delayed is unclear. Mr. Hull met at the time with both Ms. Katzenberg and Ms. Kindell, and discussed his analysis and recommendations for approving the 501(c)(4) application and denying the 501(c)(3) application.<sup>259</sup> Ms. Kindell responded by recommending that additional information be obtained regarding both cases, and that the cases be sent to TEGE counsel for review.<sup>260</sup>

After the meeting, Ms. Kindell wrote to Lois Lerner, EO head, and Ms. Paz, EOT head, proposing that all of the Tea Party cases collected by the Determination Unit in Cincinnati be moved to the EOT office in Washington, D.C., “[g]iven the sensitivity of the issue.”<sup>261</sup> Ms. Paz responded that the EOT staff was busy with other work which precluded them from being able to work on the Tea Party cases.<sup>262</sup> Ms. Paz noted that, by then, the inventory of Tea Party cases had grown to 102.<sup>263</sup>

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<sup>255</sup> 6/27/2011 email from Justin Lowe to Holly Paz, “Briefing Paper on c3/4 Advocacy Orgs,” prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735. Mr. Hull told the Subcommittee that he could not confirm the information in the email or discuss his recommendations with respect to either group due to the confidentiality requirements of Section 6103 of the tax code. Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>256</sup> 6/27/2011 email from Justin Lowe to Holly Paz, “Briefing Paper on c3/4 Advocacy Orgs,” prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735.

<sup>257</sup> 6/27/2011 email from Justin Lowe to Holly Paz, “Briefing Paper on c3/4 Advocacy Orgs,” prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735. Donald Spellmann, one of the legal experts within TEGE Counsel’s office on campaign activity issues, told the Subcommittee that he recalled the case, but did not recall there being a recommendation accompanying it when it was forwarded. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>258</sup> 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, “sensitive (c)(3) and (c)(4) applications,” IRSR00000350220 - 221 (Ms. Kindell wrote: “I just spoke with Chip Hull and Elizabeth Katzenberg” about the test cases).

<sup>259</sup> See 5/12/2011 email from Michael Seto to Holly Paz, Tea Party – Email from TAS,” IRSR0000429362 – 363; Subcommittee interview of Carter Hull, IRS, (11/19/2013).

<sup>260</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013); 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350220 - 221 (Ms. Kindell wrote: “I just spoke with Chip Hull and Elizabeth Katzenberg about [REDACTED BY IRS] cases they have that are related to the Tea Party [REDACTED BY IRS] a (c)(3) application and the [REDACTED BY IRS] a (c)(4) application. I recommended that they develop the private benefit argument further and that they coordinate with Counsel.”); 5/12/2011 email from Michael Seto to Holly Paz, “Tea Party – Email from TAS,” IRSR0000429362 - 363 (Mr. Seto wrote: “The current status is: Judy [Kindell] has reviewed our proposed (c)(3) denial and (c)(4) favorabl[y] and requested the staff to ask for more information from the taxpayers.”).

<sup>261</sup> 4/7/2011 email from Judith Kindell to Lois Lerner, Holly Paz, and others, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350219.

<sup>262</sup> 4/7/2011 email from Holly Paz to Judith Kindell, Lois Lerner, and others, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350219 (Ms. Paz wrote that the EOT and Guidance staffs were “tied up with ACA (cases

In May 2011, Mr. Hull included this observation in his Sensitive Case Report:

“The various ‘tea party’ organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The ‘tea party’ organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati is holding three applications from organizations which have applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and approximately twenty-two applications from organizations which have applied for recognition of exemption under section 501(c)(4) as social welfare organizations. Two organizations that we believe may be ‘tea party’ organizations already have been recognized as exempt under section 501(c)(4). EOT has not seen the case files, but are requesting copies of them. The issue is whether these organizations are involved in campaign intervention or, alternatively, in nonexempt political activity.”<sup>264</sup>

His report indicated that the total number of related, pending applications had reached 25, and that his office had “not seen” those case files but were in the process of requesting them. The total cited in his report conflicted with the larger total given to EO head Lois Lerner in the prior month of 102 cases. At the time of his report, the two Tea Party test cases had been pending for over one year without resolution.

**Consultation with TEGE Counsel.** In May or June 2011, at the suggestion of Ms. Kindell, Mr. Hull forwarded the two test case files to the TEGE division of the IRS Chief Counsel’s office for its review.<sup>265</sup> He included his recommendations for approving one application and denying the other.<sup>266</sup>

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and Guidance) and the possibility looming that we may have to work reinstatement cases up here to prevent a backlog in Determs,” and that she had “serious reservations about our ability to work all of the Tea Party cases out of this office.”).

<sup>263</sup> Id. When asked about that total, Ms. Paz told the Subcommittee that she had always understood that the phrase “Tea Party” was being used generically, and that the total of 102 pending cases included both conservative and liberal groups. Subcommittee interview of Holly Paz, IRS (10/13/2013).

<sup>264</sup> 5/17/11 Sensitive Case Report, prepared by Carter Hull, IRSR0000165721 - 722.

<sup>265</sup> Mr. Hull told the Subcommittee that he forwarded the cases in May 2011. Subcommittee interview of Carter Hull, IRS (11/19/2013). Donald Spellmann, from the TEGE legal counsel’s office, told the Subcommittee the case files were forwarded in June 2011. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>266</sup> See 5/17/2011 Sensitive Case Report, prepared by Carter Hull, IRSR0000165721 - 722 (indicating he had sent his recommendation for a favorable ruling on the 501(c)(4) group to TEGE Counsel and also sought additional information on the 501(c)(3) group); 8/17/2011 “Sensitive Case Report,” prepared by Carter Hull, IRSR0000164559 - 561, at 560 (indicating his proposed denial of the 501(c)(3) group had been “forwarded for review 07/19/2011,” while also removing his proposed approval of the 501(c)(4) group and indicating that an additional development letter would be prepared for that group). See also 6/27/2011 email from Justin Lowe to Holly Paz, “Briefing Paper on c3/4 Advocacy Orgs,” prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735 (noting a proposed favorable recommendation for the 501(c)(4) group and a proposed denial for the 501(c)(3) group); 1/31/2013 EO Technical Significant Case Report, prepared by the IRS, IRSR0000161237. Mr. Spellmann told the Subcommittee that he did not recall seeing any recommendation with regard to approving or denying the applications, nor did he receive the related Significant Case Reports. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

On June 26, 2011, Lois Lerner, head of Exempt Organizations, met with lawyers from the TEGE Counsel's office.<sup>267</sup> The meeting participants included EO senior personnel Holly Paz and Nan Marks, and TEGE legal counsel Don Spellmann and Janine Cook. According to Mr. Spellmann, at the meeting, Ms. Lerner explained that, by then, EO had 100 "advocacy cases," and she wanted to find a way to process them.<sup>268</sup> Mr. Spellmann told the Subcommittee that his office had suggested drafting a model development letter.<sup>269</sup> He said that Ms. Lerner told TEGE counsel that EOT would forward them the two pending test cases to demonstrate what the cases looked like and what issues were involved.<sup>270</sup>

Mr. Spellmann told the Subcommittee that, after the meeting with Ms. Lerner, the TEGE Counsel's office discovered that the two test cases had already been provided to them by Mr. Hull, and that one had been assigned to Amy Franklin and the other to David Marshall.<sup>271</sup> Mr. Spellmann told the Subcommittee that he personally reviewed the case files and saw that both organizations had been engaged in some campaign activities.<sup>272</sup> He indicated that he planned to recommend that EOT take a closer look at the organizations' campaign activities in 2010, since it had been an election year, to determine the extent of their campaign involvement.<sup>273</sup>

Two months later, on August 4, 2011, a brief meeting took place between TEGE Counsel and EOT staff in which TEGE recommended that EOT "factually develop the election year of 2010."<sup>274</sup> Invited participants were TEGE counsels Don Spellmann, Amy Franklin, David Marshall, and Ken Griffin; and EOT staff Carter Hull, Hilary Goehausen, Justin Lowe, Andy Megosh, and Elizabeth Kastenber.<sup>275</sup> In an email discussing the upcoming meeting, EOT head Ms. Paz wrote that the meeting would be helpful to coordinate with counsel on the two test cases, a guidesheet – referred to as a "checksheet" – to help determinations specialists develop and evaluate the cases, and a research paper defining "exclusively."<sup>276</sup> Mr. Spellmann told the Subcommittee that he recalled attending the meeting with Michael Seto and Amy Franklin, but did not recall anything else about the meeting other than it was brief.<sup>277</sup>

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<sup>267</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>268</sup> Id. Mr. Spellmann told the Subcommittee that Ms. Lerner had called the cases "advocacy cases" and did not refer to them as "Tea Party" cases. Id.

<sup>269</sup> Id. Mr. Spellmann told the Subcommittee that he did not get the sense from the meeting that there was an urgency to processing the cases, but that managers were trying to figure out how to handle them. Id.

<sup>270</sup> Id. According to Mr. Spellmann, it was not uncommon for TEGE Counsel to receive cases from EOT or from Cincinnati to help evaluate particular types of cases. Id.

<sup>271</sup> Id.

<sup>272</sup> Id.

<sup>273</sup> Id.

<sup>274</sup> Id. See also 8/2/2011 email from Donald Spellmann to Holly Paz, "Mtg on Advocacy Cases," IRSR0000013066 - 067, at 067 (referencing August 4, 2011 meeting).

<sup>275</sup> 8/2/2011 email from Donald Spellmann to Holly Paz, "Mtg on Advocacy Cases," IRSR0000013067. It is unclear if all invited participants actually attended the meeting.

<sup>276</sup> 8/2/2011 email from Holly Paz to Donald Spellmann, "Mtg on Advocacy Cases," IRSR0000013066.

<sup>277</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013). Mr. Spellmann told the Subcommittee that after the TIGTA report was issued, an article was written about an item in the report citing an IRS meeting on August 4, 2011, attended by the IRS "Chief Counsel." Id. See 5/14/2013 TIGTA Audit Report, at 36; "IRS Knew Tea Party Targeted In 2011," *Associated Press*, Stephen Ohlemacher (5/11/2013), <http://bigstory.ap.org/article/irs-apologizes-targeting-tea-party-groups>. Mr. Spellmann explained that the meeting was not attended by the actual



On August 10, 2011, TEGE counsel participated in a larger and longer meeting with Carter Hull and other EOT staff to discuss the two test cases and “advocacy case development.”<sup>278</sup> The invited participants were Carter Hull; the three TEGE lawyers, Donald Spellmann, Amy Franklin, and David Marshall; and other EOT personnel, including Elizabeth Kastenber, Hilary Goehausen, Justin Lowe, Andy Megosh, and Ronald Shoemaker.<sup>279</sup> According to Mr. Hull, at the meeting, TEGE counsel recommended collecting additional information about both test cases by sending another development letter to the groups and reviewing the groups’ 2010 election activities since that election cycle had recently concluded.<sup>280</sup> Mr. Hull told the Subcommittee that he was surprised by the recommendation for additional development letters, since the applications had already been pending for more than a year, and he had already sent at least one development letter to each group.<sup>281</sup>

Mr. Spellmann told the Subcommittee that his office had offered to help Mr. Hull prepare the suggested development letters, but never heard back from Mr. Hull or anyone else with regard to the test cases.<sup>282</sup> Mr. Spellmann also told the Subcommittee that although the TEGE counsel’s office had offered to draft a model development letter, the EOT head, Holly Paz, told him not to do so.<sup>283</sup> When asked whether TEGE counsel had caused a delay with regard to processing the test cases, William Wilkins, IRS Chief Counsel, told the Subcommittee that he had instructed his staff to look into the matter and his staff had found there was no delay.<sup>284</sup> Mr. Spellmann concurred there was no delay on TEGE Counsel’s end, contending that his office

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IRS Chief Counsel, William Wilkins, but by attorneys from the TEGE Counsel’s office which is a division of the Chief Counsel’s office. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>278</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013). See also 8/4/2011 email from Donald Spellmann, IRS, to Elizabeth Kastenber, IRS, and others, “Advocacy Case Development,” IRS0000001341 (regarding scheduling a meeting on August 10, 2011); 8/8/2011 email from Donald Spellman, IRS, to David Marshall, Amy Franklin, and others, IRS, “Wednesday Meeting,” IRSR0000015566 (requesting their presence at the August 10<sup>th</sup> meeting); 8/17/2011 Sensitive Case Report, prepared by Carter Hull, IRSR0000164559 - 561, at 560 (noting that Mr. Hull “[m]et with Chief Council on August 10, 2011 to discuss further development of Organization (2)”).

<sup>279</sup> 8/4/2011 email from Donald Spellmann, IRS, to Elizabeth Kastenber and others, IRS, “Advocacy Case Development,” IRS0000001341; Subcommittee interview of Carter Hull, IRS (11/19/2013). It is unclear if all invited participants actually attended the meeting.

<sup>280</sup> Subcommittee interviews of Carter Hull, IRS (11/19/2013) and Donald Spellmann, IRS (12/18/2013). See also July 2011 email exchange between Donald Spellmann, Amy Franklin, Janet Gitterman, Kenneth Griffin, and David Marshall, “Case referred from EO,” IRS0000001330 - 331 (On July 26, 2011, Janet Gitterman, senior EOT tax law specialist, emailed Amy Franklin, TEGE counsel, requesting an “estimate on timeframe for review by your office.” Mr. Spellmann, TEGE counsel, responded: “Let’s talk about this. But my suggestion from the meeting with Lois is that we go ahead and send it back with the advice that they develop 2010.”).

<sup>281</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>282</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>283</sup> Id. See also 8/3/2011 email from Holly Paz to Donald Spellmann, “Mtg on Advocacy Cases,” IRSR0000013066 - 067 (Ms. Paz advised Mr. Spellmann that “there are several moving pieces connected to this issue, my folks think it would still be helpful to coordinate as to: . . . [t]he checksheet (not a model development letter) EOT is writing for Determs specialists working the advocacy cases.”).

<sup>284</sup> Subcommittee interview of William Wilkins, IRS (12/4/2013). Mr. Wilkins also told the Subcommittee that he had been unaware at the time that TEGE legal counsel had been consulted about the test cases in 2011, and said he learned of their role only when the TIGTA report was published in 2013. Id.

received the applications from Mr. Hull in June 2011, met with Mr. Hull in August 2011, and then never heard anything further about the cases.<sup>285</sup>

According to Mr. Hull, in August 2011, after the meeting with TEGE counsel's office, Michael Seto, EO Quality Assurance Manager, told Mr. Hull that his Tea Party cases were being reassigned to another EOT specialist.<sup>286</sup> Holly Paz, EOT head, told the Subcommittee that she made the decision to reassign the cases after speaking with Mr. Seto about Mr. Hull's work.<sup>287</sup> Other EO personnel had apparently also questioned the quality of Mr. Hull's work.<sup>288</sup>

Ms. Paz told the Subcommittee that she assigned the two test cases to both Hilary Goehausen, a new attorney in EOT, and Justin Lowe, a more senior EOT specialist with expertise on political advocacy and campaign issues.<sup>289</sup> Ms. Goehausen, an attorney who had started at the IRS in the EOT Unit earlier in 2011, told the Subcommittee that Mr. Seto had asked her to take on the cases, because one of the subject matter experts on campaign activities, Siri Buller, was leaving the IRS.<sup>290</sup> Ms. Goehausen also told the Subcommittee that she believed that the backlog of cases needing action had accumulated due to a cessation of work on them in the Cincinnati office while awaiting EOT guidance.<sup>291</sup> When asked during an interview by staff from two House Committees, Ms. Goehausen described herself as a registered Republican.<sup>292</sup>

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<sup>285</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013). Aside from the August 2011 meeting on the two test cases, Mr. Spellmann told the Subcommittee that the TEGE Counsel's office had no other role in specific advocacy cases aside from two brief matters that took place in 2012 and 2013. *Id.* According to Mr. Spellmann, in April 2012, EOT transferred to the TEGE Counsel's office an application involving an applicant with Tea Party in its name, but TEGE Counsel did not review the case and returned it to EOT, because TEGE Counsel knew that those cases were supposed to be handled through a special "bucketing process" that had recently been established, as described further below. Also according to Mr. Spellmann, on another occasion in early 2013, prior to publication of the TIGTA report, Sharon Light, EO Senior Technical Advisor, sent a proposed 501(c)(4) denial to TEGE counsel for review involving a 501(c)(4) organization advocating on behalf of Democratic candidates. On that occasion, TEGE counsels Don Spellmann and Susan Brown agreed with the recommendation to deny the exemption. *Id.*

<sup>286</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that he had known Mr. Seto a long time, and when he was told about the reassignment of the cases, he didn't want to ask why and did not ask why. *Id.*

<sup>287</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz told the Subcommittee that Mr. Hull had gotten "complacent" and "was not as thorough as he used to be." *Id.*

<sup>288</sup> Cindy Thomas, Determinations Unit head, told the Subcommittee that the reason for Mr. Hull's removal was that he was not handling the cases quickly enough. Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Three months earlier, on May 26, 2011, Lois Lerner, EO head, wrote to Holly Paz, EOT head, as well as other colleagues about a 501(c)(4) organization: "Looks to me like [REDACTED BY IRS] is simply an acronym for [REDACTED BY IRS] (-: Joseph, Cindy also believes there is an application in Cincy [Cincinnati] on this as part of a larger look — it is being coordinated with EO Tech." 5/26/2011 email from Lois Lerner to Nanette Downing, Joseph Grant, and others, "C 4," IRSR0000222949 - 950. On the same day, thirty minutes later, Ms. Lerner wrote to Ms. Paz and David Fish: "I'm told Chip Hull is heading up the up [sic] — scaring me — can I get a briefing?" 5/26/11 email from Lois Lerner to Holly Paz and David Fish, "C 4," IRSR0000222949 - 950.

<sup>289</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>290</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>291</sup> *Id.*

<sup>292</sup> According to a transcript of Ms. Goehausen's July 2, 2013 interview with the House Ways and Means Committee and the House Oversight and Government Reform Committee, Ms. Goehausen provided the following testimony:

Q: Do you have a party affiliation when you're voting, registration?

A: Yes.

According to Ms. Goehausen, Mr. Hull's two cases were transferred to her, but no one described them as "test cases."<sup>293</sup> Mr. Hull told the Subcommittee that he provided Ms. Geohasuen with a great deal of information about the two cases, but did not speak with her about them after they were transferred.<sup>294</sup> Mr. Hull told the Subcommittee that he also drafted an additional development letter, but did not send it because he no longer had the test cases.<sup>295</sup>

Ms. Goehausen told the Subcommittee that, after researching the law and reviewing the case files, she prepared proposed denials on both applications.<sup>296</sup> She indicated that she did not consult with TEGE counsel prior to making the recommendations. Ms. Goehausen told the Subcommittee that she asked to be taken off of the cases nearly a year later, in the summer of 2012.<sup>297</sup> She also told the Subcommittee that, as of the end of 2013, the two Tea Party test cases still had not been closed, more than three years after they were first flagged in early 2010.<sup>298</sup>

#### **D. Handling Other Tea Party Cases in Cincinnati: February to October 2010**

At the same time the Tea Party test cases were sent to EOT for guidance on how to handle them, the EO Screening Group continued to identify additional applications raising similar concerns. To collect and analyze those cases, the Determinations Unit designated Elizabeth Hofacre, an EO determinations specialist in the Emerging Issues Specialty Group in the Cincinnati office, as the "Tea Party Coordinator." For the next eight months, the evidence indicates that the screeners and Ms. Hofacre had different views as to what types of organizations fit into the Tea Party category, leading to confusion over what cases should be sent to her. Although most screeners thought the category included both conservative and liberal groups, Ms. Hofacre viewed her job as analyzing only conservative groups and redirected any other cases referred to her to the general inventory of tax exempt cases. At the same time, internal EO presentations clearly included both conservative and liberal groups within the Tea Party category of cases.

While serving as the case coordinator, Ms. Hofacre attempted to develop and resolve the 40 or so cases she collected, including by sending development letters and seeking guidance

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Q: What is your party affiliation?

A: Republican Party.

See "Leaked Document Undermines its Case and Highlights Lack of IRS Political Motivation," Committee on Ways and Means – Democrats, (9/18/2013), <http://democrats.waysandmeans.house.gov/press-release/gop-leaked-document-undermines-its-case-and-highlights-lack-irs-political-motivation>.

<sup>293</sup> Id.

<sup>294</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>295</sup> Id. Mr. Hull, who had been employed by the IRS for decades and was in his seventies, retired from the agency in June 2013. "Written Testimony of Carter Hull Before the House Oversight and Government Reform Committee: Carter Hull Biographical Summary," (7/18/2013), <http://oversight.house.gov/wp-content/uploads/2013/07/Hull-Testimony-Final.pdf>.

<sup>296</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 11/19/2012 Sensitive Case Report, prepared by Hilary Goehausen, IRSR0000162544 - 546 (noting proposed denials for two 501(c) organizations).

<sup>297</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>298</sup> Id. See also 1/31/2013 EO Technical Significant Case Report, prepared by the IRS, IRSR0000161237 – 249, at 237 (noting Hilary Goehausen and Steve Grodnitzky were responsible for the two cases, and "proposed denials [were] with Judy and Sharon for review").

from EOT Carter Hull, but ongoing delays over the test cases stymied her efforts. In October 2010, Ms. Hofacre asked to move to a different IRS division, and her cases were reassigned.

**First Tea Party Coordinator.** After identifying the first Tea Party case in February 2010, Cincinnati continued to amass similar cases. From February 2010 to October 2010, about 40 cases falling into the Tea Party category were assigned to Elizabeth Hofacre, a determinations specialist for Emerging Issues.<sup>299</sup> When she first began collecting the cases, Ms. Hofacre worked in Group 7825, headed by Joseph Herr.<sup>300</sup> Later in 2010, after the EO groups were reorganized, Ms. Hofacre moved to group 7822, bringing her Emerging Issues cases with her.<sup>301</sup> Group 7822 was headed by Steven Bowling.<sup>302</sup>

**Confusion Over Relevant Applications.** As screeners in the Screening Group identified potential “Tea Party” cases, they forwarded them to Ms. Hofacre who retained the case files. The evidence indicates that the screeners as well as other EO personnel were confused as to what types of organizations fit into the Tea Party category and should be sent to Ms. Hofacre. Ms. Hofacre told the Subcommittee that screeners sent her all types of organizations, both liberal and conservative.<sup>303</sup> She also told the Subcommittee that she kept the conservative ones and sent the liberal ones to the general inventory, because she understood that the phrase, “Tea Party,” meant she was responsible for reviewing only the conservative organizations.<sup>304</sup> Many of her colleagues, however, viewed the term, “Tea Party,” as including both conservative and liberal groups.<sup>305</sup>

On July 28, 2010, at a routine “Screening Workshop” designed to alert screeners to a variety of issues, both Mr. Muthert and Ms. Hofacre made presentations to explain what types of cases should be sent to her as part of the “Tea Party” category of cases. The presentations reflect their division of opinion over what cases were included in that category, with Mr. Muthert

<sup>299</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>300</sup> Id.

<sup>301</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 33.

<sup>302</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>303</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>304</sup> Id.

<sup>305</sup> In interviews conducted by TIGTA, for example, most IRS employees said the term “Tea Party” included both conservative and liberal groups. See, e.g., 7/30/2012 TIGTA interview of Justin Lowe, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” PSI-TIGTA-03-000669 (According to Mr. Lowe, “Cincinnati referred to cases as Tea Party, but it was just a shorthand for all advocacy cases.”); 7/31/2012 TIGTA interview of Holly Paz, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” PSI-TIGTA-03-000678 - 682, at 679 (According to Ms. Paz, “[c]ases were commonly referred to as Tea Party cases in Cincinnati and by Chip Hull. It did not occur to Determinations not to use this ‘short hand’ for the types of cases they were identifying. Other issues have been referred to by particular names in the past.”); 7/31/2012 TIGTA interview of Sharon Light, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” PSI-TIGTA-03-000685 (“She has always referred to these cases as advocacy cases, but prior to her involvement they were probably referred to as Tea Party cases. People understood that Tea Party referred to a range of issues, not the Tea Party specifically.”); 8/7/2012 TIGTA interview of Cindy Thomas, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” PSI-TIGTA-03-000705 - 707 (According to Ms. Thomas, “Determinations should also not have used the term Tea Party to refer to advocacy cases. They did not think about how it would look to outsiders. Tea Party was just used as a shorthand for political advocacy cases.”). IRS employees provided similar statements to the Subcommittee.

identifying both conservative and liberal groups involved with “political activities,” and Ms. Hofacre identifying only conservative groups.

Two key documents describe what was discussed at the July 2010 workshop, the official IRS notes summarizing the issues addressed and a powerpoint presentation shown to IRS screeners. The official IRS “Notes” summarizing the issues discussed at the workshop included this summary of Mr. Muthert’s presentation:

“Current/Political Activities: Gary Muthert

- Discussion focused on the political activities of Tea Parties and the like – regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to [Group] 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - Emerge,
  - Progressive
  - We The People,
  - Rally Patriots, and
  - Pink-Slip Program.”<sup>306</sup>

The named groups included both conservative and liberal groups. The conservative groups were 9/12 Project, We The People, Rally Patriots, and Pink-Slip Program; the liberal groups were Emerge, a group that helped Democratic women candidates run for office, and Progressive.<sup>307</sup> This IRS document shows that, even before the first BOLO was issued, IRS screeners were being advised to be on the lookout for both conservative and liberal groups.

The Screening Workshop Notes followed the Muthert summary with this summary of Ms. Hofacre’s presentation:

“Elizabeth Hofacre, Tea Party Coordinator/Reviewer

- Re-empha[has]ize that applications with Key Names and/or Subjects should be transferred to [Group] 7822 for Secondary Screening. Activities must be primary.
- ‘Progressive’ applications are not considered ‘Tea Parties.’”<sup>308</sup>

Ms. Hofacre’s presentation showed that, contrary to Mr. Muthert, she did not consider applications filed by “Progressive” groups to be within the “Tea Party” category of cases and advised against sending her applications filed by those groups.<sup>309</sup>

<sup>306</sup> 7/28/2010 “Screening Workshop Notes,” prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 – 704, at 703 (circulating the “Screening Workshop meeting minutes).

<sup>307</sup> The Minority Staff’s Dissenting Views state, at 202-203, that only groups with “Tea Party,” “9/12,” or “Patriot” in their names were flagged for enhanced review, but this IRS document shows that, in July 2010, the IRS was also using the names “Emerge” and “Progressive” to flag groups for review.

<sup>308</sup> Id.

In addition to summarizing the two presentations, the Screening Workshop Notes attached a 25-page powerpoint presentation that was shown at the meeting addressing a variety of issues.<sup>310</sup> Six of those pages addressed the cases discussed by Mr. Muthert and Ms. Hofacre.<sup>311</sup> The first page presented images of an elephant and a donkey, symbols of the Republican and Democratic political parties, suggesting that the cases were portrayed as involving groups across the political spectrum.<sup>312</sup> Other pages named the conservative and liberal groups listed in the Muthert summary above.<sup>313</sup> None of the pages contained any indication that the Tea Party category of cases was limited to conservative groups; the presentation's overall message was, indeed, the opposite.

Mr. Muthert told the Subcommittee there was a great deal of confusion at the meeting about which cases should be considered "Tea Party" cases.<sup>314</sup> The meeting minutes themselves note, on the one hand, that both liberal and conservative groups should be flagged for additional screening, while on the other hand, that "Progressive" applications were not to be considered "Tea Parties." At the same time, the powerpoint presentation indicated that both liberal and conservative groups should be flagged. In contrast to Mr. Muthert, the Screening Group manager, John Shafer, told the Subcommittee that he did not recall a great deal of confusion by the screeners at the July meeting; he indicated that if an applicant appeared to engage in campaign activity that did not adhere to the 501(c)(4) law, the application was supposed to be sent to Ms. Hofacre, regardless of whether it had a liberal or conservative character.<sup>315</sup> All of the EO personnel interviewed by the Subcommittee agreed that, in 2010, IRS management did not intervene to clarify what applications were intended to be included in the new category of Tea Party cases.

**August 2010 BOLO.** In August 2010, the month after the screeners' meeting, the EO Determinations Unit sent out the first BOLO to help screeners identify applications warranting additional scrutiny. That BOLO included an entry using the phrase "Tea Party" and urged EO employees to be on the lookout for applicants using that phrase in their names or application materials.<sup>316</sup> Ms. Hofacre told the Subcommittee that she authored the BOLO language, with assistance from and the approval of more senior personnel, John Waddell and Steve Bowling.<sup>317</sup> The BOLO entry, which appeared in the "Emerging Issues" section, stated:

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<sup>309</sup> While Ms. Hofacre advised against sending progressive cases to her, no evidence indicates that she thought subjecting progressive cases to heightened review was inappropriate or opposed flagging those applications for heightened review by another EOD specialist.

<sup>310</sup> "Screening Workshop July 28, 2010," powerpoint prepared by IRS, IRSR0000006674 - 699.

<sup>311</sup> Id. at 687 – 692. Neither Mr. Muthert nor Ms. Hofacre clearly recalled the powerpoint presentation, and neither could remember who had prepared it. Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013).

<sup>312</sup> "Screening Workshop July 28, 2010," powerpoint prepared by IRS, IRSR0000006674 - 699, at 687.

<sup>313</sup> Id. at 688 – 690.

<sup>314</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2013).

<sup>315</sup> Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>316</sup> 2010 BOLO spreadsheet, prepared by IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503-515, at 509.

<sup>317</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

“These cases involve various local organizations in the Tea Party movement [that] are applying for exemption under 501(c)(3) or 501(c)(4).”<sup>318</sup>

As indicated earlier, “Tea Party” was not the only political group named in the August BOLO. In addition, the BOLO’s “TAG Historical” section contained an entry urging EO employees to be on the lookout for applicants using “Progressive” in either their names or their applications. The TAG Historical entry for “Progressive political activities” stated:

“[C]ommon thread is the word ‘progressive.’ Activities appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to ‘blue’ as being ‘progressive.’”<sup>319</sup>

This description of the progressive groups focused on their “political activities” as the central concern.

In addition, as indicated earlier, another BOLO section called the “BOLO List” – later renamed the “Watch List” -- urged EO employees to be on the lookout for “ACORN successor” groups. The BOLO’s description of those groups was mostly redacted by the IRS, but stated in part: “ACORN successors, Following the breakup of ACORN [REDACTED BY IRS].”<sup>320</sup> A later email urged EOD personnel to focus on the names and political views of those ACORN successor groups.<sup>321</sup> These two BOLO entries show that, from the first BOLO, the IRS did not single out only conservative groups for greater scrutiny, but also spotlighted liberal groups.

Ms. Hofacre told the Subcommittee that she was the person who actually sent the email containing the first BOLO in August 2010.<sup>322</sup> She also explained that, by mistake, instead of sending the BOLO only to the EO Determinations email list, she sent the BOLO to everyone on the EO’s email list, including EOT.

After the August 2010 BOLO was issued, screener Gary Muthert told the Subcommittee that if an organization had the words “Tea Party” in its name, the screeners automatically sent

<sup>318</sup> 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 509.

<sup>319</sup> See June 2011 BOLO spreadsheet, prepared by IRS, IRS0000001423 - 438, at 426. See also 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 507. The Minority Staff’s Dissenting Views state that the “progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group’s name,” see Dissenting Views at 195, 202, but this BOLO entry explicitly directed IRS screeners to focus on “the word ‘progressive.’”

<sup>320</sup> 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 513. ACORN stands for Association of Community Organizations for Reform Now, a decades-old, openly liberal organization discussed in more detail below. The August BOLO did not reference any “Emerge” groups, possibly because they were already referenced in another email alert, a copy of which was not provided by the IRS due to Section 6103 barring IRS disclosure of individual taxpayer information.

<sup>321</sup> See 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, “BOLO Tab Update,” IRSR0000410433 - 434 (urging EOD personnel to look for “[t]he name(s) Neighborhoods for Social Justice or Communities Organizing for Change” and for groups whose activities included mention of “Voter Mobilization or the Low-Income/Disenfranchised,” or which included advocating for “the poor”).

<sup>322</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

the application to Ms. Hofacre, but “anything else was a guess.”<sup>323</sup> In contrast, the Screening Group manager, John Shafer, told the Subcommittee that it was common knowledge that all organizations involved with campaign activity or political advocacy had to be sent to Ms. Hofacre, whether conservative or liberal.<sup>324</sup> At the same time, Ms. Hofacre continued to view her job as coordinating only those applications whose organizations were conservative in nature. The diverging views of these three key individuals demonstrate the ongoing confusion about what groups were supposed to be included in the “Tea Party” category of cases.

**Development Letters.** In addition to identifying and retaining “Tea Party” applications, Ms. Hofacre was responsible for developing them and, if possible, resolving them. Ms. Hofacre told the Subcommittee that, even though she was the Tea Party coordinator, the IRS provided no special training or guidance to help her determine how to develop or evaluate an organization that appeared to be involved with campaign activity or political advocacy.<sup>325</sup> Ms. Hofacre’s manager, Joseph Herr, told her that she needed to get guidance from EOT on how to handle the applications, and she contacted Carter Hull, the EOT specialist handling the two test cases.<sup>326</sup>

According to Ms. Hofacre, she initially sent Mr. Hull examples of some of the cases she was collecting and asked for his suggestions on appropriate development letters.<sup>327</sup> She also supplied him with initial drafts of those development letters and at times supplied copies of the case files.<sup>328</sup> Mr. Hull told the Subcommittee that, at the direction of his supervisor, Ronald Shoemaker, he contacted Steve Grodnitzky who was then acting EO Director, and they worked together on a draft for the first development letter which Mr. Hull then sent to Ms. Hofacre.<sup>329</sup>

Mr. Hull told the Subcommittee that Ms. Hofacre contacted him seeking advice on about 40 cases total.<sup>330</sup> Ms. Hofacre told the Subcommittee that she contacted Mr. Hull regarding 30 to 40 cases, of which she sent out about 20 development letters to the organizations.<sup>331</sup> One IRS document produced to the Subcommittee indicates that, from May 2010 to October 2010, Mr. Hull reviewed and, in most instances, provided comments on, approximately 26 applications and development letters.<sup>332</sup> Ms. Hofacre told the Subcommittee that she recalled one issue in connection with those development letters; the letters asked for copies of the applicants’

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<sup>323</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014). Mr. Muthert said that when screeners were in doubt, they generally sent the application to Ms. Hofacre and let her figure it out. Id.

<sup>324</sup> Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>325</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>326</sup> Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013) and Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that his manager, Ronald Shoemaker, told him to discuss the cases with Ms. Hofacre. Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>327</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>328</sup> Id.

<sup>329</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). According to Mr. Hull, for first five cases or so, Mr. Shoemaker advised Mr. Hull to coordinate with Mr. Grodnitzky. Mr. Hull indicated that, after their collaboration on the first letter, Mr. Grodnitzky told Mr. Hull that he did not need to show him any more. Id.

<sup>330</sup> Id.

<sup>331</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>332</sup> See “Timeline for informal technical assistance which was provided by EOT Personnel to EOD between May 2010 to October 2010,” prepared by the IRS, IRSR0000222967 - 971, at 970.



Facebook and Twitter pages which upset some Tea Party organizations, but Ms. Hofacre said she had asked for the same information from other groups she had evaluated.<sup>333</sup>

At one point in October 2010, Determinations head Cindy Thomas wrote to EOT head Ms. Paz expressing concern about EOT's ongoing involvement with the Tea Party cases, which was slowing down the review process:

"I have a concern with the approach being used to develop the tea party cases we have here in Cincinnati. Apparently, an additional information letter is prepared for each case and the letter is faxed to Chip Hull for him to review. After he reviews, we send out the letter. In some instances, the organizations have responded and we are just 'sitting' on these cases. Personally, I don't know why Chip needs to look at each and every additional information letter. It seems to me that if he reviewed the template letter and approved it, we should be good to go."<sup>334</sup>

Ms. Hofacre told the Subcommittee that, during the eight-month period she served as the Tea Party case coordinator, she continued to call Mr. Hull to ask him how she should handle the applications aside from sending development letters, and he continued to respond that she had to wait until the test cases were resolved before going any further.<sup>335</sup> Mr. Hull told the Subcommittee that, at some point, although he couldn't recall exactly when, he stopped advising Ms. Hofacre on the cases, because he was waiting for guidance on the test cases from the TEGE Counsel's office and felt that he couldn't advise her without that advice.<sup>336</sup> His explanation does not, however, fit the timeline of the cases, since he was not instructed to contact the TEGE Counsel's office until mid-2011, and Ms. Hofacre ceased handling the cases in October 2010.

Ms. Hofacre told the Subcommittee that she found the Tea Party cases frustrating, because the applicants kept calling her to get their applications resolved, and she couldn't help them; she said she felt like she was "working in lost luggage."<sup>337</sup> Ms. Hofacre said it was that frustration that, in October 2010, caused her to move to a different part of the IRS, the Quality Assurance division.<sup>338</sup> Her cases were then reassigned to a new Tea Party case coordinator, Ronald Bell.

Mr. Hull told the Subcommittee that he wasn't frustrated by the delay in getting guidance from the TEGE Counsel's office about the Tea Party test cases, and never mentioned it to his supervisors, because he had too much other work to do.<sup>339</sup> Ms. Goehausen accepted reassignment of the cases from Mr. Hull in August 2011.<sup>340</sup>

<sup>333</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>334</sup> 10/26/2010 email from Cindy Thomas to Holly Paz, "Political Cases – Need to Discuss," IRSR0000014070.

<sup>335</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>336</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>337</sup> Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

<sup>338</sup> Id.

<sup>339</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull also told the Subcommittee that he never told Ms. Hofacre he was waiting for TEGE Counsel. In addition, Mr. Hull said that Ms. Hofacre never expressed any frustration regarding the cases to him. Id.

<sup>340</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

### **E. Delaying Tea Party Cases Another Year: November 2010 to November 2011**

In November 2010, eight months after the first Tea Party case was flagged by the IRS, about 40 of the cases were reassigned to the new case coordinator, Ronald Bell. For the next year, Mr. Bell essentially took no action to resolve the cases, while awaiting guidance from EOT on how to handle them. EO head Lois Lerner and EOT head Holly Paz in Washington, and Determinations head Cindy Thomas in Cincinnati were in general agreement that the applications being held in Cincinnati should wait for EOT guidance on the test cases to ensure that all of the cases were resolved in a consistent manner. At the same time, Ms. Thomas expressed impatience with how long EOT was taking to resolve the two test cases. By April 2011, the inventory of Tea Party cases had grown to 102. In June 2011, EOT raised questions about the criteria being used to identify the relevant cases, and Ms. Lerner instructed the Determinations Unit to stop referring to them as “Tea Party” cases and instead call them “advocacy cases.” In response, in July 2011, the Determinations Unit revised the language used in the BOLOs to flag the cases, dropping the reference to “Tea Party.”<sup>341</sup>

By the fall of 2011, about 160 advocacy cases had been identified. In September 2011, EOT proposed developing “informal guidance” on how to handle the cases and spent months working on a “guidesheet” for the cases, before abandoning the effort. In the meantime, EOT initiated a review of the backlogged cases to remove any lacking campaign issues. EOT specialist Hilary Goeshausen conducted that review in October 2011, and prepared a list of the 160 cases with comments about how each should be handled, but her list was seen as unhelpful by the Determinations Unit in Cincinnati and was not used to close any cases. In November 2011, the advocacy cases awaiting action in the Determinations Unit were transferred from Ronald Bell to Stephen Seok, who became the third EOD coordinator of the cases in three years.

**Reassignment of Tea Party Cases in Cincinnati.** In November 2010, Steven Bowling, head of Group 7822 which included the Emerging Issues cases, reassigned the Tea Party cases from Ms. Hofacre to Ronald Bell.<sup>342</sup> Mr. Bell told the Subcommittee that Ms. Hofacre “briefly briefed” him on the cases, and it was his understanding that as Tea Party coordinator he was focusing only on conservative groups.<sup>343</sup> Like Ms. Hofacre, Mr. Bell reported that he always received a mix of both liberal and conservative cases from the screeners, but kept only the conservative ones.<sup>344</sup> Mr. Bell said that if he received a case that didn’t fall into the Tea Party category as he understood it, he returned the case to the agent who had sent it to him who then had to decide how to handle the case.<sup>345</sup>

**Instruction to Wait.** Ms. Hofacre had sent development letters to some of the Tea Party groups and when the requested information began arriving at the Cincinnati office, Mr. Bell told the Subcommittee that he asked Mr. Bowling how to proceed.<sup>346</sup> He said that Mr. Bowling told

<sup>341</sup> That change was made nearly two years before the TIGTA audit report criticized the IRS for the earlier practice.

<sup>342</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014); 5/14/2013 TIGTA Audit Report, at 33.

<sup>343</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

<sup>344</sup> Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013) and Ronald Bell, IRS (1/15/2014).

<sup>345</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

<sup>346</sup> Id.

him to wait to get guidance “from headquarters,” meaning the EOT office in Washington, D.C., before moving forward.<sup>347</sup> Mr. Bowling’s instruction to Mr. Bell led to essentially a one-year delay in the resolution of the Tea Party cases, from approximately November 2010 to November 2011, while Mr. Bell awaited guidance from EOT on how to handle the cases.<sup>348</sup>

Mr. Bell told the Subcommittee that during that waiting period he received numerous complaints from organizations asking about the status of their applications, conveyed the complaints to Mr. Bowling, and was told by Mr. Bowling to say that the cases were under review.<sup>349</sup> According to Mr. Bell, over the year, he repeatedly asked Mr. Bowling about when the EOT guidance on the cases would be available, and Mr. Bowling repeatedly told him that they were still waiting for it.<sup>350</sup>

On November 16, 2010, Mr. Bowling wrote to his supervisor, Sharon Camarillo, to alert her to the delay in processing the cases:

“I know Cindy has contacted Holly Paz about the tea party cases but I don’t know or remember if a game plan was established. I believe when this all started the idea was to have EOT take a look at some of these and provide us with a development letter similar to how we handled Credit Counseling cases. I’m not sure how everyone wants to proceed but I think we need to get a handle on this. Ron is getting phone calls on these cases and his typical answer is ‘the case is under review.’”<sup>351</sup>

Ms. Camarillo forwarded his email to the Determinations Unit head, Cindy Thomas, who responded: “I called Holly [Paz] a couple of weeks ago and she indicated she was going to check into this matter and would get back with me.”<sup>352</sup> In December 2010, Ms. Thomas asked Ms. Paz for another status report and was told that the cases had yet to be presented to Judy Kindell who would be reviewing them.<sup>353</sup>

Five months later, in April 2011, the 501(c)(4) cases were still sitting idle awaiting EOT guidance. That month, Ms. Thomas wrote to Steven Bowling:

“Judy [Kindell] also recommended that all tea party cases be sent to EOT (tell Ron Bell not to get too excited!), but Mike Seto does not believe this should happen. He thinks

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<sup>347</sup> Id.

<sup>348</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 33 (“The specialist did not work on the cases while waiting for guidance from the Technical Unit.”); Subcommittee interview of Hilary Goehausen, IRS (12/13/2013) (indicating she had been told that EO agents in Cincinnati had stopped working the cases while waiting for guidance from Washington).

<sup>349</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

<sup>350</sup> Id.

<sup>351</sup> See 11/16-17/2010 email exchange among Steven Bowling, Sharon Camarillo, and Cindy Thomas, “emerging issue cases,” PSI-TIGTA-03-000134 – 135.

<sup>352</sup> Id. See also 11/20/2010 email from Cindy Thomas to Steven Bowling, “Political Cases – Information,” IRSR0000014069 – 070 (providing him with an update, that the test cases were going to be discussed with Judith Kindell).

<sup>353</sup> See 12/13/2010 email from Cindy Thomas to Holly Paz, “Political Cases – Status,” IRSR0000014069 - 070 (“Has there been any update regarding the tea party cases as far as the discussion with Judy Kindell?”); 12/13/2010 email from Holly Paz to Cindy Thomas, “Political Cases – Status,” IRSR0000014069 - 070.

EOT should give us a template letter for the c3 denials and share developmental questions, etc., for the c4's. Holly will be meeting with Lois to discuss this. Stay tuned.”<sup>354</sup>

That same month, Ms. Paz assured EO head Lois Lerner that the Cincinnati office had “been told not to issue determs” until EOT “work[ed] through the test cases we have here.”<sup>355</sup>

Mr. Bell told the Subcommittee that over the course of the year from November 2010 to November 2011, he spoke on a few occasions with Mr. Hull, the EOT specialist then handling the test cases.<sup>356</sup> Mr. Bell told the Subcommittee that when he asked Mr. Hull when he would be receiving guidance about the cases, Mr. Hull indicated that he didn't know.<sup>357</sup> Ms. Goehausen told the Subcommittee that when she took over the test cases in August 2011, she received only a few calls from the Determinations Unit about them.<sup>358</sup> Mr. Bell told the Subcommittee that he did not contact Ms. Goehausen about the cases.

While Mr. Bell waited for guidance from EOT, EO screeners continued to identify additional cases falling within the Tea Party category. By April 2011, the inventory of Tea Party cases had grown to 102.<sup>359</sup> When asked about those cases, Ms. Paz told the Subcommittee that she had always understood that the phrase “Tea Party” was being used generically, and that the total of 102 pending cases included both conservative and liberal groups.<sup>360</sup>

In May 2011, Mr. Bell received a request from another IRS revenue agent about how to handle a Tea Party case, and he wrote to the Determinations head, Ms. Thomas, inquiring how he should respond.<sup>361</sup> Ms. Thomas sent Mr. Bell's inquiry to Ms. Paz, the EOT head, who forwarded it to Michael Seto, the EO Quality Assurance Manager. Mr. Seto responded:

“Okay. The current status is: Judy [Kindell] has reviewed our proposed (c)(3) denial and (c)(4) favorabl[y] and requested the staff to ask for more information from the taxpayers. We are waiting for the information from the taxpayers. The cases have not gone to Counsel yet.”<sup>362</sup>

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<sup>354</sup> 4/13/2011 email from Cindy Thomas, to Steven Bowling, “Tea Party Cases – DUE 5/31/2011,” IRSR0000013882.

<sup>355</sup> 4/7/2011 email from Holly Paz to Lois Lerner, Judith Kindell, and others, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350220 - 221.

<sup>356</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

<sup>357</sup> Id.

<sup>358</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). A July 2011 email from Michael Seto, EO Quality Assurance Manager, stated that Justin Lowe was “the contact person for EOT for all political advocacy cases pending in EOD [Exempt Organizations Determinations Unit],” and that Mr. Lowe would work with “Hilary Goehausen and Chip Hull, who are initiators on political advocacy cases pending in EOT.” 7/23/2011 email from Michael Seto to Justin Lowe, Hilary Goehausen, Carter Hull, and others, “Contact Person for EOD Political Advocacy Cases,” IRSR0000002738.

<sup>359</sup> 4/7/2011 email from Holly Paz to Lois Lerner, Judith Kindell, and others, “sensitive (c)(3) and (c)(4) applications,” IRSR0000350219.

<sup>360</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>361</sup> See 5/12/2011 email from Ronald Bell to Cindy Thomas, “exempt application,” IRSR0000429362 - 363.

<sup>362</sup> 5/12/2011 email from Michael Seto to Holly Paz, “Tea Party – Email from TAS,” IRSR0000429362.

It would be another three months until Mr. Hull met with TEGE counsel in August 2011, after which his test cases were transferred to Ms. Goehausen.

**Focus on Tea Party Selection Criteria.** In June 2011, for the first time, IRS personnel in Washington asked IRS personnel in Cincinnati to describe exactly how they were identifying applications falling within the category of “Tea Party” cases. On June 1, 2011, Ms. Paz, EOT head, asked Ms. Thomas, Determinations head, to tell her “[w]hat criteria are being used to label a case a ‘Tea Party case?’”<sup>363</sup> On June 2, 2011, Ms. Thomas conveyed that inquiry to the Screening Group manager, John Shafer, writing: “Could you send me an email that includes the criteria screeners use to label a case a ‘tea party case?’”<sup>364</sup>

In response, Mr. Shafer emailed his top three screeners, Gary Muthert, Roger Vance, and Dale Schaber, and asked them to provide him with “what issues may indicate an organization is involved with the tea party movement.”<sup>365</sup> Mr. Muthert promptly responded: “I myself look for cases with the names, such as ‘Tea Party’, ‘Patriots’, or the ‘9/12 Project’.”<sup>366</sup> Mr. Vance responded: “Some of the cases do contain references to the tea party and other cases that I have identified are organizations concerned with government spending, government debt, and taxes.”<sup>367</sup> The IRS was unable to locate the email response from Mr. Schaber. Later that same day, June 2, 2011, after hearing from his agents, Mr. Shafer sent Ms. Thomas an email summarizing the criteria being used to identify Tea Party cases:

“The following are issues that could indicate a case to be considered a potential ‘tea party’ case and sent to Group 7822 for secondary screening.

- 1.”Tea Party”, “Patriots” or “9/12 Project” is referenced in the case file.
2. Issues include government spending, government debt and taxes.
3. Educate the public through advocacy/legislative activities to make America a better place to live.
4. Statements in the case file that are critical of how the country is being run.”<sup>368</sup>

These emails indicate that, as of June 2011, more than one year after the first Tea Party case was flagged, the IRS office in Cincinnati did not have any official criteria for identifying

<sup>363</sup> 6/1/2011 email from Holly Paz to Cindy Thomas, “group of cases,” PSI-IRS-09-000093 (Ms. Paz wrote: “What criteria are being used to label a case a ‘Tea Party case’? We want to think about whether those criteria are resulting in over-inclusion.”).

<sup>364</sup> 6/2/2011 email from Cindy Thomas to John Shafer, “Tea Party Cases – NEED CRITERIA,” PSI-IRS-09-000092.

<sup>365</sup> 6/2/2011 email from John Shafer to Gary Muthert, Roger Vance, and Dale Schaber, “Tea Party Cases – NEED CRITERIA,” PSI-IRS-09-000092; Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>366</sup> 6/2/2011 email from Gary Muthert to John Shafer, “Tea Party Cases – NEED CRITERIA,” IRSR0000706928. Mr. Muthert was the only IRS screener to report using those three search terms to identify 501(c)(4) applications for heightened review. When asked if he had a negative view of the Tea Party, Mr. Muthert replied: “No, I align with them.” Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>367</sup> 6/2/2011 email from Roger Vance to John Shafer, “Tea Party Cases – NEED CRITERIA,” IRSR0000706930.

<sup>368</sup> 6/2/2011 email from John Shafer to Cindy Thomas, “Tea Party Cases – NEED CRITERIA,” PSI-IRS-09-000048.

which cases fell within the Tea Party category. Instead, when asked, the Screening Group head surveyed his screeners to find out how they were identifying the cases, compiled their uncoordinated and divergent approaches into a list, and forwarded the list to the Determinations Unit head, explaining that the proffered criteria “could indicate a case to be considered a potential ‘tea party’ case.”

The emails also indicate that, prior to June 2011, IRS officials in Washington were unaware of the criteria being used by EO screeners in Cincinnati to identify cases falling within the Tea Party category. In fact, Ms. Paz, located in Washington, D.C., had to ask Ms. Thomas, the EO Determinations head in Cincinnati, and Ms. Thomas had to ask Mr. Shafer, the Screening Group head in Cincinnati, for the specific criteria being used. He, in turn, had to ask his screeners. These internal emails demonstrate that no Washington IRS official had directed any IRS personnel in Cincinnati to single out Tea Party groups for special scrutiny.<sup>369</sup> To the contrary, the evidence indicates that the screeners themselves had first identified the Tea Party cases as raising sensitive issues and then came up with their own selection criteria to identify similar cases, without any input from IRS personnel in Washington.<sup>370</sup> The Subcommittee investigation found no evidence that any IRS official directed, pressured, or encouraged any IRS personnel in Cincinnati to subject applications filed by Tea Party or other conservative groups to heightened review.

When asked about the four selection criteria listed in the Shafer email, Ms. Thomas told the Subcommittee that she didn’t know whether the criteria were conservative or liberal in nature, and observed that they had picked up liberal leaning organizations as well as conservative ones.<sup>371</sup> During the TIGTA audit, when asked by a TIGTA auditor who had “sanctioned” the four criteria listed in the Shafer email, Ms. Paz stated that “[n]o one in the EO management chain sanctioned the use of the four criteria.”<sup>372</sup>

To the contrary, the criteria listed in the Shafer email stirred up both questions and concerns among IRS officials in Washington. On June 6, 2011, Determinations head Cindy Thomas sent an email to Steven Bowling, manager of the group handling the Tea Party cases, indicating that questions had been raised about the criteria; she also expressed a willingness to

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<sup>369</sup> For allegations that Washington politicians pressured the IRS to scrutinize Tea Party groups, see, e.g., Linchpins of Liberty v. Internal Revenue Service, Case No. 1:13-cv-00777 (D.D.C. filed May 29, 2013), <http://media.aclj.org/pdf/second-amended-complaint-filed-redacted.pdf>.

<sup>370</sup> See, e.g., 2/25/2010 email from Jack Koester to John Shafer, “Case # [REDACTED BY IRS],” IRSR0000195549 - 554, at 553 (indicating that it was a screener in Cincinnati, Jack Koester, who first identified an applicant using the Tea Party name and sent his manager, Mr. Shafer, an email asking how he should handle the case); 6/2/2011 email from John Shafer to Cindy Thomas, “Tea Party Cases – NEED CRITERIA,” PSI-IRS-09-000048 (indicating the screeners identifying the Tea Party cases had devised their own search terms and selection criteria).

<sup>371</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). For example, Patriot Majority USA, a 501(c)(4) group that began operation in 2010, used the word “Patriot” in its name, but supported views and candidates affiliated with the Democratic Party. In the 2012 election cycle, the Center for Responsive Politics characterized it as one of the largest spending Democratic-leaning 501(c)(4) groups. See “2012 Outside Spending, by Group: Non-Disclosing Groups,” prepared by Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>. For more information about the Patriot Majority USA, see the Report section on Evaluating Campaign and Social Welfare Activities, below.

<sup>372</sup> 11/19/2012 email from Holly Paz to Troy Paterson, “Responses,” IRSR0000188490 - 493, at 490.

change the criteria and a need to get official guidance on what selection criteria should be used to ensure consistent treatment of the cases. Ms. Thomas wrote:

“Holly [Paz] sent an email and asked questions about criteria being used to identify cases as ‘tea party cases.’ The D.C. office thinks the criteria being used may be resulting in over-inclusion. [REDACTED BY IRS]. My response was that we have no problem including or excluding any type of case, as long as they come up with the criteria so we can provide it to the Screening Group. And, it doesn’t matter what the cases are called or how they are grouped, EOD still needs guidance to ensure consistency.”<sup>373</sup>

A week later, on June 14, 2011, Ms. Thomas sent an email to Steven Bowling about an upcoming meeting to discuss the selection criteria for Tea Party cases:

“Discussion probably won’t be about specific cases but more of a general discussion about criteria for determining the cases that are in this group, figuring out if there are like kinds that can be grouped into buckets, changing the label we have assigned to these cases, i.e., tea party cases, to something that is more descriptive for the wide net we are using to capture these cases (all cases included in the net are not tea party cases), etc.”<sup>374</sup>

**Changing Case Label and BOLO Description.** On June 29, 2011, Lois Lerner, EO head, convened a meeting of senior EO staff in Washington, D.C. to discuss the Tea Party cases. Participants included Ms. Lerner, Ms. Paz, Mr. Hull, Michael Seto, Hilary Goehausen, Justin Lowe, and Elizabeth Kastenber, with Ms. Thomas participating by telephone from Cincinnati.<sup>375</sup> A briefing paper prepared in anticipation of the meeting described the category of cases as “advocacy” cases instead of “Tea Party” cases, while also including the criteria listed in the Shafer email.<sup>376</sup> The briefing paper also noted that two “sample” cases had been transferred to EOT, and a total of about 100 cases had been identified by the Determinations Unit.<sup>377</sup>

Ms. Thomas told the Subcommittee that, during the meeting, Ms. Lerner expressed concern about using the phrase “Tea Party” in the BOLO lists to describe the cases that required additional review.<sup>378</sup> According to Ms. Thomas, Ms. Lerner said that she knew Tea Party organizations weren’t being singled out, but the term still needed to be changed since it could be misperceived by others.<sup>379</sup> According to Ms. Paz, Ms. Lerner directed that the cases be referred to in the future as “advocacy cases,” rather than “Tea Party” cases.<sup>380</sup> Ms. Thomas told the

<sup>373</sup> 6/6/2011 email from Cindy Thomas to Steven Bowling, “[REDACTED BY IRS],” PSI-TIGTA-03-000156.

<sup>374</sup> 6/14/2011 email from Cindy Thomas to Steven Bowling, “C3 AND C4 APPLICATIONS BRIEFING,” IRSR0000440089.

<sup>375</sup> Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Cindy Thomas, IRS (11/13/2013).

<sup>376</sup> 6/27/2011 email from Justin Lowe to Holly Paz, “Briefing Paper on c3/4 Advocacy Orgs,” prepared by staff for Lois Lerner, PSI-TIGTA-03-000165.

<sup>377</sup> Id.

<sup>378</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also 5/14/2013 TIGTA Audit Report, at 30 (“Criteria changed ... based on the concerns the Director, EO, raised in June 2011.”).

<sup>379</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>380</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz also told the Subcommittee that when she first learned that the relevant BOLO used by the screeners listed “Tea Party,” she found it surprising and told Lois Lerner about it as soon as she could. Id.

Subcommittee that she agreed with Ms. Lerner and thought “that makes sense.”<sup>381</sup> Ms. Paz said that during the discussion, various participants explained that the Determinations Unit had not been looking just at Tea Party groups, even though that was the phrase used in the BOLO, and agreed the focus should be on all groups involved with campaign activity.<sup>382</sup>

Ms. Thomas told the Subcommittee that, in response to the June meeting, she revised the BOLO entry flagging the cases, and on July 5, 2011, Ronald Bell, the keeper of the BOLO lists, distributed the revised version.<sup>383</sup> The new description, which appeared in the Emerging Issues section, omitted any mention of the Tea Party and instead described the cases as follows:

“Advocacy Orgs[:] Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4).”<sup>384</sup>

The BOLO indicated that covered cases should be forwarded to “Group 7822,” and identified Mr. Bell as the case coordinator.<sup>385</sup>

The revised description did not please everyone. EO screener Gary Muthert told the Subcommittee that, because the new BOLO entry used much broader terms than the prior version, it no longer offered useful search terms to conduct electronic reviews of incoming applications; instead he had to look at each application and determine whether the applicant was engaged in political advocacy or campaign activities.<sup>386</sup>

**Ongoing Delays.** In Cincinnati, despite the focus by senior EO management on changing the case label and BOLO description, the advocacy cases continued to sit idle through the summer and fall of 2011, with no EOT guidance about how they should be resolved. The number of cases also continued to increase, reaching 160 cases by the fall.<sup>387</sup> Ms. Thomas and Mr. Bell continued to ask EOT in Washington, D.C. for guidance on the cases.

On July 19, 2011, Holly Paz sent an email outlining a plan for processing the cases:

“Lois would like to discuss our planned approach for dealing with these cases. We suspect we will have to approve the majority of the c4 applications. Given the volume of applications and the fact that this is not a new issue (just an increase in frequency of the issue), we plan to [have] EO Determinations work the cases. However, we plan to have

<sup>381</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Two EO employees told the Subcommittee that they did not understand why using “Tea Party” was a bad idea. Subcommittee interviews of Hilary Goehausen (12/13/2013) and Carter Hull (11/19/2013).

<sup>382</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>383</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also 5/14/2013 TIGTA Audit Report, at 35. This change was made nearly two years before the TIGTA report was issued.

<sup>384</sup> 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 - 552, at 547. The revised language was promptly put into effect. See, e.g., 7/15/2011 email from Laurice Ghougasian to Michael Seto, “July SCRs due 07/22/11,” IRSR0000159751 - 752 (Ms. Ghougasian wrote: “Should we reassign the ‘Tea Party’ SCR [Significant Case Report] to Hilary (and change its name)? Thank you.” Mr. Seto responded : “Yes. We should call it ‘political advocacy organization’ henceforth.”).

<sup>385</sup> 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 – 552, at 547.

<sup>386</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>387</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).



EO Technical compose some informal guidance re: development of these cases (e.g., review websites, check to see whether org is registered with FEC, get representations re: the amount of political activity, etc.) EO Technical will also designate point people for Determs to consult with questions. We will also refer these organizations to the Review of operations for follow-up in a later year.”<sup>388</sup>

This email was written about 18 months after the first Tea Party case was flagged by the EO screeners, and six months after Ms. Lerner wrote that the Cincinnati office “should probably NOT” handle the cases.<sup>389</sup> It indicates that, even then, neither the EOT nor the Determinations Unit in Cincinnati had an established process or clear guidance as to how to handle those cases.

Two months later, in September 2011, Holly Paz and Sharon Light, senior EOT personnel based in Washington, happened to be in the Cincinnati office, and Ms. Thomas shared with them an application filed by an advocacy group and asked how to handle it.<sup>390</sup> Ms. Light reviewed the application and determined that it could be approved.<sup>391</sup> Ms. Thomas asked them for help in resolving the growing backlog of advocacy cases, and Ms. Paz offered to assist by having EOT personnel review all of the pending cases to weed out those that did not involve lobbying or campaign activities.<sup>392</sup>

On September 21, 2011, Ms. Paz sent an email to EOT personnel announcing that review effort:

“We have now have over 100 advocacy cases on hold in determs awaiting guidance from EOT/EOG in the form of a list of areas to be developed. Justin [Lowe] has been overseeing Hilary [Goehausen] on this. In meeting with Cindy [Thomas] in Cincy [Cincinnati] last week and looking at some of the cases, it is clear to me that we cast the net too wide and have held up cases that have nothing to do with lobbying or campaign intervention (e.g., org distributing educational material on the national debt). We are tasking Hilary with the task of looking at these cases on TEDs and triaging them – identifying those that clearly are advocacy cases and those that are clearly not.”<sup>393</sup>

Ms. Goehausen told the Subcommittee that, when she was given the assignment, about 160 advocacy cases were pending.<sup>394</sup> According to Ms. Goehausen, she went through the list of advocacy cases in the TEDS system, looked at the “facts and circumstances” of each case, and made comments on each application in a document she provided to the Determinations Unit.<sup>395</sup> Her document listed each case with her comments after each organization’s name.

<sup>388</sup> 7/19/2011 email from Holly Paz to Janine Cook, “Advocacy orgs,” IRSR0000428420.

<sup>389</sup> 2/1/2011 email from Lois Lerner to Holly Paz, “SCR Table for Jan. 2011,” IRSR0000168020 - 023.

<sup>390</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>391</sup> Id.

<sup>392</sup> Id.

<sup>393</sup> 9/21/2011 email from Holly Paz to David Fish and Andy Megosh, “advocacy cases,” IRSR0000010132.

<sup>394</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>395</sup> Id.

Ms. Thomas, the Determinations Unit head, told the Subcommittee that she did not find Ms. Goehausen's list particularly helpful,<sup>396</sup> writing in an email at the time: "Not sure where this leaves us and I'm unclear as to what action is being suggested for some of these cases."<sup>397</sup> Ms. Thomas told the Subcommittee that even after Ms. Goehausen's effort, her team struggled to decipher a confusing set of IRS regulations on how to handle applications involving campaign activity.<sup>398</sup> According to Ms. Goehausen, a few weeks later, Michael Seto, EO Quality Assurance Manager, instructed Ms. Goehausen to rework the document, which she did, but it appears that it was never used by the Determinations Unit to close cases.<sup>399</sup>

Two years later, USAToday published what it claimed was a 2011 IRS list of 160 501(c)(4) organizations that were reviewed by "IRS lawyers in Washington."<sup>400</sup> The title of the published document is "EOD Political Advocacy Cases – Screened by EO Technical 11/16/11." According to the article, while most of the organizations on the list were conservative in nature, at least eleven were on the liberal side of the political spectrum.<sup>401</sup> It is possible that the published document was the list prepared by Ms. Goehausen.<sup>402</sup>

**Cases Transferred to Third Coordinator.** In the late fall of 2011, the advocacy cases awaiting action in the Determinations Unit were transferred again, from Ronald Bell to Stephen Seok, who became the third coordinator of the cases in three years.<sup>403</sup> Ms. Thomas told the Subcommittee that Mr. Bowling put Mr. Seok in charge of the cases instead of Mr. Bell, because Mr. Bowling thought Mr. Seok would be a better leader.<sup>404</sup> Mr. Seok told the Subcommittee that he transferred to IRS Determinations Group 7822 in August of 2011, and when he asked his manager, Steven Bowling, about the cases he'd be handling, Mr. Bowling said he would have an assignment for him later.<sup>405</sup> Mr. Seok told the Subcommittee that he later received an email from Mr. Bowling assigning him the advocacy cases.<sup>406</sup>

According to Mr. Seok, after receiving the email, he met with Mr. Bowling and Ms. Thomas to determine how to develop the cases.<sup>407</sup> He said they discussed creating an "advocacy

<sup>396</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>397</sup> 10/25/2011 email from Cindy Thomas to Theodore Lieber and Michael Seto, "Advocacy Orgs\_Cincinnati.xls," IRS0000000285 - 316, at 288.

<sup>398</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>399</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 4/17/2012 email from Cindy Thomas, IRS, to Nancy Marks and others, IRS, "Advocacy Orgs Guidesheet from EOT and Listing of Cases," IRS0000000285.

<sup>400</sup> "IRS list reveals concerns over Tea Party 'propaganda,'" USAToday, Gregory Korte (9/17/2013), <http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-propaganda/2825003/>.

<sup>401</sup> Id. The liberal groups apparently included the following: Arkansans for Common Sense, Californians for Regulatory Reform, Coffee Party USA, Corporate Accountability Project, Delawareans for Social and Economic Justice, Louisiana Progress Action Fund, Inc., Progress Texas, Progressives United, Inc., and New York Civic Action, Inc.

<sup>402</sup> See "EOD Political Advocacy Cases," prepared by the IRS, IRSR0000063025 - 037 (providing the Subcommittee with a case list in redacted form).

<sup>403</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>404</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>405</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>406</sup> Id. Mr. Seok didn't recall exactly what was in the email, and the Subcommittee was unable to locate it.

<sup>407</sup> Id.

team” to handle the cases, which he would lead.<sup>408</sup> Mr. Seok told the Subcommittee that, in December 2011, he called the first advocacy team meeting to discuss the cases which then numbered around 170.<sup>409</sup> He said that, in January 2012, he also introduced himself by email to the EOT specialists who were assigned to the test cases, Ms. Goehausen and Mr. Lowe, and asked for their technical assistance.<sup>410</sup> Mr. Seok told the Subcommittee, when asked, that he thought most of the advocacy cases assigned to him were conservative groups, but wasn’t certain.<sup>411</sup> Mr. Seok said that he wasn’t concerned about the type of cases he had; his objective was to work all of the cases in the inventory, as he did when he worked credit counseling cases, his previous assignment.<sup>412</sup>

## F. Processing Applications from Liberal Groups

While the TIGTA audit report provided systematic information about IRS treatment of conservative groups, comparative information about IRS treatment of liberal groups has emerged through isolated IRS documents, liberal organization complaints, and media reports suggesting liberal groups encountered many of the same IRS processing problems as conservative groups.<sup>413</sup>

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<sup>408</sup> Id.

<sup>409</sup> Id. Mr. Seok said that the team members were taken from different groups around the IRS.

<sup>410</sup> Id. See also 1/31/2012 email from Stephen Seok to Hilary Goehausen and Justin Lowe, “Advocacy team in EOD,” IRSR0000011217 - 218 (Mr. Seok wrote: “Hello, Justin and Hilary, My name is Stephen Seok in Group 7822 in Cincinnati. Steve graciously put me in charge of the Advocacy Team recently formed in EOD. As you are our contacts in EOT, I would like to introduce myself to you. So far, we are in the stage of developing cases and forging template questions and developmental guidance. Once they are done, I would like to send them to you for your input and feedback. Please let me know that is ok with you.”).

<sup>411</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>412</sup> Id.

<sup>413</sup> See, e.g., 6/5/2012 IRS analysis of 501(c)(4) advocacy cases, PSI-IRS-37-000004 – 19, at 011-012 (listing 24 progressive advocacy cases reviewed by the IRS, some of which took six months or longer to resolve); “Does the IRS really have it in for tea party groups?” Colorado Independent, Teddy Wilson (3/28/2012), <http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups> (describing conservative and progressive groups in Texas experiencing application delays and intrusive questions); “IRS Sent Same Letter to Democrats That Fed Tea Party Row,” Bloomberg News, Julie Bykowitz and Jonathan Salant (5/14/2013), <http://www.bloomberg.com/news/2013-05-15/irs-sent-same-letter-to-democrats-that-fed-tea-party-row.html> (describing intrusive letters sent to Progress Texas and Clean Elections Texas); “IRS approved liberal groups while Tea Party in limbo,” USAToday, Gregory Korte (5/15/2013), <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/> (indicating Bus for Progress, Progress Florida, and Action for a Progressive Future experienced delays of 9 to 18 months and at least one group received “intrusive questions” before obtaining tax exempt status); “Nonconservative Groups Say IRS Scrutinized Them, Too,” National Public Radio, Brian Naylor (5/19/2013), <http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too> (describing progressive groups experiencing application delays and intrusive questions, including Progress Texas and the Chicago News Cooperative); “Dems unhappy IRS screened for progressive groups, upset investigator didn’t tell lawmakers,” Associated Press, Stephen Ohlemacher and Henry Jackson (6/24/2013), <http://news.yahoo.com/dems-unhappy-irs-screened-progressives-071941069.html> (describing BOLO entries for liberal groups in 15 IRS BOLOs); “In IRS Scandal, Spat Over Level of Scrutiny,” Wall Street Journal, John McKinnon (6/25/2013) (describing a liberal group, Alliance for a Better Utah, whose affiliate experienced intrusive questions and a two-year delay in processing a still pending application); “IRS Scrutiny Went Beyond the Political,” New York Times, Jonathan Weisman (7/4/2013), [http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&_r=0) (describing delays and intrusive questions directed to two liberal groups seeking tax exempt status, Minnesota Break the Bonds, a group promoting Palestinian rights, and Chi Eta Phi, a black nurses’ sorority advocating social change); “IRS scrutinized some liberal groups,” Politico, David Nather

To determine whether liberal groups had, in fact, experienced the same mismanagement as conservative groups, the Subcommittee examined how the IRS processed applications filed by groups associated with three nationwide, liberal organizations: ACORN, Occupy, and Emerge America, and by groups with “Progressive” or “Progress” in their names. The evidence shows that some of those liberal groups underwent the same types of inappropriate IRS screening, lengthy EOT reviews, intrusive questions, and years-long delays as some conservative groups.

### (1) ACORN

As explained earlier, “ACORN” stands for Association of Community Organizations for Reform Now, a decades-old, openly liberal organization that advocated for the poor, especially in the area of housing. At its peak, it claimed more than 1,200 community-based affiliates. On November 2, 2010, the national association declared bankruptcy, leading to the termination of the ACORN network of groups. When it appeared that some ACORN affiliates were reorganizing under new names, questions arose about whether those successor organizations might be disqualified from tax exempt status, in part due to issues involving political advocacy or campaign activities. Like Tea Party groups, applications filed by ACORN successor groups were singled out for heightened scrutiny, resolution of the applications was suspended pending EOT review of the issues, and the ACORN successor cases sat idle for more than three years awaiting final disposition.

**First ACORN Case Flagged.** The first ACORN successor cases were flagged by the IRS in February 2010, the same month as the first Tea Party case. On February 26, 2010, an IRS ROO examinations specialist wrote:

“There is a lot of internet traffic about ACORN reinventing itself. [REDACTED BY IRS] office is now occupied by [REDACTED BY IRS]. They have formed a new corporation and will be applying for exemption under 501(c)(4). ... These cases probably should be handled by the TAG group if they can be identified.”<sup>414</sup>

He and others noted that an earlier ACORN successor group had been the subject of a Sensitive Case Report.<sup>415</sup>

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(7/22/2013), <http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html> (indicating Progress Texas’ 501(c)(4) application had been subjected to intrusive questions and an 18-month delay before the group obtained tax exempt status); “New Records: IRS Targeted Progressive Groups More Extensively Than Tea Party,” Think Progress website, Josh Israel and Adam Peck (4/23/2014), <http://thinkprogress.org/politics/2014/04/23/3429722/ire-records-tea-party/> (providing a chart showing that IRS BOLOs issued between August 2010 and April 2013, “included more explicit references to progressive groups, ACORN successors, and medical marijuana organizations than to Tea Party entities”).

<sup>414</sup> 2/26/2010 email from Richie Heidenreich to Nancy Todd, “Investigation,” IRSR0000458439 - 447, at 441. As explained earlier, “ROO” stands for “Review of Operations,” and refers to an IRS review of an existing tax exempt organization to gauge its compliance with the tax code. Seven months earlier, in August 2009, Congressman Darrell Issa, Chairman of the House Government Reform Committee, wrote to the IRS voicing concerns regarding ACORN’s tax-exempt status due to alleged violations of the tax code and Federal Election Campaign Act. See 8/11/2009 letter from Committee Chairman Issa to the IRS, IRSR0000469223 - 228.

<sup>415</sup> See 3/28/2010 email from Cindy Thomas to Robert Choi and others, “ACTION by 12noon 3/29/10: Investigation,” IRSR0000458456 (attaching a copy of the sensitive case report).

By March 2010, the examiner's email had been forwarded to Steven Grodnitzky, then acting head of the EO Technical Unit, who forwarded it to the head of the EO Rulings and Agreements Unit, Robert Choi, with this note:

"Just a heads up that it appears that ACORN is morphing into new organizations. According to Cincy [Cincinnati], there was one organization that came in for exemption, but they believe it was closed FTE [Failure to Establish]. Will keep you updated as to new developments in this area. May cause some press attention."<sup>416</sup>

A few days later, Mr. Choi indicated to his EO colleagues that he was scheduled to meet with IRS officials from headquarters in Washington, D.C., to discuss the ACORN cases. In an email dated March 26, 2010, Mr. Choi wrote to Determinations head Cindy Thomas and others: "I need a summary from Cincy regarding this issue of ACORN morphing into new entities. I have a meeting Monday afternoon, 3/29, to discuss this issue with HQ folks."<sup>417</sup> Jon Waddell, a manager in the Determinations Unit, responded to Mr. Choi that no ACORN successor applications had recently been approved or denied, but managers and screeners had been told that ACORN groups were changing their names and they should be on the lookout for successor organizations.<sup>418</sup>

**ACORN BOLO Entry.** Five months later, in August 2010, an ACORN entry was included in the first BOLO issued by the Determinations Unit in Cincinnati asking EO employees to be on the lookout for certain applications. That BOLO included entries for both conservative and liberal groups; a section called "Emerging Issues" contained the entry for "Tea Party" groups, while a separate section called "BOLO List" (later renamed "Watch List") contained the entry for "ACORN successor" groups.<sup>419</sup> The entry describing the ACORN cases has been largely redacted by the IRS so that all that is disclosed in the BOLO is as follows: "ACORN successors, Following the breakup of ACORN [REDACTED BY IRS]."<sup>420</sup>

IRS screeners used the BOLO list to conduct searches for the listed groups, including ACORN successor organizations. Gary Muthert, a senior IRS screener, told the Subcommittee that, as he did with the Tea Party groups, he ran electronic searches for applications filed by ACORN successor groups.<sup>421</sup> Mr. Muthert told the Subcommittee that he ran searches for ACORN successor organizations even before the August 2010 BOLO, because he had received

<sup>416</sup> 3/24/2010 email from Steven Grodnitzky to Robert Choi, "Investigation," IRSR0000458430 - 432. "Failure to Establish" means that the group failed to provide the information needed to establish its tax exemption.

<sup>417</sup> 3/26/2010 email from Robert Choi to Cindy Thomas and others, "ACTION by 12noon 3/29/2010: Investigation," IRSR0000458439. A week earlier, on March 21, 2010, the ACORN Board of Directors had met and approved steps to close its operations, amid media speculation about ACORN successor groups. See, e.g., ACORN Board statement reprinted in "ACORN Board Approves Shutdown," National Public Radio, Frank James (3/22/2010), [http://www.npr.org/blogs/thetwo-way/2010/03/acorn\\_board\\_approves\\_groups\\_sh.html](http://www.npr.org/blogs/thetwo-way/2010/03/acorn_board_approves_groups_sh.html); "Acorn Disbanding, Housing Offshoot to Remain," Wall Street Journal, James Hagerty and Brody Mullins, (3/23/2010), <http://online.wsj.com/news/articles/SB10001424052748704117304575138161112658930>.

<sup>418</sup> 3/26/2010 email from Jon Waddell to Cindy Thomas and Sharon Camarillo, "ACTION BY 12noon 3/29/10: Investigation," IRSR0000458456 - 459, at 456-457.

<sup>419</sup> August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 509 (for Tea Party) and 513 (for ACORN); August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196.

<sup>420</sup> Id.

<sup>421</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

an earlier email alert asking screeners to be on the lookout for those organizations.<sup>422</sup> Mr. Muthert told the Subcommittee that he recalled personally finding about two ACORN successor cases which he sent to the specialty group handling them.<sup>423</sup> Mr. Muthert also observed that ACORN had been featured in an internal IRS presentation as a “watch for example” which included a picture of a smiling acorn.<sup>424</sup>

The BOLOs used by the EOD Unit continued to carry the ACORN successor entry for nearly two years until approximately June 2012, when multiple entries were consolidated in the Emerging Issues section of the BOLO and were referred to by this single entry: “501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit).”<sup>425</sup> When that new entry was included in the June 2012 BOLO for groups involved with campaign activity, the separate ACORN entry was eliminated and ACORN successor groups were intended to be included in the new one.

**ACORN Selection Criteria.** Just as they had for the Tea Party cases, EOD personnel in the Cincinnati office created selection criteria to identify the cases that should be included within ACORN successors category. In October 2010, a determinations manager, Jon Waddell, advised that he had identified two applications for ACORN successor groups based in Pennsylvania that were in addition to two pending applications for ACORN successor groups in New York.<sup>426</sup> He recommended issuing an email alert asking EO personnel to be on the lookout for similar cases, and proposed adding the following criteria to the BOLO Watch list section for ACORN:

1. “The name(s) Neighborhoods for Social Justice or Communities Organizing for Change.
2. Activities that mention Voter Mobilization or the Low-Income/Disenfranchised.
3. Advocating for Legislation to Provide for Economic, Healthcare, and Housing Justice for the poor.
4. Educating Public Policy Makers (i.e. Politicians) on the above subjects.”<sup>427</sup>

The proposed criteria were very similar in style and in their use of organization names and political views to the criteria used to identify the Tea Party cases.<sup>428</sup> John Shafer, the

<sup>422</sup> Id.

<sup>423</sup> Id.

<sup>424</sup> Id. See also undated “Heightened Awareness Issues,” prepared by IRS, IRSR0000195600 - 617, at 613-614 (containing the cartoon picture of a smiling acorn and referencing the ACORN successor groups issue).

<sup>425</sup> See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013252. See also 5/17/2012 email from Holly Paz to Lois Lerner, Nancy Marks, Judith Kindell, Sharon Light, and Cindy Thomas, “Potential revised BOLO language,” IRS0000000492 (Ms. Paz wrote: “I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to ACORN successors and Occupy groups[:]).

501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention or excess private benefit to organizations or individuals.”).

<sup>426</sup> 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, “BOLO Tab Update,” IRSR0000410433 – 434.

<sup>427</sup> Id.

<sup>428</sup> Compare with 6/6/2011 email from John Shafer to Cindy Thomas, “Tea Party cases – NEED CRITERIA,” PSI-IRS-09-000048 (providing the following selection criteria for Tea Party cases:

manager of the Screening Group, forwarded the proposed ACORN criteria to the IRS screeners and asked them to be on the lookout for the ACORN successor cases.<sup>429</sup>

**ACORN EOT Review.** Like the Tea Party cases, once the ACORN cases were identified, action on the applications was delayed pending receipt of guidance from the EO Technical Unit in Washington D.C. on how to handle the cases. Carter Hull, the EOT specialist who handled the Tea Party cases, also handled the ACORN cases.<sup>430</sup> He told the Subcommittee that he did not know why he had been designated as the EOT contact person for the ACORN cases.<sup>431</sup> According to Mr. Hull, his only involvement with the ACORN cases was that he received a phone call from someone asking about an ACORN successor case, and advised treating the group as a new organization.<sup>432</sup> Ronald Bell, a determinations specialist who, from November 2010 to November 2011, served as the coordinator for the Tea Party cases, told the

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- “1. ‘Tea Party,’ ‘Patriots’ or ‘9/12 Project’ is referenced in the case file.
  2. Issues include government spending, government debt and taxes.
  3. Educate the public through advocacy/legislative activities to make America a better place to live.
  4. Statements in the case file that are critical of how the country is being run.”).

<sup>429</sup> See 10/8/2010 email from John Shafer, IRS, to Gary Muthert and others, IRS, “FW: BOLO Tab Update,” IRSR0000410433; 10/8/2010 email from Sharon Camarillo, IRS, to John Shafer, IRS, “BOLO Tab Update,” IRSR0000410433 - 434 (including the ACORN successor selection criteria and asking: “John: Please ask your screeners to be on the lookout for these cases.”). The Minority Staff’s Dissenting Views suggest that ACORN successor groups were placed on the BOLO list because of concerns about illegality, rather than advocacy activities, writing that the groups were “not flagged for their political beliefs, but rather because of a specific association to a group known to have legal problems.” Dissenting Views at 204. That assertion, however, is at odds with the actual selection criteria used by the IRS to flag ACORN successor cases; those criteria make no mention of illegality or fraud, and instead focus exclusively on the successor groups’ names and political views. Attributing the flagging of ACORN successor groups as solely the result of IRS concerns about illegality or fraud is also inconsistent with the actions taken by the IRS in June 2012, to combine the ACORN, Occupy, and Tea Party cases under a single, new Emerging Issues entry focused on indicators of campaign activity.

<sup>430</sup> See 11/26/2010 email from Holly Paz, IRS, to Cindy Thomas, IRS, “ACORN Successor,” IRSR0000054942 - 944 (Ms. Paz wrote: “I apologize for the delay – I thought I had already responded but, in going through the emails today, I realized I had not. Please work with Chip Hull on these cases.”); Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>431</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). A year later, in July 2011, Mr. Hull told at least one EO determinations specialist that he was no longer handling ACORN cases. That specialist sent an email to a colleague as follows: “I am working a case that has a board member who is also serving on the board of an ACORN organization. Per the instructions on the BOLO list and your instruction, I called Chip Hull in EO Technical for guidance in developing the case. Mr. Hull informed me that he should not be on a list as contact person for ACORN related organizations. While he previously provided guidance to a Determ manager re: ACORN successors, his manager informed him that he should not be doing research for our cases. Mr. Hull requested that his name be removed from the BOLO list as a contact person.” 7/11/2011 email from Melissa Conley to William Angner, “BOLO List Issue,” IRSR0000054946. The next month, in August 2011, his Tea Party cases were transferred to a new EOT specialist, Hilary Goehausen, as explained earlier, but his name continued to be listed as the contact for ACORN cases until June 2012, when the ACORN cases were folded into the category of tax exempt groups with campaign activities. See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013252. See also 5/17/2012 email from Holly Paz to Lois Lerner and others, “potential revised BOLO language,” IRS0000000492 (recommending a revision of the BOLO entry for advocacy groups in part to eliminate “the separate references to ACORN successors and Occupy groups”).

<sup>432</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that he could not recall who had contacted him about the ACORN case or when. Mr. Hull also said that he had heard of ACORN, but was unaware of the screening criteria used to identify ACORN cases.

Subcommittee that he also worked on ACORN cases, including with Mr. Hull, and knew other people who had as well.<sup>433</sup>

The Determinations Unit in Cincinnati waited years for ACORN EOT guidance, just as it waited years for Tea Party guidance. As with the Tea Party cases, EO senior management explicitly suspended resolution of the ACORN cases pending issuance of EOT guidance on them. In June 2010, for example, Steven Grodnitzky, then acting head of EO Technical, wrote to Determinations head Cindy Thomas about the ACORN-related cases:

“Just want to make sure we are all on the same page as to the ACORN-related cases. We should not be developing or resolving them at this point. I had spoken to Rob [Choi] about a successor to one of the ACORN orgs in NY and he mentioned that some activity is going on in the TEGE Commissioner’s office with respect to ACORN and to hold off.”<sup>434</sup>

Internal IRS documents confirm that limited action was taken on the ACORN cases while awaiting EOT guidance. A July 2010 document, for example, reported that one ACORN group’s application had been awaiting guidance from EO Technical for over 60 days.<sup>435</sup> Emails exchanged among EO personnel three months later, in October 2010, described two more pending ACORN successor cases that were sitting idle in Cincinnati, awaiting EOT guidance.<sup>436</sup> On March 8, 2011, one year after the ACORN successor cases were first flagged, Donna Abner, in Quality Assurance, sent this email to her team:

“Today I received a call from Jon Waddell regarding specifically Acorn related cases and Tea Party cases. In brief, guidance from EO Technical is pending and EO Technical has advised that no determination letters be issued – favorable or unfavorable – until guidance is received.”<sup>437</sup>

This email shows that ACORN and Tea Party cases were being handled by the same IRS personnel in the same way.

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<sup>433</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014). See also 5/13/2012 email from Ronald Bell to Carter Hull, “ACORN Successor org’s,” IRSR0000054963 (Mr. Bell wrote: “Hi Chip – I’ve got a case that I believe is an acorn successor org. I googled the name of the org and that is where several websites (such as the capital research center) indicate that it is an acorn successor. The BOLO list states to contact you.”).

<sup>434</sup> 6/8/2010 email from Steven Grodnitzky to Cindy Thomas and Donna Abner, “High Profile orgs,” IRSR0000054937.

<sup>435</sup> See 7/2/2010 “June Briefing Notes, Group 7830,” prepared by the IRS, IRSR0000054918 - 923, at 920 (“[o]ne case exceeds 60 days which is [REDACTED BY IRS but previously identified as ACORN successor organization]. We are awaiting guidance from EO Technical on next action with this case.”).

<sup>436</sup> See October/November 2010 email chain among Sharon Camarillo, Cindy Thomas, Holly Paz and others, “ACORN Successor,” IRSR0000054942 - 944; 7/15/2010 email from Cindy Thomas to Robert Choi, “Potential Successor to Acorn,” IRSR0000054948 (“It appears as though we have another case that may be a potential successor to Acorn. Refer to Jon’s email below. We placed the other case in suspense pending guidance from the Washington Office and are doing so with this case.”).

<sup>437</sup> 3/8/2011 email from Donna Abner to her Quality Assurance team, “politically sensitive cases,” IRSR0000453023.



**Proposed ACORN Denials.** Almost two years after the first ACORN case was flagged, in January 2012, Ms. Abner proposed denying tax exempt status for one of the ACORN successor organizations. She wrote: “[B]ecause this is the first such letter we’ve prepared I’d like to have someone in EO Technical review before it is issued. (I also think that this might receive some attention).”<sup>438</sup>

Ms. Abner submitted the proposed denial to EOT in February 2012, and provided the case file in March.<sup>439</sup> In March 2012, EOT advised that the ACORN “denial need[ed] additional facts to support the legal conclusion that the organization doesn’t qualify as a (c)(3).”<sup>440</sup> In response, Ms. Abner revised the denial.<sup>441</sup>

On April 6, 2012, Holly Paz, by then Director of the Rulings and Agreements Unit, indicated that EOT needed to review the revised denial.<sup>442</sup> That same day, Ms. Abner asked Michael Seto, then EOT Acting Manager, for an estimate on how long the review would take, in particular because the Determinations Unit wanted to issue a second ACORN denial and wanted EOT’s advice before proceeding.<sup>443</sup> Mr. Seto responded that he would reassign the case to another EOT specialist whose review would take about two weeks.<sup>444</sup> In fact, the review took months, and the case remained unresolved for more than another year.

In July 2012, according to press reports, a group called Cause of Action urged review of two ACORN successor groups in Texas, the Texas Organizing Project and the Texas Organizing Project Education Fund, for what it said was “a scheme to collect donations and divert them for political use” to support Democratic candidates for office.<sup>445</sup> One article stated that the Texas groups provided the third occasion in which Cause of Action had asked for ACORN successor

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<sup>438</sup> 1/30/2012 email from Donna Abner to David Fish and Michael Seto, “Review requested,” IRSR0000458064 - 065. Ms. Abner also noted: “This case has a March 2010 control date,” which suggests it had been pending for nearly two years. See also proposed ACORN denial letters, with IRS redactions: 1/30/2012 email from Donna Abner, IRS, to David Fish and Michael Seto, IRS, “Review requested,” IRSR0000457889 - 899.

<sup>439</sup> See 4/6/2012 email from Donna Abner to Michael Seto, with a copy to Holly Paz, “Denial – advocacy,” IRSR0000617103.

<sup>440</sup> 3/26/2012 email from Michael Seto to Donna Abner, “Review requested,” IRSR0000458064.

<sup>441</sup> The IRS did not supply a copy of the revised denial, citing Section 6103 barring disclosure of taxpayer information.

<sup>442</sup> 4/6/2012 email from Holly Paz to Donna Abner and Michael Seto, “Denial – advocacy,” IRSR0000617102 (“I would like EOT to look at this proposed denial Donna just sent.”).

<sup>443</sup> 4/6/2012 email from Donna Abner to Michael Seto, “Denial – advocacy,” IRSR0000617103 (“I want to follow up on the status of the review of the Acorn successor denial (originally forwarded denial letter early February and copy of case March). Determs has another proposed denial for an almost identical Acorn successor. So, the decision on the first will help with the second. Any idea on when we might receive feedback?”).

<sup>444</sup> 4/6/2012 email from Michael Seto to Donna Abner, “Denial – advocacy,” IRSR0000617102.

<sup>445</sup> “Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch,” Fox News, (7/19/2012), <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/>; “ACORN Political Money Laundering,” *Front Page Magazine*, Matthew Vadum (7/26/2012), <http://www.frontpagemag.com/2012/matthew-vadum/acorn-political-money-laundering-in-texas/>. See also “Texas Organizing Project says it’s ‘not ACORN with a new name,’” *Dallas Morning News*, Kim Horner (7/23/2010, updated 1/18/2011), <http://www.dallasnews.com/news/community-news/coppell/headlines/20100723-texas-organizing-project-says-it-s-not-acorn-with-a-new-name.ece>. TIGTA’s auditors took note of the 2012 Fox News article. See 7/23/2012 email from Troy Paterson to Thomas Seidell and others, “Article on Political Advocacy,” TIGTA Bates No. 010433 – 434 (referencing the Fox News article).

groups to be investigated.<sup>446</sup> The IRS and TIGTA declined at the time to discuss either organization.<sup>447</sup>

In October 2012, Jon Waddell, an IRS determinations manager, noted in a monthly briefing report that two ACORN cases with proposed denials were still pending at EOT:

“These are advocacy cases (similar to Tea Parties) where we have proposed denial and QA [Quality Assurance] has agreed. There are two cases that are involved and both currently reside in EO Tech for review of the denial letters – cases have been in EO Tech for at least six months. At some point (months from now), the cases will ultimately return to the group to issue the denial letters and communicate with the applicants. When the denial letters are ultimately issued, media attention will almost certainly follow.”<sup>448</sup>

Mr. Waddell’s report directly compared the ACORN and Tea Party cases, both of which were then undergoing extended EOT review.

At another point in 2012, at least one ACORN case was included in the so-called “bucketing” effort, described further below, which was a 2012 effort by the IRS to process a large number of the advocacy cases quickly.<sup>449</sup> But in March 2013, at least two ACORN cases were still pending, awaiting guidance from EOT on the proposed denials.<sup>450</sup> When the IRS received a new application from still another ACORN successor organization in March 2013, this summary was prepared regarding the pending ACORN cases:

“I’m elevating a case identified in Vicki’s group related to the political advocacy area. While the development issues within Vicki’s group are straightforward, any type of ruling on this case could be impactful. Below is the background on the Acorn-related cases:

1. Acorn-related cases were previously reflected on the BOLO and subsequently folded into the political advocacy category over a year ago.
2. Currently, we have two proposed denials under review in D.C. involving Acorn-related cases. One is assigned to Ed Pomerantz and the other to April Garrett[.]

<sup>446</sup> See “Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch,” Fox News, (7/19/2012), <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/>. In August 2012, Cause of Action released a list of what it alleged were 174 ACORN successor groups across the country. See “174 Hidden ACORN Chapters Still Exist,” Cause of Action website (8/27/2012), <http://causeofaction.org/174-hidden-acorn-chapters-still-exist/>.

<sup>447</sup> “Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch,” Fox News, (7/19/2012), <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/>.

<sup>448</sup> “Area 1 Monthly Briefing, October 2012,” prepared by Jon Waddell, IRS, IRSR0000167847 - 851, at 851.

<sup>449</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013); 3/21/2013 email from Cindy Thomas to Sharon Light and David Fish, “Advocacy Case – Congressional Inquiry,” IRSR0000444264 (identifying case “like the Acorn successor cases” as “a bucket 3 case”).

<sup>450</sup> See 3/26/2013 email from Jon Waddell to Cindy Thomas, “Sensitive Case,” IRSR0000054977.

3. These cases contain the same characteristics as other identified political advocacy cases as the applications contain instances of partisan political activity and excessive legislative and mobilization activities precluding approval under c(3).<sup>451</sup>

This email indicates that the IRS viewed the ACORN-related cases as involving the “same characteristics as other identified political advocacy cases.”

In April 2013, Rulings and Agreements Director Holly Paz indicated that the EOT review of the ACORN cases continued unabated: “These cases are still going back and forth between the initiator and reviewer. I have asked Mike to get these cases to Virginia ASAP for a fast track review so we can reach a decision.”<sup>452</sup>

**Over Three Year Delay.** When Determinations head Cindy Thomas was asked about the status of the ACORN successor cases during her Subcommittee interview in November 2013, she indicated that the proposed denial letters still had not been sent and the cases were still pending more than three years after the ACORN successor applications were first submitted to the IRS in February 2010.<sup>453</sup> The evidence shows that those ACORN cases experienced the same inappropriate selection criteria focused on their names and political views, the same EOT reviews, and the same delays and mismanagement as the Tea Party cases being considered at the same time.

## (2) Occupy

A second example of IRS treatment of liberal groups involves applications filed by groups associated with “Occupy.” “Occupy,” sometimes called “Occupy Wall Street,” has described itself as “a people-powered movement that began on September 17, 2011 in Liberty Square in Manhattan’s Financial District, and has spread to over 100 cities in the United States and actions in over 1,500 cities globally.”<sup>454</sup> Occupy has described its mission as “fighting back against the corrosive power of major banks and multinational corporations over the democratic process, and the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations.”<sup>455</sup> A loose affiliation of organizations using the word “Occupy” in their names began forming across the country in late 2011. The groups were generally viewed as liberal or progressive organizations, sometimes described as having opposing or overlapping interests with the Tea Party.<sup>456</sup> Like Tea Party groups, applications filed by Occupy groups were singled out for heightened scrutiny by the IRS due to advocacy issues, they were identified using

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<sup>451</sup> Id.

<sup>452</sup> 4/2/2013 email from Holly Paz to Cindy Thomas, “Sensitive Case,” IRSR0000054976. See also 5/7/2013 emails between Cindy Thomas and Holly Paz, “Sensitive Case,” IRSR0000444805 (indicating Determinations continued to hold an ACORN case while waiting for EO Examinations to finish its audit).

<sup>453</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>454</sup> “About Occupy Wall Street,” prepared by Occupy Wall Street, <http://occupywallst.org/about/>.

<sup>455</sup> Id.

<sup>456</sup> See, e.g., “A Very Simple Venn Diagram of Where the Tea Party and Occupy Wall Street Agree,” *The Atlantic*, Alexis C. Madrigal (10/14/2011), <http://www.theatlantic.com/politics/archive/2011/10/a-very-simple-venn-diagram-of-where-the-tea-party-and-occupy-wall-street-agree/246687/>.

screening criteria that focused on the groups' names and political views, the applications were subjected to extended EOT review, and resolution of the cases was delayed for years.

**First Occupy Case Flagged.** On January 20, 2012, the first Occupy case was flagged within the IRS by EOD personnel. An email was sent to Determinations head Cindy Thomas under the subject line, "Potential Watch List/BOLO item - Occupy Groups Applying for (c)(3)."<sup>457</sup> Ms. Thomas told the Subcommittee that she first heard about the Occupy organizations when an IRS agent saw the group in the news and elevated the related case to her.<sup>458</sup> She also told the Subcommittee that she wasn't sure at the time whether Occupy organizations were conservative or liberal, but viewed their applications as ones that should be treated in the same manner as other advocacy cases.<sup>459</sup> A few days after the case was flagged, Jon Waddell, a senior EOD manager, advised that he saw the Occupy cases as falling into the same "advocacy cases" category as the Tea Party and ACORN successor cases.<sup>460</sup>

Issues involving the Occupy cases were handled by Steven Bowling, head of Group 7822 which was already handling the Tea Party cases. In an email, Mr. Bowling indicated that he viewed the Occupy cases as falling within the advocacy category, but also expressed confusion over how to alert screeners to be on the lookout for them: "I know we don't want to use the words 'tea party' or 'occupy' but I'm not sure how we could weed out a simple advocacy type organization."<sup>461</sup> This email suggests that, from the initial effort to alert IRS personnel to Occupy applications, EO managers viewed the Occupy cases as comparable to the Tea Party cases. EO personnel debated how to adequately capture the Occupy groups on the BOLO list without referring to them as "Occupy," with one agent noting: "We wouldn't want to miss this one if it comes in so it needs to be pretty clear."<sup>462</sup>

**Occupy BOLO Entry.** In January 2012, a separate entry for Occupy organizations was added to the BOLO in the "Watch List" section. The entry read as follows:

"Occupy Organizations involve organizations occupying public space protesting in various cities, call people to assemble (people's assemblies) claiming social injustices due to 'big money' influence, claim the democratic process is controlled by wall street/banks/multinational corporations, could be linked globally. Claim to represent the

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<sup>457</sup> 1/20/2012 email from Peggy Combs to Cindy Thomas, "Potential Watch List/BOLO item – Occupy Groups Applying for (c)(3)," IRSR0000013419. See also 5/25/2012 email from Peggy Combs to Tyler Chumney, "Watch List Case Identified," IRSR0000013430 - 433, at 432 (Ms. Combs: "Are these cases considered advocacy cases per the BOLO?").

<sup>458</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also "Which 'Occupy' Movements are Seeking, Considering Nonprofit Status?" *Huffington Post* (11/18/2011, updated 11/21/11), [http://www.huffingtonpost.com/2011/11/18/occupy-wilmington-files-f\\_n\\_1097351.html](http://www.huffingtonpost.com/2011/11/18/occupy-wilmington-files-f_n_1097351.html) (discussing efforts by Occupy Las Vegas, Occupy Denver, Occupy Wilmington, and Occupy Portland to obtain nonprofit status).

<sup>459</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>460</sup> 1/24/2012 email from Jon Waddell to Steven Bowling, "Advocacy Cases—Clarification," IRSR00000645603.

<sup>461</sup> 1/20/2012 email from Steve Bowling to Cindy Westcott, "Potential Watch List/BOLO item – Occupy Groups Applying for (c)(3)," IRSR0000013418 - 419.

<sup>462</sup> Id. at 418.

99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy.”<sup>463</sup>

The BOLO entry instructed IRS agents to send any Occupy applications to Group 7822, the same group handling the Tea Party cases.<sup>464</sup>

The January 2012 BOLO also contained a revised entry for “current political issues,” in the Emerging Issues section, which read as follows:

“[C]urrent political issues: Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, Social economic reform/movement.”<sup>465</sup>

In a January 25, 2012 email, Ronald Bell, the keeper of the BOLO lists for the Determinations Unit, wrote to his manager, Steven Bowling, asking why there was a separate Occupy entry: “I thought the Social economic reform in the updated current political issues was our ‘code word’ for the occupy organizations.”<sup>466</sup> Mr. Bell told the Subcommittee that he had met with Mr. Bowling and Stephen Seok about revising the BOLO entry for political issues, and thought that the group had agreed to use “Social economic reform” as a “code” for identifying Occupy cases.<sup>467</sup> Mr. Bowling responded: “I think we can leave it in. Some of the orgs are pushing that other than occupy groups.”<sup>468</sup>

Gary Muthert, a senior EO screening agent, told the Subcommittee that once he received the January 2012 BOLO, he would have been on the lookout for Occupy cases and would have sent any to Group 7822.<sup>469</sup> He said that he didn’t recall receiving any of those cases nor did he recall if he used “Occupy” as a search term.<sup>470</sup> He also noted that he did not know why Occupy had its own separate BOLO entry, and wasn’t simply included in the advocacy issues entry.<sup>471</sup>

In June 2012, at the direction of Lois Lerner and Holly Paz, the BOLO entry for current political issues, which appeared in the Emerging Issues section, was revised to encompass all types of political groups, including Occupy and ACORN, with campaign activity.<sup>472</sup> At that

<sup>463</sup> January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289, at 285.

<sup>464</sup> Id.

<sup>465</sup> Id. at 287.

<sup>466</sup> 1/25/2012 email from Ronald Bell to Steven Bowling, “BOLO,” IRSR0000013187.

<sup>467</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014). Mr. Bell told the Subcommittee that he did not recall the use of any other code words in the BOLO entries.

<sup>468</sup> 1/25/2012 email from Steven Bowling to Ronald Bell “BOLO,” IRSR0000013187.

<sup>469</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>470</sup> Id.

<sup>471</sup> Id.

<sup>472</sup> See 6/14/2012 email from Ronald Bell, IRS, to Tyler Chumney, IRS, “BOLO ALERT 06/13/2012,” IRSR0000013251, attaching “BOLO Spreadsheet 06132012.xls” (Mr. Bell wrote: “Attached is the latest BOLO updates. ... The issue description for **Current Political Issues** located in the Emerging Issue Tab has been revised and the new coordinator is Sharon Light. Watch list issues #2 [REDACTED BY IRS] and #21 ‘Occupy’ Organizations from the last BOLO Alert dated 3-26-12 have been removed and now are to be included in the description for Current Political Issues.”)(emphasis in original). The redacted portion of the email was later disclosed as referring to ACORN-successor groups.

time, the BOLO dropped the separate entry for Occupy cases.<sup>473</sup> From then on, the political issues entry was the sole entry used to identify Occupy as well as other advocacy cases.<sup>474</sup>

**Occupy Applications.** In February 2012, Mr. Bowling assigned the first Occupy case to Stephen Seok, who was then the Tea Party case coordinator, explaining that it was similar to the other “political type cases” he was handling.<sup>475</sup> The IRS received a second Occupy application in May 2012.<sup>476</sup> Ronald Bell, the prior Tea Party coordinator, told the Subcommittee that he also worked on the Occupy cases, which he perceived as involving liberal organizations.<sup>477</sup>

Mr. Seok told the Subcommittee that he helped develop the Occupy case he was assigned.<sup>478</sup> Hilary Goehausen, the EOT specialist who began handling the Tea Party cases in 2011, told the Subcommittee that she was also assigned an Occupy case as part of her work on the advocacy cases.<sup>479</sup> She told the Subcommittee that she did not recall the details of the Occupy case, but would have treated it like any other advocacy case and helped put together development questions for the group.<sup>480</sup> In addition, at least one Occupy case was included in the 2012 so-called “bucketing” effort, described further below, which was an IRS attempt to quickly process a large number of the advocacy cases then pending.<sup>481</sup> In short, the Occupy cases went through the same processing, using the same IRS personnel, as the Tea Party cases.

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<sup>473</sup> Id.

<sup>474</sup> Id. The wording, as indicated earlier, was as follows: “[C]urrent political issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit).” See 6/13/12 BOLO spreadsheet, prepared by IRS, IRS0000013252 – 256, at 254.

<sup>475</sup> 2/29/2012 email from Steven Bowling to Stephen Seok, “BOLO case,” IRSR0000014171 – 174 at 173 - 174 (Mr. Bowling wrote: “We have our first ‘occupy’ type organization. We were thinking that these could be worked by the same agents working the political type cases.”). See also 5/24/2012 email from Tyler Chumney to Peggy Combs, “Watch List Case Identified,” IRSR0000013420 (Ms. Combs wrote: “There is one other ‘Occupy’ case, Steve Bowling just called to let me know this. He also told me it is assigned to Stephen Seok who is developing the case.”).

<sup>476</sup> See 5/24/2012 email from Tyler Chumney, IRS, to Peggy Combs, IRS, “Watch List Case Identified,” IRSR0000014175 - 189, at 177; 7/19/2013 letter from TIGTA to Congressman Sander Levin, at 2, <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf> (noting 0 Occupy organizations in the political advocacy list from May 2010 to May 2012, and two Occupy organizations after May 2012).

<sup>477</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014). The Minority Staff’s Dissenting Views note that the Occupy cases were not included in the IRS list of advocacy cases reviewed by IRS specialists from May 2010 to May 2012. See Dissenting Views at 204-205. The evidence shows, however, that whether or not they appeared on that list, Occupy cases were flagged using a BOLO entry that focused on the groups’ names and political views, were later combined with Tea Party cases under a revised BOLO Emerging Issues entry, and were assigned to the same EOD and EOT personnel handling Tea Party cases. In addition, the first Occupy application was filed in February 2012, more than a year before the TIGTA audit report was released in May 2013, and the IRS repeatedly brought the Occupy BOLO entry and cases to the attention of TIGTA auditors who failed to examine them.

<sup>478</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>479</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>480</sup> Id. She told the Subcommittee that she did not recall whether development letters were actually sent out.

<sup>481</sup> See 5/31/2012 email from Tyler Chumney to Stephen Seok, “Occupy Case,” IRSR0000014190 (“You indicated you had an Occupy case. This case[ ] needs to go to the bucketing team today. Would you let me know where it is so I can get it to them, thanks.”).

The current status of the Occupy applications is unclear. Applications filed in the first half of 2012 were still unresolved by the end of the year, but whether or how they may have been resolved in 2013 or 2014 has not been publicly disclosed. When asked, the IRS told the Subcommittee that it was barred by Section 6103 of the tax code from discussing individual cases and could not disclose the current status of the Occupy applications. The IRS personnel interviewed by the Subcommittee indicated that they did not know the current status of the cases.

On the internet, Occupy Solidarity Network, Inc., which operates the OccupyWallSt.org website, “the oldest and most trusted online resource for the Occupy Movement,” describes itself as a “New York 501(c)(4) non-for-profit organization.”<sup>482</sup> Another group, Occupy.com, Inc., which operates the Occupy.com website, describes itself as a nonprofit corporation “currently awaiting our tax-exempt, 501(c)(3) status.”<sup>483</sup> Friends of Occupy Portland has described itself as a nonprofit “social welfare/civic organization for the purpose of tax laws.”<sup>484</sup> It is unclear whether these or other Occupy groups submitted the applications described in IRS documents.

One Occupy group which does not appear to have filed one of the applications already discussed has provided public information on its website about its nearly two-year effort to obtain tax exempt status from the IRS. On its website, Occupy the Roads, a group whose self-described mission is “to educate Americans about the social and economic injustices which oppress people or destroy resources of the earth for profit,” indicates that it first applied for 501(c)(3) status from the IRS in August 2012.<sup>485</sup> More than a year later, in September 2013, the group’s application was still pending.<sup>486</sup> In January 2014, hoping to expedite the process, Occupy the Roads divided its operations and sought approval as two tax-exempt organizations — one under Section 501(c)(3) and one under Section 501(c)(4).<sup>487</sup> Both applications were finally approved in April 2014, 21 months after the initial application was filed.<sup>488</sup> According to Occupy the Roads, its activities were curtailed during the prolonged review process, because its uncertain tax status did not permit it to apply for grants or accept tax-deductible donations. After approval was granted, on June 6, 2014, the group’s director called the IRS to ask why the group’s approved 501(c)(3) status was still not listed on the IRS website. According to the director, the IRS informed her that the group’s approved application had been “lost,” and it

<sup>482</sup> See “About Occupy Wall Street,” prepared by Occupy Wall Street, [www.occupywallst.org/about/](http://www.occupywallst.org/about/).

<sup>483</sup> “Donate,” prepared by Occupy.com, [www.occupy.com/donate](http://www.occupy.com/donate).

<sup>484</sup> “How to Support FO OP,” prepared by Friends of Occupy Portland, [www.foopdevelopment.blogspot.com](http://www.foopdevelopment.blogspot.com).

<sup>485</sup> See “About Us,” prepared by Occupy the Roads, <http://www.occupytheroads.com/blog/about/>; 1/23/2014

“Weekly Update,” Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2014/01/11326/>.

<sup>486</sup> 9/24/2013 “Parkersburg on hold while IRS play politics for 501c3 status,” Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2013/09/10322/> (discussing group’s effort to establish its headquarters in Parkersburg, West Virginia). According to Occupy the Roads executive director Janet Wilson, “The agent at the IRS has said we don’t educate enough.... We are fighting back with the help of a tax advocate and a Senator from Colorado.” Id. See also 6/30/2013 “Ready to roll on to Parkersburg,” Occupy the Roads, <http://www.occupytheroads.com/blog/2013/06/ready-to-roll-on-to-parkersburg/>.

<sup>487</sup> 1/14/2014 “Ready for Final Inspection at Pueblo House,” Occupy the Roads, <http://www.occupytheroads.com/blog/2014/01/11291/>. According to Occupy the Roads, the IRS asked it to file a second 501(c)(3) application, and converted its initial August 2012 application to a 501(c)(4) application. 1/23/2014 “Weekly Update,” Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2014/01/11326/>.

<sup>488</sup> 4/23/2014 “OTR gives birth to OTR Foundation,” Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2014/04/otr-otr-foundation/>; 6/6/2014 “Lost in space but surely this cant be?”, Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2014/06/lost-in-space-but-surely-this-cant-be/>.

might take up to eight more weeks for the listing to appear, during which time potential grantors and donors would be unable to easily verify Occupy the Roads' tax-exempt status.<sup>489</sup>

The evidence shows that Occupy cases were handled by the same IRS personnel who handled Tea Party cases and, like Tea Party groups, were flagged using BOLO entries that at first focused on the groups' names and political views, and later employed the same Emerging Issues criteria used to flag Tea Party cases. Occupy groups also underwent the same EOT reviews and experienced the same lengthy delays and mismanagement as their Tea Party counterparts.

### (3) Emerge America

A third example of IRS treatment of liberal groups involves organizations associated with Emerge America. Emerge America characterizes itself as an organization dedicated to encouraging and training Democratic women candidates to run for office.<sup>490</sup> It currently operates in 14 states and has affiliates across the country.<sup>491</sup>

Emerge organizations began applying for 501(c)(4) tax exempt status in 2008. Documents reviewed by the Subcommittee discuss at least eight Emerge organizations whose tax exempt applications have undergone IRS review since then. Like Tea Party groups, the Emerge applications were singled out for heightened scrutiny by the IRS using inappropriate screening criteria focused on their names, and the applications were subjected to extended EOT review. In 2011, after a three-year wait, the IRS denied tax exempt status to three Emerge organizations and approved tax exempt status for five others, demonstrating ongoing confusion within the IRS on applying the law to groups involved with partisan campaign activity. In 2012, the IRS revoked the tax exemptions that had been granted to the five Emerge organizations in the prior year.

**Emerge Applications Flagged.** The first Emerge application appears to have been flagged for heightened review in January 2008.<sup>492</sup> By September 2008, two Emerge applications had been sent to the EO Technical Unit for review. Donna Abner, in the IRS Quality Assurance division, wrote:

“Because of the partisan nature of the cases – guidance from EO Technical is pending. ... Per IRM [Internal Revenue Manual] 7.20.5 – ‘sensitive political issue’ cases were designated as subject to mandatory review in 2007. Please note the two case[s] above closed in 2008 that did not come through QA [IRS Quality Assurance]. I recommend an

<sup>489</sup> 6/6/2014 “Lost in space but surely this cant be?”, Janet Wilson, Occupy the Roads, <http://www.occupytheroads.com/blog/2014/06/lost-in-space-but-surely-this-cant-be/>.

<sup>490</sup> According to Emerge America's website: “Emerge America is changing the face of American politics by identifying, training and encouraging women to run for office, get elected and to seek higher office. Our intensive, cohort-based seven-month training program is unique. As the number of elected Democratic women remains flat or even declines, the need for our work is growing across the country.” “About Emerge America,” prepared by Emerge America, <http://www.emergeamerica.org/about>.

<sup>491</sup> Id.

<sup>492</sup> See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, [http://waysandmeans.house.gov/uploadedfiles/4.9.14\\_lerner\\_referral\\_and\\_exhibits.pdf](http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf).



alert be issued regarding this type of case as well as a reminder that ‘sensitive political issue’ cases are subject to mandatory review.”<sup>493</sup>

Her email indicated that two other Emerge cases had already been “closed,” in addition to the two cases then undergoing review, but did not indicate whether those applications had been approved or denied.<sup>494</sup> The Subcommittee was told that, at some point, an email alert was issued to EO personnel as Ms. Abner had requested, asking them to be on the lookout for Emerge cases.<sup>495</sup>

In November 2008, two Emerge applications were the subject of an EO Sensitive Case Report.<sup>496</sup> The report was prepared by Jon Waddell, a senior EOD manager who also worked on Tea Party and ACORN cases. He wrote:

“Two organizations from 2 different states applied for exemption under section 501(c)(4) for the purpose of training women to run for political office. The services are only provided to women affiliated with the Democratic Party and focus on a variety of subjects such as public speaking and press relations, as well as how to conduct fund raising activities. The applications appear to represent potential partisan political activity.”<sup>497</sup>

**EOT Review.** At EOT, the two Emerge cases were originally assigned to Justin Lowe, an EOT tax law specialist who handled a variety of 501(c)(4) cases involving political and campaign activities, including Tea Party cases.<sup>498</sup> Mr. Waddell coordinated with Mr. Lowe on the Emerge cases.<sup>499</sup> In February 2009, when a third case, described as “another Emerge Case (political Case),” was identified, and Mr. Waddell learned that Mr. Lowe had been temporarily

<sup>493</sup> 9/8/2008 email from Donna Abner to Cindy Westcott and others, “Political Case Alert,” IRSR0000011493 - 494. Under IRM 7.20.5.4, IRS Quality Assurance conducts mandatory reviews of certain activities, including:

- “Applications that present sensitive political issues, including the following types of activities:
- Voter registration
  - Inaugural and convention host committees
  - Post-election transition teams (to assist the elected official prior to officially assuming the elected position)
  - Voter guides
  - Voter polling
  - Voter education
  - Other activities that may appear to support or oppose candidates for public office.”

Internal Revenue Manual, § 7.20.5.4 (03-0-2008), “Cases Subject to Review,” [http://www.irs.gov/irm/part7/irm\\_07-020-005.html](http://www.irs.gov/irm/part7/irm_07-020-005.html).

<sup>494</sup> 9/8/2008 email from Donna Abner to Cindy Westcott and others, “Political Case Alert,” IRSR0000011493 - 494. The IRS told the Subcommittee that Section 6103 of the tax code barred the IRS from discussing the closed cases.

<sup>495</sup> The IRS told the Subcommittee that Section 6103 of the tax code barred the IRS from providing a copy of the email alert. When the first official BOLO list was issued almost two years later, in August 2010, it did not include a separate entry for Emerge groups, perhaps because of this earlier email alert.

<sup>496</sup> See 11/14/2008 Sensitive Case Report, prepared by Jon Waddell, IRS, IRSR0000444824 - 825. See also 11/19/2008 Sensitive Case Report, IRSR0000444817 - 829.

<sup>497</sup> 11/14/2008 Sensitive Case Report, prepared by Jon Waddell, IRS, IRSR0000444824 - 825. See also 11/19/2008 email from Cindy Westcott to Oksana Xenos, “Sensitive Case Report for November,” IRSR0000444817.

<sup>498</sup> See 12/12/2008 emails exchanged between Jon Waddell and Justin Lowe, “Emerge Case Correspondence,” IRSR0000640307 - 308.

<sup>499</sup> Id.

detailed to another office, he contacted the EOT head, Steven Grodnitzky, about what to do. Mr. Grodnitzky advised Mr. Waddell to consult with EOT tax law specialists Siri Buller and Andy Megosh, who handled “political activity cases.”<sup>500</sup>

Ms. Buller became the lead EOT contact for the three Emerge cases.<sup>501</sup> In at least one of them, she sent a development letter to gather more information about the group and its application.<sup>502</sup> In April 2010, another EOT specialist Janet Gitterman, working on still another Emerge case, also worked on a development letter.<sup>503</sup>

On April 28, 2010, an EOT Sensitive Case Report indicated that Emerge applications were then pending from four organizations: Emerge Maine, Emerge Nevada, Emerge Massachusetts, and Emerge Oregon.<sup>504</sup> The report indicated that the groups were being reviewed to determine “[w]hether orgs that recruit women belonging to [the] Democratic party to schools that teach campaign-related skills qualify for C4 status.”<sup>505</sup> April 2010 was also the first month that a Sensitive Case Report was prepared for two Tea Party groups.<sup>506</sup>

In July 2010, as described earlier, at a routine “Screening Workshop” to alert EOD screeners to a variety of issues, a presentation urging IRS personnel to look for groups involved with “political activities” listed “Emerge” groups along with “Tea Party” groups.<sup>507</sup> The presentation stated that “the following names ... were of interest and should be flagged for review,” and listed Emerge along with six other groups.<sup>508</sup> This presentation showed that, like

<sup>500</sup> 2/6/2009 email from Steven Grodnitzky to Jon Waddell, “Emerge Case Correspondence,” IRSR0000640307.

<sup>501</sup> See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, [http://waysandmeans.house.gov/uploadedfiles/4.9.14\\_lerner\\_referral\\_and\\_exhibits.pdf](http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf).

<sup>502</sup> See 4/23/2010 email exchange between Siri Buller and Janet Gitterman, “scr case,” IRSR0000626700 – 701.

<sup>503</sup> Id.

<sup>504</sup> The Significant Case Report contains specific taxpayer information that the IRS is prohibited from disclosing under Section 6103 of the tax code, but the report was released in unredacted form by the House Ways and Means Committee, which has independent authority to release taxpayer information. See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, (referencing Emerge Maine, Emerge Nevada, Emerge Massachusetts, and Emerge Oregon), [http://waysandmeans.house.gov/uploadedfiles/4.9.14\\_lerner\\_referral\\_and\\_exhibits.pdf](http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf). For the redacted version provided to the Subcommittee, see 4/28/2012 email from Steven Grodnitzky to Lois Lerner and Robert Choi, “SCR Chart,” IRSR0000141809 - 811.

<sup>505</sup> 4/28/2010 Significant Case Report, Exhibit 21, House Ways and Means Committee,

[http://waysandmeans.house.gov/uploadedfiles/4.9.14\\_lerner\\_referral\\_and\\_exhibits.pdf](http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf).

<sup>506</sup> 4/19/2010 TEGE Division Sensitive Case Report, submitted by Carter Hull, IRSR0000165382 - 383. (“The various ‘tea party’ organizations are separately organized, but appear to be a part of a national politically conservative movement that may be involved in political activities.”). As explained earlier, the prior month, Gary Muthert, a senior EO screener, had directly compared the Emerge and Tea Party cases, calling Emerge “an equal Democratic ‘tea party’ type entity.” 3/16/2010 email from Gary Muthert to John Shafer, “TEA PARTY,” IRSR0000482737.

<sup>507</sup> See 7/28/2010 “Screening Workshop Notes,” prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 – 704, at 703; “Screening Workshop July 28, 2010,” powerpoint presentation prepared by IRS, IRSR0000006674 – 699, at 689.

<sup>508</sup> 7/28/2010 “Screening Workshop Notes,” prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 – 704, at 703 (stating that, in addition to Tea Party groups, “the following names and/or titles were of interest and should be flagged for review: o 9/12 Project, o Emerge, o Progressive, o We The People, o Rally Patriots, and o Pink-Slip Program”).

Tea Party groups, IRS screeners were instructed to look for Emerge groups by name and, due to their “political activities,” ensure they were subjected to heightened review.<sup>509</sup>

**Emerge Denials.** In the first half of 2011, three years after the first Emerge application was flagged, the IRS denied tax exempt status to three Emerge organizations due to the groups’ engaging in partisan political activity benefiting the Democratic party.<sup>510</sup> Emerge America publicly acknowledged at the time that three state organizations, Emerge Nevada, Emerge Maine, and Emerge Massachusetts, had been denied tax exemption.<sup>511</sup>

At the same time the IRS denied those three applications, which had undergone EOT review, the IRS approved five other Emerge applications which had apparently been processed by EO screeners without EOT input.<sup>512</sup> The executive director of one of the groups granted tax exemption, Emerge California, was quoted as saying: “It’s just bizarre. Nevada has been around and waiting for approval for the last five years, and in the interim, Oregon and Kentucky are established and file for their approval — and Kentucky gets it but Nevada, Maine and Massachusetts don’t.”<sup>513</sup>

When Lois Lerner learned that the five Emerge applications had been approved by EOD screeners in the Cincinnati office without EOT input, she wrote: “How in the world did this get screened in Cincy?”<sup>514</sup> That IRS EO personnel approved some Emerge cases and disapproved others in the same year provides another indicator of the subjective nature of the decisionmaking

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<sup>509</sup> Id. The Minority Staff’s Dissenting Views contend that the IRS treated the Emerge groups differently from Tea Party groups due to their partisan activities, but the facts indicate that, in both cases, the groups were flagged for heightened review due to their involvement in political activities, were flagged in part due to their names, were sent to Washington, D.C. for EOT review, were subjected to development letters, and underwent years of review. See Dissenting Views at 205-206.

<sup>510</sup> See 5/26/2011 email from Siri Buller to Jason Kall, “Referral to ROO,” IRSR0000196739 - 758, at 739 (“Recently, we denied the 1024 applications of three state chapters of [REDACTED BY IRS], a Democratic candidate training school for women. We denied the applications on the basis that their primary activity confers a private benefit to a political party. In the course of reviewing these applications, we learned that Determinations had already approved the 1024 applications of several other state chapters and the national organization.”). See also 2011 IRS letters to the Emerge groups denying their applications. Id.

<sup>511</sup> “3 Groups Denied Break by IRS are Named,” New York Times, Stephanie Strom, (7/21/2011), [http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?\\_r=0](http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0). See also 7/20/2011 email from Stephanie Strom, New York Times to Grant Williams, IRS, “Bazinga,” IRSR0000640490 (asked why some Emerge organizations had been approved, while others hadn’t); 7/22/2011 email from Lois Lerner to Holly Paz, “New York Times – 501(c)(4)s,” IRSR0000350749.

<sup>512</sup> See 5/26/2011 email from Siri Buller to Jason Kall, “Referral to ROO,” IRSR0000196739 (“In the course of reviewing these [Emerge] applications, we learned that Determinations had already approved the 1024 applications of several other state chapters and the national organization.”); 7/21/2011 email from Donna Abner to Holly Paz, “IRM 7.20.5,” IRSR0000429501 (“I’m also concerned with the cases approved in screening. The screening checklist does not include ‘Political Activities-Sensitive Issues’ among the types of cases ‘not’ suitable for screening. Despite this, the cases were closed on merit with no contact. It might be helpful to pull the admin file to see if the applicant fully disclosed their operations - or - if the screeners/specialists need a reminder regarding political/sensitive cases.”).

<sup>513</sup> “3 Groups Denied Break by IRS are Named,” New York Times, Stephanie Strom, (7/21/2011), [http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?\\_r=0](http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0).

<sup>514</sup> 7/20/2011 email from Lois Lerner to Holly Paz, “website info,” IRSR0000196659. See also 10/21/2011 email from David Fish to Nanette Downing, Holly Paz and others, “previously referred cases,” IRSR0000636330 (discussing plans to revoke the approval of “5 or 6 Emerge cases”).

process as well as ongoing IRS confusion over how the rules related to campaign activities should be applied to 501(c)(4) organizations.

In 2012, the IRS reversed course and revoked the tax exemptions that had been granted to the five Emerge organizations in the prior year.<sup>515</sup> To prevent a repetition of the problem, two training sessions were provided to IRS screeners and determinations specialists.<sup>516</sup>

These facts show that Emerge groups, like Tea Party groups, were identified using inappropriate selection criteria focused on their names and political views, were subjected to EOT analysis and development letters, and in some cases, waited three years for their applications to be resolved. Worse yet, the applications were decided by the IRS in an inconsistent manner, and five groups that were granted tax exemptions lost those exemptions within a year. No Tea Party group experienced that same level of case mismanagement.

#### (4) Progressive Groups

A final example of IRS treatment of liberal groups involves organizations with “Progressive” or “Progress” in their names. Like some Tea Party groups, a number of these groups were identified using inappropriate selection criteria focused on their names and political views, were subjected to EOT reviews, and experienced lengthy delays and intrusive questions.

**Inappropriate Selection Criteria.** The earliest occasion identified by the Subcommittee in which “Progressive” was used as a selection criteria for groups involved with political activity was in connection with a July 2010 IRS “Screening Workshop,” described earlier, which directed EOD screeners to look for certain applications and send them to the same IRS group handling Tea Party cases. The official IRS summary of the workshop included these notes:

“Current/Political Activities: Gary Muthert

- Discussion focused on the political activities of Tea Parties and the like – regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to [Group] 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - Emerge,
  - Progressive
  - We The People,
  - Rally Patriots, and

<sup>515</sup> See 7/17/2012 draft document from Lois Lerner to Steven Miller, “Recent section 501(c)(4) activity,” IRSR0000468978 - 980, at 979 (“Emerge cases were worked in 2008. Recent activity was revoking the 5 organizations that were wrongly approved.”).

<sup>516</sup> See 8/1/2011 email from Holly Paz to Justin Lowe, “Sensitive Political Issues – CENTRA Session,” IRSR0000435473 (indicating Judith Kindell conducted a training session with EO employees in September 2011, and Siri Buller provided a training presentation sometime in 2011; in her email, Ms. Paz stated: “[t]he private benefit analysis of Emerge should also be discussed.”).

- Pink-Slip Program.’”<sup>517</sup>

This IRS document shows that at the earliest stages of the effort to subject Tea Party groups to heightened review, in July 2010, IRS screeners were also advised to look for progressive groups, using the groups’ names as the key selection criteria.<sup>518</sup>

When the IRS issued the first Be On the Lookout (BOLO) list in August 2010, progressive groups were again spotlighted. As indicated earlier, the BOLO’s “TAG Historical” section included an entry urging EO employees to look for applications filed by groups involved with “Progressive political activities,” explaining:

“[C]ommon thread is the word ‘progressive.’ Activities appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to ‘blue’ as being ‘progressive.’”<sup>519</sup>

This BOLO description urged screeners to focus on the “the word ‘progressive,’” described the groups’ political views, and identified their “political activities” as the central concern.<sup>520</sup> Like the BOLO entry for Tea Party groups, it urged IRS personnel to flag a set of groups solely because of their names and political views and subject them to heightened review.

**Heightened Reviews and Lengthy Delays.** Gary Muthert, a senior EOD screener interviewed by the Subcommittee, confirmed that, in 2010, he conducted searches using the term “progressive” to identify groups for heightened review.<sup>521</sup> Mr. Muthert explained that, due to the “progressive” entry in the BOLO TAG Historical section, all EOD screeners were obligated to be on the lookout for those groups, including by running searches for those entities and checking their files to see if they had any of those cases.<sup>522</sup> Mr. Muthert told the Subcommittee that, just as he did with the Tea Party, he ran electronic queries using the word “progressive” and would have sent any cases he found to the relevant specialty group handling them.<sup>523</sup> That specialty group, Group 7822, was also handling the Tea Party cases.

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<sup>517</sup> 7/28/2010 “Screening Workshop Notes,” prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 – 704, at 703 (circulating the “Screening Workshop meeting minutes). See also “Screening Workshop July 28, 2010,” powerpoint prepared by IRS, IRSR0000006674 – 699, at 690 (also indicating that IRS screeners should look for “Progressive” groups). The Minority Staff’s Dissenting Views state that the “progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group’s name,” Dissenting Views at 195, but this document shows that, in fact, IRS screeners were explicitly instructed to use certain “names,” including “Progressive,” to identify groups that “should be flagged for review.”

<sup>518</sup> In the same presentation, while the Tea Party case coordinator, Elizabeth Hofacre, advised against sending progressive cases to her, she did not suggest that heightened review of those cases was inappropriate or that the cases should not be sent to Group 7822, which was also handling the Tea Party cases. *Id.*

<sup>519</sup> August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 – 196. Because the 2010 BOLO has been partially redacted by the IRS, see also July 2012 BOLO spreadsheet, prepared by the IRS, at IRS0000001484 - 499.

<sup>520</sup> Again, in contrast to the Minority Staff’s Dissenting Views statement that “progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group’s name,” Dissenting Views at 195, this BOLO entry directed IRS personnel to focus on “the word ‘progressive.’”

<sup>521</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

The evidence shows that groups with “Progressive” or “Progress” in their names were, in fact, subjected to heightened scrutiny by the IRS. For example, a list compiled by the IRS Chief Risk Officer, David Fisher, looking at 501(c)(4) groups reviewed by the IRS from May 2010 through December 2012, identified 20 applications filed by groups with the words “Progressive” or “Progress” in their names.<sup>524</sup> Of those 20 applications, nine were included in the same advocacy case list as the Tea Party groups and four others were otherwise subjected to EOT review, for a total of 13 cases out of 20, or 65%.<sup>525</sup> The list also showed that at least eleven of the cases had been under IRS review for six months to a year.<sup>526</sup> Five other applications on the list appear to have been processed relatively quickly.<sup>527</sup> The final four applications had been under consideration for just one to five months before the analysis was undertaken, making it difficult to determine whether they were undergoing heightened scrutiny.<sup>528</sup>

Several groups with “Progressive” or “Progress” in their names have publicly disclosed the difficulties they experienced in obtaining tax exempt status from the IRS. A group called Progress Texas, for example, reported that it had been subjected to intrusive questions and underwent an 18 month delay before it obtained a 501(c)(4) exemption.<sup>529</sup> Another group known as Action for a Progressive Future had a similar experience, undergoing both extensive questioning and an 18-month delay.<sup>530</sup> While some dismiss concerns involving Progressive

<sup>524</sup> See IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 – 19, at 011-012. The total does not include four groups that appear to have been processed prior to May 2010. Although the Minority Staff’s Dissenting Views suggest, at 201-202, that the IRS limited its review to progressive groups seeking 501(c)(3) status, all of the cases on the list compiled by the IRS Chief Risk Officer sought (c)(4) status. *Id.*

<sup>525</sup> IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 – 19, at 011 (indicating that nine cases were included in a May or December 2012 advocacy case list, and four cases underwent “other tech/group screening” as shown by the “6” or “9” designation in the column showing “Current EDS Status”). A TIGTA letter has indicated that seven, rather than nine, progressive groups appeared on the advocacy case list, but TIGTA’s smaller number is due to TIGTA’s considering only the May 2012 advocacy case list and not the December 2012 advocacy case list which included two additional progressive groups. See 7/19/2013 letter from TIGTA to Congressman Sander Levin of the House Committee on Ways and Means, <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf>.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> See, e.g., “Nonconservative Groups Say IRS Scrutinized Them Too,” National Public Radio, Brian Naylor (5/19/2013), <http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too>; “IRS scrutinized some liberal groups,” *Politico*, David Nather (7/22/2013), <http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html> (discussing Progress Texas and Progress Now), providing a link to an IRS letter at <http://www.scribd.com/doc/141747252/IRS-Request-for-More-Information-Progress-Texas-Feb-2012>. See also “Does the IRS really have it in for tea party groups?” *Colorado Independent*, Teddy Wilson (3/28/2012), <http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups> (providing copies of IRS letters sent to a conservative group and a progressive group in Texas and indicating the two letters were equally intrusive).

<sup>530</sup> See “IRS approved liberal groups while Tea Party in limbo,” *USAToday*, Gregory Korte (5/15/2013), <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/> (discussing Action for a Progressive Future as well as mentioning Bus for Progress and Progress Florida). Another liberal group that did not have “Progressive” or “Progress” in its name, but reported similar experiences was Alliance for a Better Utah, a “multi-issue education and advocacy organization promoting progressive ideas and causes.” See Alliance for a Better Utah website, <http://betterutah.org/about/>; “In IRS Scandal, Spat Over Level of Scrutiny,” *Wall Street Journal*, John McKinnon (6/25/2013), <http://online.wsj.com/news/articles/SB10001424127887323998604578567963466211132> (indicating Alliance for a

groups by noting that all of the progressive groups on the IRS case advocacy list eventually obtained tax exempt status, during the same period 111 conservative groups – more than five times as many – also received approval, while others continued to wait for resolution of their applications. Eventual approval of an application does not mean that the application approval process itself was appropriate or timely.

The following chart summarizes some of the common negative experiences among the liberal groups that filed 501(c)(4) applications with the IRS.

### **IRS PROCESSING OF 501(C)(4) APPLICATIONS 2010 - 2013**

	<b>ACORN Successors</b>	<b>Occupy Groups</b>	<b>Emerge Groups</b>	<b>Progressive Groups</b>	<b>Tea Party Groups</b>
Inappropriate selection criteria focusing on name or political views	X	X	X	X	X
BOLO searches	X	X		X	X
IRS reviews in Cincinnati and Washington	X	X	X*	X*	X*
Intrusive questions			X*	X*	X*
At least one year of delay	X*	X*	X*	X*	X*
At least three years of delay	X*		X*		X*
Tax exemption reversed			X*		

\*Affected some but not all groups.

Together, the evidence of how the IRS treated 501(c)(4) applications filed by ACORN successor, Occupy, Emerge America, and progressive groups offers additional proof that the IRS subjected liberal groups to the same types of inappropriate selection criteria, heightened scrutiny, delayed processing, and mismanagement that affected conservative groups.

### **G. Developing 501(c)(4) Guidance**

The Subcommittee investigation found that applications filed by both conservative and liberal groups were put on hold for years while IRS revenue agents awaited guidance from the EO Technical Unit on how to proceed. The IRS' inability to provide timely and effective guidance for EO employees on how to develop and evaluate 501(c)(4) cases involving campaign

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Better Utah affiliate had waited almost two years for action on a still pending application). Still other liberal groups were the subject of other BOLO listings, including groups promoting medical marijuana, Palestinian rights, and implementation of President Obama's health care law. See, e.g., "New Records: IRS Targeted Progressive Groups More Extensively Than Tea Party," Think Progress website, Josh Israel and Adam Peck (4/23/2014), <http://thinkprogress.org/politics/2014/04/23/3429722/ire-records-tea-party/> (providing a chart showing that IRS BOLOs issued between August 2010 and April 2013, "included more explicit references to progressive groups, ACORN successors, and medical marijuana organizations than to Tea Party entities"); "I.R.S. Scrutiny Went Beyond the Political," *New York Times*, Jonathan Weisman (7/4/2013), [http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&_r=0) (discussing Minnesota Break the Bonds, a group promoting Palestinian rights, that underwent intrusive questioning and a two-year delay in the processing of its then still pending application).

activities was a major contributor to the casework delays. Missed opportunities included the IRS' inability to produce a 501(c)(4) guidesheet for EO employees; failure to provide templates for or detailed guidance on development letters; and repeated changes in the key screening criteria. In large part, the IRS' difficulties revolved around its decision to use a facts and circumstances test to evaluate the cases rather than provide more objective criteria and bright line rules to guide EO deliberations.

### **(1) Seeking Increased Guidance**

A primary reason the advocacy applications were delayed for years was IRS hesitation and confusion over how to apply the 501(c)(4) requirements to organizations involved with campaign activities. Because the agency mandated use of a facts and circumstances test that sought to take into account all relevant material factors, whatever they might be, the IRS required EO employees to make case-by-case determinations with multiple interpretation issues and few objective standards or bright line rules.<sup>531</sup>

One key issue was determining what activities qualified as campaign intervention. Questions included how to evaluate issue ads, legislative campaigns, voter educational materials, voter guides, and donations to other 501(c)(4) groups. A second issue was that the law governing 501(c)(4) organizations stated unequivocally that they should be used "exclusively" to promote social welfare, but the key implementing regulation stated that 501(c)(4) organizations may be used "primarily" for social welfare activity.<sup>532</sup> That statutory-regulatory mismatch required EO personnel to determine when an organization was engaged "primarily" in social welfare activities. The issues included how to categorize various expenditures, how to quantify volunteer efforts, and whether to use a percentage test.

The IRS provided limited regulatory guidance and revenue rulings on those and other issues, leaving EO personnel struggling to interpret how the facts and circumstances test should be applied. In addition, because the facts and circumstances test, by its nature, considered a wide range of unspecified factors, applicants often criticized it as inherently time consuming, intrusive, unpredictable, nontransparent, or subjective.<sup>533</sup> EO agents had to operate under that

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<sup>531</sup> See, e.g., 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 44 ("There are no bright line tests for what constitutes political campaign intervention (in particular, the line between such activity and education) or whether an organization is primarily engaged in social welfare activities.").

<sup>532</sup> Compare 26 U.S.C. § 501(c)(4) (2012) with 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012). An internal TIGTA memorandum took note of this contradiction: "It appears that the Treasury regulation contradicts the I.R.C. [Internal Revenue Code]. If an organization is required by law to operate exclusively for the promotion of social welfare, its activities cannot be properly assessed using a lesser standard of primarily engaged in promoting the common good and general welfare of the people of the community and still meet the requirements of the law." 1/28/2013 TIGTA Memorandum for the Office of the Chief Counsel, by the Assistant Inspector General for Audit (Management Services and Exempt Organizations), "Request for Assistance Regarding Internal Revenue Code Section 501(c)(4) and Treasury Regulation Section 1.501(c)(4)-1," PSI-TIGTA-16-000006 - 009, at 007.

<sup>533</sup> The problems with the facts and circumstances test were described in one publication, the National Review, as follows: "The proposed rule [to revise the regulation] is not entirely without merit. It would do away with the broad, indeterminate 'facts and circumstances' test that was a major contributing factor to the IRS scandal. Under that rule, it was left to IRS agents, considering all the 'facts and circumstances,' to decide whether an organization's activities constituted 'social welfare activities' (good) or 'electioneering' (bad). Obviously, that gave huge discretion to the



constant barrage of criticism as well as broader skepticism about the ability of IRS revenue agents to evaluate campaign activities in a fair, consistent, and unbiased manner.

**Consensus on Lack of Clear Standards.** Virtually all of the IRS personnel interviewed by the Subcommittee, from the most to least senior, described the facts and circumstances test as difficult to administer and made more difficult by a lack of objective criteria or bright line rules.

Defining campaign intervention activities was widely acknowledged as a problem. Former IRS Commissioner Steven Miller told the Subcommittee that determining campaign intervention was a “very difficult area.”<sup>534</sup> In 2008, when Mr. Miller was Commissioner of Tax Exempt and Government Entities, he wrote a draft memo to Lois Lerner about the “2008 Political Campaign Season” and advocated issuing additional guidance due to “the limited and somewhat flawed statutory tools available to us to address instances of political intervention.”<sup>535</sup> When asked about the revenue rulings used by agents to determine political advocacy and campaign intervention, IRS Chief Counsel William Wilkins said they were “better than nothing,” but “not that helpful.”<sup>536</sup>

EO head Lois Lerner wrote to a colleague: “I personally have been up to the Hill at least 8 times this past year to explain the complexities of the rules — they are not black and white and they are not always intuitive.”<sup>537</sup> She made the same point at a January 2013 meeting with TIGTA officials. A summary of that meeting stated:

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IRS agents .... Replacing the ‘facts and circumstances’ test with more objective criteria is a plus.” “Silenced by the Taxman,” *National Review Online*, Bradley A. Smith (11/30/2013), <http://nationalreview.com/node/365143/print>.

<sup>534</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>535</sup> 1/24/2008 memorandum from Steven Miller to Lois Lerner, “2008 Political Campaign Season,” IRSR0000379714 -719 (Mr. Miller wrote: “This leads to the third goal for this year. I believe we must clarify our interpretation of the law in certain areas, and act to obtain certainty with respect to several of our legal positions. We can do some of this by issuing additional guidance, or, where our guidance is challenged, by seeking confirmation of our position in the courts. But guidance is preferred.”).

<sup>536</sup> Subcommittee interview of William Wilkins, IRS (12/4/2013). Mr. Wilkins noted that the lack of helpful guidance was one of the motivating factors behind the IRS’s November 2013 proposed regulation on political activity. *Id.* See also 7/25/2011 meeting invitation from Justin Lowe, an attorney in the Chief Counsel’s office, “Advocacy Orgs Meeting,” IRSR0000428433 (Mr. Lowe: “David Marshall and Amy Franklin, who are working on the advocacy organization cases in Chief Counsel, suggested that we meet so that they can gain a better understanding of the big picture surrounding these cases and so that we can discuss some of the broad legal issues together. This sounds like a good idea to me as the issue is a tricky one and the more collaboration we have, the better.”).

<sup>537</sup> 1/31/2012 email from Lois Lerner to Christopher Wagner, “A Couple Items,” IRSR0000122863. See also 12/21/2012 email from Lois Lerner to Nancy Marks, “501(c)(4) question in Senate Finance Committee Nomination Hearing,” IRSR0000408471 (Ms. Lerner: “Just got back from lunch with my old FEC boss, Larry Noble who now works for Americans for Campaign Reform. Informed me that Congress is pretty mad at the IRS for not doing anything about the c4s – I’m shocked! But what really got me is the expectation that not only should we be revoking them, we should be prosecuting them for tax fraud! Hadn’t heard that before. It was disappointing to me that Larry didn’t recognize that determining what is political activity is not easy – he thought IRS should have provided ‘clearer’ guidance – you can’t win.”); 8/16/2012 email exchange between Sharon Light and Lois Lerner, “Lungren (2012-30473),” IRSR0000221479 (Ms. Light: “[A group hasn’t] demonstrated they qualify for c/3. I’m not sure they can, but we figured one more development letter that educated them (in the absence of having their own counsel) would be more appropriate (and understandable) than a denial.” Ms. Lerner responded: “Nothing is ever sure under IRS rules (:”).

“Lois noted that it is difficult for non-lawyers (like our exams and determines agents) who are looking for clear rules to operate in areas where there are no clear rules. In this situation you can’t apply black and white rules.”<sup>538</sup>

Ms. Lerner later complained to TIGTA officials that in their report: “[T]here was no recognition about how difficult these cases were and the fact that there is no bright line test for making determinations on applications involving these issues.”<sup>539</sup> At another point, Ms. Lerner wrote to an attorney in the Chief Counsel’s office: “We need guidance on c4, we need guidance on c4, we need guidance on C4. ... IRS is getting hammered!”<sup>540</sup>

Other EO personnel made similar points. Former EOT head and later head of the Rulings and Agreements Unit Holly Paz told the Subcommittee that determining campaign intervention was difficult and confusing for the Cincinnati revenue agents working the cases.<sup>541</sup> Cindy Thomas, Determinations Unit head, told the Subcommittee that IRS agents struggled with determining what political advocacy and campaign intervention were, also describing it as a difficult and confusing area.<sup>542</sup> Hilary Goehausen, an EOT specialist who worked on the advocacy cases, told the Subcommittee that, under “the facts and circumstances [test] two people can come to different conclusions” on the same case.<sup>543</sup> Carter Hull, another EOT specialist who worked on the advocacy cases, described “political activity” as “a complicated area.”<sup>544</sup> One of the Cincinnati determinations specialists, Stephen Seok, told the Subcommittee that, from his own experience, it was “almost impossible” to define campaign activity and the work was made harder by the absence of useful guidance.<sup>545</sup> Two other Cincinnati EOD employees, Gary Muthert and Elizabeth Hofacre, each told the Subcommittee that their jobs were made harder by the fact that they had received no training on how to apply the facts and circumstances test.<sup>546</sup>

**Defining Primarily.** IRS officials acknowledged a lack of clarity, not only with respect to what activities qualified as campaign intervention, but also as to what was meant by “exclusively” and “primarily.” On September 19, 2012, Ms. Lerner wrote to two of her advocacy experts, Justin Lowe and Judith Kindell: “I am going up on the Hill today – I know both of you have given me insight about why the Reg say primarily instead of exclusively – like the statute, but I have no recollection of the reasons. Can you remind me ASAP please!”<sup>547</sup> Mr. Lowe responded:

“There is nothing public about why the regs say primarily instead of exclusively. In the old drafting files from when the regs were written, both (c)(3) and (c)(4) regs originally

<sup>538</sup> 1/31/2013 Minutes from meeting between IRS and TIGTA, prepared by IRS, IRSR0000428195 - 203, at 202.

<sup>539</sup> 3/26/2013 email from Troy Paterson, TIGTA, to Gregory Kutz, TIGTA, “EO Applications Report,” TIGTA Bates No. 008440 (summarizing Mr. Paterson’s conversation with Lois Lerner).

<sup>540</sup> 4/4/2013 email from Lois Lerner to Janine Cook, copying Holly Paz, “EO Enforcement Guidance Priority,” IRSR0000054399.

<sup>541</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>542</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>543</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>544</sup> Subcommittee interview of Carter Hull, IRS (11/19/2013).

<sup>545</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>546</sup> Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013).

<sup>547</sup> 9/19/2012 email from Lois Lerner to Justin Lowe and Judith Kindell, “c4,” IRSR0000184248 - 250, at 249.

said primarily. During the editing process, a reviewer commented on the (c)(3) regs that the primarily language was overbroad and should be restricted, so the insubstantial wording was added. There was no similar comments or changes made to (c)(4) regs, so we don't know what the thinking was there.”<sup>548</sup>

On another occasion in 2012, Joseph Urban, TEGE Tax Law Specialist, discussed the lack of a clear benchmark for the “primarily” standard:

“FYI, among the questions I would ask an IRS witness at a hearing is why, after all these years, the IRS has not defined primary, or given any indication as to what facts and circumstances the IRS uses in determining whether a (c)(4)'s activities primarily benefit public or private interests. Mr/Ms Witness, don't you think vagueness might scare honest folks away from doing things they are permitted to do, but be exploited by those who want to take advantage of (c)(4) although they are not legitimate social welfare orgs? Doesn't vagueness leave the IRS open to charges of arbitrary enforcement?”<sup>549</sup>

In 2013, when asked about these issues during a hearing before the Senate Finance Committee, former IRS Commissioner Douglas Shulman testified:

“I think everybody knew that it was very difficult to administer the (c)(4) laws, and so I do not have any memory of it, but there very well could have been conversations [between the IRS and the Treasury Department] about policy, the policy matters that members of this committee have talked about: should the ‘primary purpose’ test be changed?”<sup>550</sup>

Together, these statements suggest that senior IRS officials were well aware that the lack of guidance was inhibiting IRS enforcement efforts with regard to 501(c)(4) organizations.

**Percentage Standard.** Another ongoing source of debate and confusion, both within and outside of the IRS, was whether the agency used a percentage test to determine whether a group was engaged “primarily” in social welfare activities and, if so, what the percentage was.

When the Subcommittee asked about this issue in 2012, the IRS replied: “The IRS has taken no position on a fixed percentage or any one factor in precedential guidance.”<sup>551</sup> When asked about the issue during a briefing, the IRS told the Subcommittee that the agency did not have an official percentage test that was used to decide cases.<sup>552</sup> Yet former Acting IRS

<sup>548</sup> 9/19/2012 email from Justin Lowe to Lois Lerner and Judith Kindell, “c4,” IRSR0000184248 - 250, at 249. See also 3/21/2012 email from Justin Lowe to David Fish, “c4 history,” IRSR0000410695 (attaching a legal analysis of the issue entitled, “Exclusively Standard Under §501(c)(4),” detailing decades of disputes within the IRS over the definition of “primarily”).

<sup>549</sup> 4/20/2012 email from Joseph Urban to Lois Lerner and Nancy Marks, “Sen. Levin—Draft Response # 4,” IRSR0000410028.

<sup>550</sup> Testimony of Douglas Shulman, “A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny,” Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013), at 30.

<sup>551</sup> 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 008. See also earlier discussion of this issue in the Report's Background section.

<sup>552</sup> 4/30/2013 IRS briefing of the Subcommittee.

Commissioner Steven Miller told the Subcommittee that it was common knowledge at the IRS that a 501(c)(4) organization was permitted to engage in campaign activities up to 49% of its total expenditures.<sup>553</sup> Cindy Thomas, the Determinations head, told the Subcommittee that the IRS used a 51% test to establish whether an organization was engaged primarily in social welfare activities, although she didn't recall why that number was used or where the number came from.<sup>554</sup> Elizabeth Hofacre told the Subcommittee that the test was 51% social welfare activity and up to 49% campaign activity, while Carter Hull told the Subcommittee that "everyone assumed a 50% dividing line." During the 2012 special bucketing effort to reduce the advocacy case backlog, Holly Paz told the Subcommittee that she had instructed IRS employees to use a 51/49% test for permissible social welfare/campaign activity.<sup>555</sup>

The investigation also found several IRS documents suggesting that the agency was using a 51% test. For example, a July 2009 Instructor Guide for determinations specialists stated: "[E]xclusively only means 'primary' for (c)(4) and 'primary' is generally understood to mean 51%."<sup>556</sup> A summary of a 2010 briefing on Tea Party cases noted that when determining political activity, if that activity was "more than 50% political, possible PAC (Political Action Committee)."<sup>557</sup> On the other hand, an undated document from the IRS Quality Assurance Division stated:

"There is no absolute 51% primary activity test. Because the law is so grey, the conclusion that the organization qualifies for exemption under 501(c)(4) is ultimately a professional assertion of the specialist."<sup>558</sup>

Together, these statements and documents show conflicting guidance and ongoing ambiguity over use of a percentage test in 501(c)(4) cases; the result was confusion for the Cincinnati determinations specialists who repeatedly requested clarifying guidance.

## **(2) Failing to Agree on a Guidesheet**

In the summer of 2011, more than a year after the first Tea Party application was filed and as the number of advocacy cases collected by the IRS exceeded 100 for the first time, the Exempt Organizations Technical (EOT) Unit undertook an effort to produce a "guidesheet" to

<sup>553</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>554</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>555</sup> Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013), Carter Hull, IRS (11/19/2013), and Holly Paz, IRS (10/30/2013).

<sup>556</sup> 9/2009 Instructor Guide, "Exempt Organizations Determinations Unit 1b," prepared by the IRS, IRSR0000540412 - 545, at 436. See also 7/28/2010 Screening Workshop Notes, prepared by IRS, IRSR0000006723 (including a powerpoint presentation indicating that if an organization engaged in more than 50% campaign activity, it could be a political action committee: "Concerns: May be more than 50% political, possible PAC (Political Action Committee)").

<sup>557</sup> 7/28/2010 "Screening Workshop" powerpoint presentation, prepared by IRS, IRSR0000006674 - 699, at 692

<sup>558</sup> Undated "Advocacy Feedback from QA," prepared by IRS Quality Assurance, IRSR0000415066. See also 3/21/2012 email from Justin Lowe to David Fish, "c4," IRSR0000410695 (attaching an undated draft analysis of the issue entitled, "Exclusively Standard Under §501(c)(4)," prepared by the IRS, IRSR0000410696 - 711, at 709 ("The IRS has not published a precise method of measuring exempt activities or purposes in any of its published guidance, though three revenue rulings have stated that all of the organization's activities must be considered and that there is no pure expenditure test.")).

help EOD employees identify, develop, and evaluate the cases assigned to them. In September 2011, EOT circulated a draft, but multiple rounds of comments, criticisms, and suggested edits from the Chief Counsel's office slowed and eventually halted work on the draft. In May 2012, after about ten months of effort and despite ongoing requests for guidance, EO stopped working on the guidesheet, which was never finalized.

**Initiating the Guidesheet.** The EO Determinations (EOD) Unit had been pressing EOT to develop additional written guidance on how to handle advocacy cases since 2010.<sup>559</sup> According to EOT head Holly Paz, the effort to develop a guidesheet was finally undertaken, because the determination specialists in Cincinnati were struggling with how to handle the advocacy cases; understanding the activities that qualified as campaign intervention was generally difficult for the agents who were confused about how to make those determinations; and making those determinations was time consuming and complex.<sup>560</sup>

In July 2011, the Exempt Organizations division decided that additional written guidance on advocacy cases should be developed for the Determinations Unit.<sup>561</sup> An attorney in the IRS Chief Counsel's office later summarized the "three principal objectives" of the guidesheet as follows:

"To help agents (1) screen applications for possible political campaign intervention or lobbying, (2) decide which cases require further development and which facts to develop, and (3) make a determination whether a particular activity is political campaign intervention or lobbying."<sup>562</sup>

**Circulating the Draft Guidesheet.** According to EOT specialist Hilary Goehausen, around the same time she took over the advocacy case duties from Carter Hull, then Acting EOT head Michael Seto directed her to draft the advocacy "guidesheet" that the Determinations Unit had been requesting.<sup>563</sup> Ms. Goehausen told the Subcommittee that she worked to model the guidesheet after ones the IRS had previously created for other issues like health care.<sup>564</sup> She said that she was the primary author of the initial draft, with help from Justin Lowe.<sup>565</sup>

In September 2011, Ms. Goehausen circulated the draft guidesheet to a number of EOT managers and specialists to obtain their comments, including Judith Kindell, Thomas Miller, Carter Hull, and Elizabeth Kastenber.<sup>566</sup> On October 25, 2011, Determinations head Cindy

<sup>559</sup> See 5/14/2013 TIGTA Audit Report, at 12-13. See also 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, "SCR," PSI-IRS-09-000045 - 046 (Ms. Thomas: "None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT.").

<sup>560</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>561</sup> 5/14/2013 TIGTA Audit Report, at 13, 36.

<sup>562</sup> 4/20/2012 email from Janine Cook to Lois Lerner and others, "Retooled Advocacy Guidesheet," IRSR0000057184.

<sup>563</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>564</sup> Id.

<sup>565</sup> Id.

<sup>566</sup> Id. See also 9/21/2011 email from Hilary Goehausen to EOT colleagues, "Advocacy Orgs Guidesheet Draft – updated," IRSR0000011220 - 221 (alerting them to the revised draft); and accompanying draft guidesheet, "Advocacy Organizations Guidesheet," prepared by the IRS, IRS0000000289 - 300.

Thomas asked for an update on the effort, noting the IRS was “starting to get a lot of heat” to resolve the cases:

“[W]here do we stand with the document Justin Lowe or others from D.C. were putting together with lessons learned, suggested developmental questions for those applying under c3 and for those applying under c4, sample denial letter, etc.? We’re starting to get a lot of heat from the public on these cases sitting idle and now have Congressionals on some of these. What is the plan of action and estimated completion date?”<sup>567</sup>

Five days later, on October 30, 2011, Ms. Thomas sent an email with the subject line, “Congressionals Coming! WE NEED TO MOVE ON THIS,” in which she urged swift action on the guidesheet:

“I’m not sure what the hold is on the document/guidance EOT is supposed to be providing for us, but I’ve received a phone call from an individual who was previously an EO Determinations specialist. He is working with one of these organizations [REDACTED BY IRS] and is threatening to go to his Congressional Office regarding this organization and others. That is only going to create even more work for us and we need to get letters out to these organizations ASAP. Please let me know when we can expect to get the document from EOT.”<sup>568</sup>

By that point, Ms. Thomas had been pressing EOT to issue guidance for nearly 18 months.<sup>569</sup>

On November 3, 2011, after incorporating suggested edits, Ms. Goehausen circulated a revised draft, writing: “Attached is an updated version of the draft Advocacy Org Guidesheet that Cincinnati requested and has been asking us for.”<sup>570</sup> A copy was provided to Ms. Thomas by Michael Seto later in November.<sup>571</sup> In December, the draft was also given to the members of a newly formed “advocacy team” of determinations specialists.<sup>572</sup>

The draft guidesheet was summarized by a TEGE attorney as a document that had been drafted:

“for organizations that engage in lobbying, political intervention and general issue advocacy. It summarizes the law for applicable organizations (social welfare, labor, business leagues and political organizations), explains how to distinguish politics from

<sup>567</sup> 10/25/2011 email from Cindy Thomas to Theodore Lieber and Michael Seto, “Advocacy Orgs – Where Do We Stand?,” IRSR0000013911.

<sup>568</sup> 10/30/2011 email from Cindy Thomas to Michael Seto, “Advocacy Orgs – Congressionals Coming! WE NEED TO MOVE ON THIS,” IRSR0000013910.

<sup>569</sup> See, e.g., 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, “SCR,” PSI-IRS-09-000045 - 046 (Ms. Thomas: “None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT.”).

<sup>570</sup> 11/3/2011 email from Hilary Goehausen to Judith Kindell and others, “Advocacy Orgs Guidesheet – [U]pdated,” IRSR0000011220 (circulating the revised draft “Advocacy Org Guidesheet”).

<sup>571</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

<sup>572</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013); 12/12/2011 email from Stephen Seok to advocacy team members, “Advocacy Org. Guide Sheet (Draft), IRSR0000069334 (forwarding draft “Advocacy Org Guidesheet”).

issue advocacy, and provides comprehensive case development questions. EO will use the guide to process exemption applications and provide general guidance to the public on irs.gov.”<sup>573</sup>

At that point, the guidesheet was composed of an overview and eight individual guidesheets on specific activities, including how to distinguish between issue advocacy versus campaign intervention. Generally, the specific guidesheets set out some general principles, provided a list of facts tending to show that an activity did or did not qualify as campaign intervention, and offered a list of questions that could be directed to an applicant to develop the facts needed to apply the facts and circumstances test.<sup>574</sup>

According to Ms. Goehausen, in late 2011, she learned that that the Determinations Unit viewed the draft guidesheet as unhelpful because it was “too lawyerly.”<sup>575</sup> She also learned that attorneys in the TEGE Counsel’s office had a copy and were working on revisions.<sup>576</sup> In February 2012, Donald Spellmann, one of the TEGE attorneys, also alerted his supervisor, Victoria Judson, to the guidesheet project. Ms. Judson worked directly for IRS Chief Counsel William Wilkins.<sup>577</sup> Ms. Goehausen told the Subcommittee that the draft guidesheet then began going back and forth between her office, attorneys who worked directly for the Chief Counsel, and attorneys in the TEGE section of the Chief Counsel’s office.<sup>578</sup> Various changes were made without the participants coming to a final agreement on the document.<sup>579</sup>

IRS Chief Counsel Wilkins told the Subcommittee that the attorneys who worked directly for him, Vicki Judson and Janine Cook, told him about the guidesheet effort, explained that EO head Lois Lerner had asked them to review the draft due to the sensitive topics, and indicated the draft needed some fine tuning. Mr. Wilkins also said that Ms. Judson and Ms. Cook had indicated that they thought the guidesheet should not stray from existing law, and he agreed with that assessment.<sup>580</sup>

Mr. Wilkins told the Subcommittee that he did not share a copy of the draft guidesheet with anyone at Treasury or the White House, nor did he talk to anyone there about it.<sup>581</sup> When asked about an email in which he asked his staff about whether the draft guidesheet should be shared with Treasury, Mr. Wilkins told the Subcommittee that he thought Treasury was concerned primarily about public guidance, and the guidesheet was intended to be used internally

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<sup>573</sup> 2/28/2012 email from Donald Spellmann to Victoria Judson and others, “Advocacy Org Guide Sheet,” IRSR0000014377.

<sup>574</sup> See, e.g., 4/25/2012 email from Donald Spellmann to Lois Lerner and others, “Clean-ups & Revisions to Guide Sheet,” PSI-TIGTA-01-000145 - 199 (attaching the draft guidesheet with revisions suggested by TEGE).

<sup>575</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013); 5/14/2013 TIGTA Audit Report, at 37.

<sup>576</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>577</sup> See 2/28/2012 email from Donald Spellmann to Victoria Judson and others, “Advocacy Org Guide Sheet,” IRSR0000014377 (“[w]e wanted you to be aware that the EO client asked us for an accelerated review of a guide sheet they drafted”). See also Subcommittee interviews of Donald Spellmann, IRS (12/18/2013) and William Wilkins, IRS (12/4/2013).

<sup>578</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>579</sup> Id.

<sup>580</sup> Subcommittee interview of William Wilkins, IRS (12/4/2013).

<sup>581</sup> Id.

within the IRS.<sup>582</sup> Mr. Wilkins said that he learned his staff was exchanging comments on the draft with EOT and TEGE attorneys, and that Ms. Lerner began having intense conversations with Ms. Judson and others about how the guidesheet should look.<sup>583</sup>

The key participants from the TEGE Counsel office were Donald Spellmann, Susan Brown, and David Marshall.<sup>584</sup> Mr. Spellmann told the Subcommittee that Lois Lerner gave his office the draft in February 2012, and the TEGE attorneys viewed it as needing additional work.<sup>585</sup> On February 24, 2012, Ms. Lerner wrote to Mr. Spellmann and others: “The guidance provided to Cincy [Cincinnati] that Don reviewed – I’m hoping you can let us know your concerns as soon as possible so we can finalize the draft. We will be sending it over to them and putting it out on the web with other check sheets/guide sheets.”<sup>586</sup> On February 28, 2012, Mr. Spellmann wrote to his supervisor, Victoria Judson, that EO had asked the TEGE Counsel’s office “for an accelerated review of the guide sheet” and that they viewed the draft as “good, but needs a fair amount of work throughout.”<sup>587</sup>

Mr. Spellmann told the Subcommittee that his office returned preliminary comments on the draft to Ms. Lerner in early March 2012.<sup>588</sup> On March 7, 2012, after reviewing TEGE’s suggested changes, Ms. Lerner made the following comments:

“I looked quickly last night and overall like the approach. I do think, however, that we need more upfront text explaining why this is a difficult determination. You[r] papers [are] great for lawyers who understand the facts and circumstances grayness, but I think we need to add a more ‘practical’ piece in the introduction, as well. Also, I noticed you took out the chart on different types of orgs and what they can do – I’d like that added back in – I think it clearly illustrates to the non-expert that this isn’t even on[e] size fits all for the requirements – we have given it to the press with good results in the past.”<sup>589</sup>

On March 26, 2012, Ms. Lerner tried to explain to Victoria Judson of the Chief Counsel’s office the importance of providing practical guidance to the IRS agents analyzing 501(c)(4) applications:

“I also think we live in 2 different worlds. I live in a more ‘real’ world than yours where my staff can’t wait for formal guidance to do their jobs. ... These are live cases and if all

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<sup>582</sup> 3/7/2012 and 3/8/2012 email exchange between William Wilkins, Janine Cook, and Victoria Judson, “Heads up on Draft Guide Sheet for advocacy organizations,” IRSR0000428427 - 428 (Mr. Wilkins: “Isn’t this the kind of subreg guidance that Treasury is complaining about not seeing in advance?” Ms. Judson: “In their discussion, Treasury has been focusing on items that are published in the I.R.B., so this is not what they have been talking about. However, my guess is that they would also want to be seeing items like this one.”).

<sup>583</sup> Subcommittee interview of William Wilkins, IRS (12/4/2013).

<sup>584</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>585</sup> Id.

<sup>586</sup> 2/24/2012 email from Lois Lerner to Donald Spellman and others, “Congressional Follow-Up,” PSI-IRS-09-000027.

<sup>587</sup> 2/28/2012 email from Donald Spellman to Victoria Judson and Janine Cook, “Advocacy Org Guide Sheet,” IRSR0000014377.

<sup>588</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>589</sup> 3/7/2012 email from Lois Lerner to Donald Spellmann and others, “Corrections to Draft Guide Sheet,” IRSR0000333194.



we can give them is published guidance on the extreme ends of the spectrum, they will get themselves in trouble.”<sup>590</sup>

Attorneys from EOT, the TEGE section of the Chief Counsel’s office, and the attorneys who worked directly for the Chief Counsel continued to exchange comments on the guidesheet. The TEGE and Chief Counsel attorneys carefully reviewed the existing IRS revenue rulings and attempted to ensure that the guidesheet did not break new ground, even though the purpose of the guidesheet was to provide additional guidance beyond what already existed. In late March, the TEGE and Chief Counsel’s attorneys discussed cutting out certain parts of the draft to ensure it didn’t exceed existing guidance.<sup>591</sup> Mr. Spellman noted at one point that striking the right balance between the existing and new guidance was “super tricky.”<sup>592</sup> On April 4, 2012, Susan Brown wrote that she and Don were thinking about deleting the specific guidesheet on lobbying, due to difficulties associated with distinguishing between lobbying communications and campaign activities.<sup>593</sup> Ms. Cook responded:

“I think Lois [Lerner] will react very strongly against that, particularly on the theory that this is fact gathering focused. I think we need to leave them in if at all possible; she is already pushing back a lot on [501(c)] 5/6s deletion and if we take out lobbying, I’m concerned we’ll lose any remaining credibility in their eyes in giving them something they can conceivably use.”<sup>594</sup>

In fact, the next day, Ms. Lerner wrote to Ms. Cook, opposing the suggestion that the guidesheet address only 501(c)(3) and (4) organizations, and omit any mention of 501(c)(5) or (6) groups, since applications were being filed by all four groups, and EO determinations specialists were going to be confronted with campaign activity issues with respect to all of them:

“I know you suggested just including c3 and c4 information in the guide sheet – that just won’t work. So, if – as we initially agreed – you can tell me specifically what parts of the draft we sent give you heart burn and why, we will try to lessen the heartburn. Ignoring pieces or not speaking to them because Counsel is not comfortable is NOT an option for me. The work is here, my folks need to do it, and they will regardless of what we give them. Our job is to provide them with the best tool we can.”<sup>595</sup>

<sup>590</sup> 3/26/2012 email from Lois Lerner to Victoria Judson, “Thanks,” IRSR0000411078.

<sup>591</sup> 3/26/2012 email exchange between Donald Spellman and Janine Cook, “Do you have original draft guidesheet that you can send me,” IRSR0000057111. The TEGE attorneys also considered bringing in the Treasury Department, but decided against it since they didn’t think the guidesheet was “breaking much new ground.” *Id.*

<sup>592</sup> *Id.*

<sup>593</sup> See 4/4/2012 email from Susan Brown to Donald Spellmann and Janine Cook, “Advocacy guide,” IRSR0000057166 (“Just to let you know Don and I are struggling with lobbying questions because we’re concerned that agents that put a communication in the ‘lobbying’ bucket might think their job is done and not look further at whether the lobbying is disguised campaign activity. Could be a problem if the lobbying is ‘Stop the wrongheaded legislation (sponsored by Candidate X)!’ For that reason we plan to delete the lobbying guide sheets (which applied to (c)(3)s only anyway). These issues don’t get easier!”).

<sup>594</sup> See 4/4/2012 email from Janine Cook to Susan Brown and Donald Spellmann, “Advocacy guide,” IRSR0000057166.

<sup>595</sup> 4/3/2012 email from Lois Lerner to Janine Cook, “Follow-up,” IRSR0000428403 - 404.

Ms. Cook responded:

“I do have a sense of the challenges you are under here and that frankly you’re being caught between a rock and a hard place. ... While much of what you do every day falls into the highly sensitive category, I venture to say that this has got to be one of the top at this time. Accordingly, our legal advice is to follow as closely to the guidance line as possible in what is disseminated and thus publicly available – formal or not, we all know it will be scrutinized.”<sup>596</sup>

A few weeks later, on April 25, 2012, Mr. Spellmann provided Ms. Lerner with still another revised version of the guidesheet, explaining: “We just can’t keep our hands off this thing (or stop thinking about it).”<sup>597</sup> At the end of May, Ms. Lerner expressed frustration with the edits made by the attorneys, in particular the proposed deletion of substantive portions of the draft guidesheet, given the pressing need for guidance to ensure IRS agents treated cases in a consistent manner in accordance with the law.<sup>598</sup> Ms. Lerner expressed her concerns in an email to Nancy Marks, who worked for then TEGE Commissioner Miller:

“Counsel has been very uncomfortable about applying c3 stuff even to c4 and wasn’t willing to include the c5 and 6s. They also were unwilling to use the c4, 5 and 6 rev rule because it was designed to talk about 527 political activity, which has a slightly different articulation. I find that silly since the entire regulated community has been relying on that guidance as a look at how the IRS might think about specific factual scenarios. Nikole [Flax] asked me whether I thought this would actually help our guys practically – for example does it provide direction in how to determine which activity is primary. I told her I think it is cumbersome and not the best practical tool, but – with some discussion about where to focus – could work. ... Perhaps could add language that reminds them it’s a look at all the facts and circumstances including, but not limited to, expenditures, volunteer activity, communications, etc.”<sup>599</sup>

**Abandoning the Guidesheet Project.** Mr. Spellmann told the Subcommittee that after supplying the revised version of the draft guidance at the end of April 2012, he didn’t hear back from Ms. Lerner, and eventually learned EO had decided it wasn’t going to issue the document.<sup>600</sup> After ten months of effort, EO gave up trying to finalize the draft guidesheet.<sup>601</sup>

The documents suggest that the biggest issue dividing IRS personnel over the guidesheet was how much guidance to provide beyond the regulations and revenue rulings already available. Determinations personnel wanted more guidance; the Chief Counsel’s office apparently did not

<sup>596</sup> 4/3/2012 email from Janine Cook to Lois Lerner, “Follow-up.” IRSR0000428403 - 404.

<sup>597</sup> 4/25/2012 email from Donald Spellmann to Lois Lerner and others, “Clean-Ups & Revisions to Guide Sheet,” PSI-TIGTA-01-000145. See also 4/20/2012 email from Janine Cook to Lois Lerner and others, “Retooled Advocacy Guide Sheet,” IRSR0000057184.

<sup>598</sup> 5/30/2012 email from Lois Lerner to Nancy Marks, Sharon Light, and Joseph Urban, “Revised Guide Sheet,” IRSR0000198670 - 671.

<sup>599</sup> Id.

<sup>600</sup> Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

<sup>601</sup> See 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026; Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

want to use the guidesheet to expand the existing guidance, despite acknowledging gray areas and interpretation difficulties. The inability of the IRS to provide the guidance repeatedly requested by the Determinations Unit is more evidence of the difficult issues and ongoing confusion and disagreements over how to apply the law to 501(c)(4) organizations.

**Initial Refusal to Provide Guidesheet.** The Subcommittee first learned of the draft guidesheet when it was mentioned in a June 2012 letter from the IRS.<sup>602</sup> In that letter, the IRS wrote: “In connection with recent cases, EO Technical prepared a draft educational guide sheet on the issue of political activity for section 501(c)(4) applications that was shared for comment with some employees in EO Determinations. That guide sheet was neither mandated nor finalized.”<sup>603</sup> The Subcommittee requested a copy of the guidesheet on several occasions in 2012 and 2013, but the IRS refused to provide it. After the TIGTA report was issued in May 2013, however, the IRS finally provided a copy to the Subcommittee.

### (3) Disagreeing on Development Letters

The draft guidesheet was intended to provide guidance not only on how to apply the law, but also on how to use development letters to gather the information needed to apply the facts and circumstances test requiring consideration of all relevant, material factors. Development letters were the primary tool used by EO determinations specialists to obtain additional information about pending 501(c)(4) applications. Early on, EOT specialists had reviewed some of the development letters before they went out and sometimes promised to develop templates for them, but never did so. In January 2012, in an effort to reduce a growing backlog of 501(c)(4) applications, some of which had been sitting idle for more than a year, a newly designated advocacy case coordinator, Stephen Seok, used the draft guidesheet to develop sample questions, encouraged the determinations specialists to draft development letters, and approved the sending of dozens of development letters to applicants. Some recipients of those letters criticized some questions as inappropriate, burdensome, or intrusive, resulting in negative media stories and Congressional inquiries. The new coordinator was removed from his post, despite having consulted his supervisor beforehand, demonstrating the ongoing division of opinion within the agency and lack of reliable guidance on how to develop 501(c)(4) cases.

**Early Development Letters.** For the first eight months that IRS was reviewing Tea Party cases, from February to November 2010, as explained earlier, Elizabeth Hofacre acted as the case coordinator and worked with EOT specialist Carter Hull who reviewed her development letters. Her caseload was then reassigned to Ronald Bell, who acted as the case coordinator from November 2010 to November 2011. He took little action on the cases, while awaiting guidance from EOT. In December 2011, he was replaced by Stephen Seok who became the third coordinator of what, by then, were called the “advocacy” cases.

That same month, in consultation with his supervisors, Mr. Seok formed an “advocacy team” composed of determinations specialists who would be working on the advocacy cases,

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<sup>602</sup> 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 013.

<sup>603</sup> Id.

and, on December 16, 2011, called a team meeting to discuss how to handle the cases.<sup>604</sup> According to the meeting minutes, the team faced a backlog of about 170 pending cases, which were described in the following manner: “30 Something Tea party, Several 912, Repeal PPACT (Patient Protection and Affordable Care Act), Enact Universal Single-Payer Health Care System, etc.”<sup>605</sup> While that list was not all inclusive, it suggested that the team was processing both conservative and liberal leaning organizations.

Mr. Seok told the Subcommittee that, at the advocacy team meeting, he emphasized the need to treat the cases in a consistent manner, and discussed the use of development letters to develop key facts, including developing a template letter which the team hoped EOT would provide.<sup>606</sup> He said that Ms. Hofacre also attended the meeting, gave a history of the cases, and provided copies of the development letters she had sent out.<sup>607</sup> Mr. Seok said that, after the meeting, he sent the team members a copy of the draft guidesheet which had recently been sent to him and which included guidance on developing 501(c)(4) cases.<sup>608</sup>

**January 2012 Development Letters.** Mr. Seok told the Subcommittee that he used the draft guidesheet to develop a list of questions that could be included in development letters sent to advocacy organizations.<sup>609</sup> According to a later email, Mr. Seok circulated to the advocacy team a 12-page list of possible questions, which he later described as a “reference” list, not a “template” for development letters.<sup>610</sup> In January 2012, EOD revenue agents began sending a new round of development letters to organizations with pending 501(c)(4) applications. Many of those letters contained questions from the list circulated by Mr. Seok.<sup>611</sup>

According to a later email, a total of 59 development letters were sent by multiple IRS revenue agents to organizations with pending 501(c)(4) applications.<sup>612</sup> Mr. Seok told the

<sup>604</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013). The team members were taken from different EOD groups in the IRS. See also 5/14/2013 TIGTA Audit Report, at 38.

<sup>605</sup> 12/16/2011 “Advocacy Team Meeting Minutes,” IRS0000000386 - 387.

<sup>606</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>607</sup> Id.

<sup>608</sup> Id. See also 12/12/2011 email from Stephen Seok to Advocacy Team, “Advocacy Org. Guide Sheet (Draft),” IRSR0000069334 (forwarding draft “Advocacy Org Guidesheet”). Although the guidesheet was only in draft form, Mr. Seok expressed his appreciation to the authors for the guidance. 2/2/2012 email from Stephen Seok to Hilary Goehausen and Justin Lowe, “Advocacy Team in EOD,” IRSR0000011217-218, (“Note: Advocacy Organizations Guide Sheet and Comments on BOLO Advocacy cases from you are excellent and extremely helpful. We sincerely thank you.”).

<sup>609</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>610</sup> See 4/17/2012 email from Cindy Thomas to Nancy Marks and others, “Advocacy Org Questions – Shared with Team for Reference,” IRS0000000271 - 284 (“Attached are sample questions that were shared with team members. These questions were developed based on the Advocacy Organization Guidesheet given to EOD from EOT.”). Ms. Thomas attached a copy of a 3/23/2012 email sent to her by Stephen Seok, “ADVOCACY QUESTIONS – REFERENCE,” IRS0000000271 - 284 (containing Mr. Seok’s donor related questions).

<sup>611</sup> See 5/14/2013 TIGTA Audit Report, at 18-19, 38.

<sup>612</sup> 4/25/2012 email from Judith Kindell to Holly Paz and Sharon Light, “Determs Review,” IRSR0000006583 - 584. See also 5/13/2013 email from Judith Kindell to Holly Paz, Sharon Light and Nancy Marks, “Review of Determinations Development Letters,” IRSR0000168062 (indicating that 59 development letters had been sent); Subcommittee interview of Ronald Bell, IRS (1/15/2014) (indicating that Mr. Bell, who sent out one of the development letters, had based his letter on the list of questions provided by Mr. Seok).

Subcommittee that development letters were not sent to all 170 of the pending applicants in early 2012, due to resource constraints.<sup>613</sup>

IRS personnel later summarized some of the troubling development letter questions as follows:

“A. Requests Names of Donors.

B. Provide a list of all issues that are important to your organization. Indicate your position regarding such issue[s].

C. In list of questions soliciting details about activity ask[s] about the following: (1) the roles and activities of audience and participants other than members in the activity and (2) what type of conversations and discussions did your members and participants have during the activity

D. Asks whether officer, director, etc. has run or will run for public office

E. Requests political affiliation of officer, director, speakers, candidates supported, etc. or otherwise refers to relationship with identified political party-related organizations

F. Requests info re employment other than for org, including hours worked

G. Letter requests information regarding activities of another org – not just relationship of other org to applicant.”<sup>614</sup>

The TIGTA audit report reprinted the following set of questions seeking detailed donor information, which it indicated were included in some of the development letters:

“Provide the following information for the income you received and raised for the years from inception to the present. Also, provide the same information for the income you expect to receive and raise for 2012, 2013, and 2014.

- a. Donations, contributions, and grant income for each year, which includes the following information:
  1. The names of the donors, contributors, and grantors. If the donor, contributor, or grantor has run or will run for a public office, identify the office. If not, please confirm by answering this questions ‘No.’
  2. The amounts of each of the donations, contributions, and grants and the dates received them.
  3. How did you use these donations, contributions, and grants? Provide the details.”<sup>615</sup>

<sup>613</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>614</sup> 4/25/2012 email from Judith Kindell to Holly Paz and Sharon Light, “Determs Review,” IRSR0000006583 - 584. See also 5/14/2013 TIGTA Audit Report, at 20.

In addition, some of the development letters asked applicants to provide printed copies of all of their information on their websites, Twitter, or Facebook.<sup>616</sup>

EOT head Holly Paz told the Subcommittee that, for the most part, the development letters issued by the new advocacy team in January and February 2011, were not reviewed by anyone other than Mr. Seok before they went out.<sup>617</sup> The TIGTA Audit Report, which conducted a review of all of the development letters sent by the IRS to the 170 organizations, many of which received more than one letter and many of which received letters prior to 2012, determined that 98 of the applicants received requests for “unnecessary” information.<sup>618</sup>

**Negative Reaction to Information Requests.** A few weeks after the first development letters were mailed in January 2011, as word of the letters spread, some recipients objected to some of the questions as inappropriate, burdensome, or intrusive, criticizing in particular requests for donor information and copies of materials on the organizations’ websites, Twitter, and Facebook. Negative media stories followed.<sup>619</sup> A March 2012 New York Times article, which was circulated among IRS officials, expressed alarm about IRS inquiries into the groups’ politics: “In recent weeks, the IRS has sent dozens of detailed questionnaires to Tea Party organizations applying for nonprofit tax status, demanding to know their political leanings and activities.”<sup>620</sup>

Members of Congress also expressed concern. On February 28, 2012, Mr. Spellmann from the IRS Chief Counsel’s office sent an email to his colleagues noting: “Lois [Lerner] told me the Hill gripes include the applications are taking too long to process, the requests for information are too burdensome, and some types of organizations (like Tea Party) are being singled out for greater scrutiny.”<sup>621</sup> A number of Members of Congress expressed concern about the requests for donor names. Although 501(c)(4) organizations were already required to disclose the names of donors of \$5,000 or more on Schedule B of their Form 990 tax returns, that information was filed after the close of the covered year, and Schedule B was normally kept confidential unless an organization elected to make it public. A March 2012 letter signed by twelve Senators stated in part: “A number of our constituents have raised concerns that the

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<sup>615</sup> 5/14/2013 TIGTA Audit Report, at 19.

<sup>616</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>617</sup> Id.

<sup>618</sup> 5/14/2013 TIGTA Audit Report, at 20, 28.

<sup>619</sup> See, e.g., “Numerous Tea Party chapters claim IRS attempts to sabotage nonprofit status,” Fox News Online, Perry Chiaramonte, (2/28/2012), <http://www.foxnews.com/politics/2012/02/28/numerous-tea-party-chapters-claim-irs-attempting-to-sabotage-non-profit-status/>; “Tea Party Groups Question IRS Requests For Information,” CBS News, Bud Gillett (2/29/2012), <http://dfw.cbslocal.com/2012/02/29/tea-party-groups-question-irs-requests-for-information/>.

<sup>620</sup> “Scrutiny of Political Nonprofits Sets Off Claim of Harassment,” New York Times, Jonathan Weisman (3/6/2012). This article was included in a number of press clips circulated within the IRS. See, e.g., 3/7/2012 email from Steven Miller to Catherine Barre, “In the News –March 7, 2012,” IRSR0000210445 - 464.

<sup>621</sup> 2/28/2012 email from Donald Spellmann to Victoria Judson, Janine Cook, and Susan Brown, “Advocacy Org Guide Sheet,” IRSR0000014377.

recent IRS inquiries sent to civic organizations exceed the scope of typical disclosures required under IRS Form 1024 and accompanying Schedule B.”<sup>622</sup>

**Intrusive Questions to Conservative and Liberal Groups.** On March 26, 2012, an article was circulated to Ms. Lerner and others reporting that the Landmark Legal Foundation had sent a letter to TIGTA calling for an investigation into the IRS’ “inappropriate and intimidating investigation tactics in the administration of applications for exempt status submitted by organizations associated with the Tea Party movement.”<sup>623</sup> A TIGTA analysis later determined, however, that of the development letters sent to the 170 organizations, only 27 letters included donor questions, and of those 27, only 13 were sent to groups with Tea Party, Patriots, or 9/12 in their names.<sup>624</sup>

The evidence indicates that burdensome development letters were sent to both conservative and liberal groups.<sup>625</sup> For example, an article examining IRS review of two Texas groups seeking tax exempt status analyzed IRS development letters sent to a Tea Party

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<sup>622</sup> 3/14/2012 letter from twelve Senators to the IRS, IRSR0000468544 - 547. See also 6/18/2012 letter from eleven Senators to IRS, IRSR0000462281 (expressing concerns over IRS requests for donor information); 4/23/2012 letter from 63 Members of Congress to IRS, IRSR0000465030.

<sup>623</sup> 3/26/2012 email from Joseph Urban to Lois Lerner and others, “Referral to TIGTA on (c)(4),” IRSR000218372 - 375. See also 3/27/2012 email from Joseph Grant to Nancy Marks, “Referral to TIGTA on (c)(4),” IRSR0000218372 (circulating the article and recommending that TIGTA investigate the allegations: “This may already have been decided by now, but, for my part, I think it would be a good idea to have TIGTA review this.”). See also 3/23/2012 letter from the Landmark Legal Foundation to the IRS, “REQUEST FOR INVESTIGATION INTO IRS AGENCY MISCONDUCT,”

<http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf>.

<sup>624</sup> 5/14/2013 TIGTA Audit Report, at 18 and footnote 43. See also 9/25/2012 “Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases, Audit Status Meeting,” prepared by TIGTA, TIGTA Bates 003084 - 085. At least some liberal groups also received requests for donor information. See, e.g., “In IRS Scandal, Spat Over Level of Scrutiny,” Wall Street Journal, John McKinnon (6/25/2013), (indicating a liberal affiliate of Alliance for a Better Utah was asked for donor information); “Scrutiny Went Beyond the Political,” New York Times, Jonathan Weisman, (7/4/2013), <http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all> (indicating Minnesota Break the Bonds, a group promoting Palestinian rights, and Chi Eta Phi Sorority, a black nurses’ society advocating “social change,” were subjected to intrusive questions, including regarding “fees” and “any voluntary contributions”); “IRS scrutinized some liberal groups,” Politico, David Nather (7/22/2013), <http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html> (indicating Progress Texas, a progressive group, was subjected to questions about its “membership fees”), providing a link to the IRS letter at <http://www.scribd.com/doc/141747252/IRS-Request-for-More-Information-Progress-Texas-Feb-2012>.

<sup>625</sup> See, e.g., “IRS Sent Same Letter to Democrats That Fed Tea Party Row,” Bloomberg News, Julie Bykovicz and Jonathan Salant (5/14/2013), <http://www.bloomberg.com/news/2013-05-15/irs-sent-same-letter-to-democrats-that-fed-tea-party-row.html> (describing intrusive letters sent to Progress Texas and Clean Elections Texas); “IRS approved liberal groups while Tea Party in limbo,” USAToday, Gregory Korte (5/15/2013), <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/> (indicating Action for a Progressive Future received “intrusive questions” before obtaining tax exempt status); “Nonconservative Groups Say IRS Scrutinized Them, Too,” National Public Radio, Brian Naylor (5/19/2013), <http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too> (describing progressive groups that received intrusive questions, including Progress Texas and the Chicago News Cooperative).

organization and a progressive group, making copies of both letters publicly available.<sup>626</sup> The article concluded:

“A comparison of the letter from the IRS released by the Waco Tea Party and of a letter provided by the progressive Texas organization found that both are extensively detailed, asked similar questions, and were tailored to each organization. Both letters asked for copies of the organization’s board meeting minutes and for copies of each organization’s web sites. Questions also addressed specific concerns that the IRS had with each organization but, on the whole, did not appear to treat the organizations differently.”<sup>627</sup>

While the article indicated that the letters did not treat the conservative and liberal groups differently, it indicated that both were subjected to extensive, detailed questions.

**Prior Approval of Donor Questions.** Mr. Seok told the Subcommittee that, before the development letters went out, he had sought guidance on asking for donor names and related information and received permission to include the questions.<sup>628</sup> Mr. Seok indicated that he had shown a draft development letter with the donor questions to his manager, Steve Bowling, and they had discussed the donor questions with EOD manager Jon Waddell.<sup>629</sup> Mr. Seok told the Subcommittee that Mr. Waddell had advised against including the donor questions, but Mr. Seok had explained it was important, because it would indicate whether a Super PAC involved with campaign activities was funding the proposed 501(c)(4) organization.<sup>630</sup> Mr. Seok told the Subcommittee that his manager, Mr. Bowling, agreed that the donor questions should be included in the development letters.<sup>631</sup>

**Development Letters Halted.** According to Mr. Seok, he held a second advocacy team meeting in February 2012.<sup>632</sup> At that meeting, he noted the negative media reports raising concerns about the IRS asking inappropriate questions, and urged his advocacy team to be very careful when sending out their development letters.<sup>633</sup>

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<sup>626</sup> See “Does the IRS really have it in for the tea party groups?” The Colorado Independent, Teddy Wilson, (3/28/2012), <http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups>).

Copies of both letters are included as exhibits to this Report.

<sup>627</sup> Id.

<sup>628</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>629</sup> Id.

<sup>630</sup> Id.

<sup>631</sup> Id. See also draft guidesheet, IRSR0000069334 - 346, at 338 (advising IRS agents to ask about a group’s fundraising activities, including requesting “copies of all documents related to the organization’s fundraising events including pamphlets, flyers, brochures, webpage solicitations,” determining “[h]ow much of the organizations’ budget is spent on fundraising,” and determining “the sources of fundraising expenses”); 3/23/2012 email from Stephen Seok to Cindy Thomas, “ADVOCACY QUESTIONS – REFERENCE,” IRS0000000271 - 284, at 277 (containing Mr. Seok’s donor related questions, including questions asking for “[t]he names of the donors, contributors and grantors,” “[t]he amounts of each of the donations, contributions, and grants and the dates” received, and how the organization “use[d] these donations, contributions, and grants”).

<sup>632</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013). There are no notes summarizing that meeting.

<sup>633</sup> Id.



Due to the criticism, confusion arose over whether EOD determinations specialists in the Cincinnati office were supposed to stop issuing new development letters. On February 27, 2012, one EOD manager wrote to Mr. Seok:

“Do we have any idea on when we might be able to issue developmental letters again. I have four un-reviewed cases. It does not make sense to review them if we cannot issue letters. If it will be a while, I should request some non-advocacy case[s] to work.”<sup>634</sup>

The same day, Determinations head Cindy Thomas emailed Mr. Seok’s manager, Mr. Bowling: “A question though: Why are we not issuing development letters? Who instructed folks to stop? The only thing I heard from Holly is that we shouldn’t be asking organizations to submit their entire website.”<sup>635</sup> Mr. Bowling responded: “I told Stephen [Seok] to hold off on any further development of template questions, not to stop developing cases. I’ll straighten it out. I understood that Washington is looking at the letters that went public and would provide guidance.”<sup>636</sup>

In March 2012, then TEGE Commissioner Steven Miller approved giving some of the advocacy groups that had received development letters an additional 60 days to respond.<sup>637</sup> Ms. Thomas sent an email to EOT head Holly Paz, protesting: “I don’t understand why an organization who is not being compliant is getting special treatment. But obviously, we’ll do what we are told.”<sup>638</sup> Ms. Paz responded: “The theory is that when we have had a case for a long time without taking action and are asking for a lot of stuff, we have to give more time. I hear you on fairness but I also do what I am told.”<sup>639</sup>

Mr. Seok told the Subcommittee that, in early March 2012, Mr. Bowling sent him an email directing him to stop his team from sending out any more development letters on the advocacy cases, and Mr. Seok relayed this message to his team.<sup>640</sup> On March 6, 2012, EO head Lois Lerner wrote: “Cincy [Cincinnati] is on hold for the time being on sending anymore questions out on these cases.”<sup>641</sup> A few days later, according to Mr. Seok, Mr. Bowling reversed course and told him to instruct his team to continue sending out development letters.<sup>642</sup> Mr. Seok said that, two weeks later, Mr. Bowling reversed course again and told him to stop developing the cases entirely.<sup>643</sup>

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<sup>634</sup> 2/27/2012 email from Joseph Herr to Stephen Seok, “Guidance on developing advocacy cases,” PSI-TIGTA-02-000067.

<sup>635</sup> 2/27/2012 email from Cindy Thomas to Steven Bowling, “Guidance on developing advocacy cases,” PSI-TIGTA-02-000065.

<sup>636</sup> 2/28/2012 email from Steven Bowling to Cindy Thomas, “Guidance on developing advocacy cases,” PSI-TIGTA-02-000065.

<sup>637</sup> Subcommittee interviews of Cindy Thomas, IRS (11/13/2013) and Holly Paz, IRS (10/30/2013).

<sup>638</sup> 3/8/2012 email from Cindy Thomas to Holly Paz, “EDS Letter 4587 (modified) (3).doc,” PSI-TIGTA-01-000206-209; Subcommittee interview of Cindy Thomas (10/30/2013).

<sup>639</sup> 3/8/2012 email from Holly Paz to Cindy Thomas, “EDS Letter 4587 (modified) (3).doc,” PSI-TIGTA-01-000206 - 209, at 206.

<sup>640</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>641</sup> 3/6/2012 email from Lois Lerner to Nikole Flax, “Cinc. template questions,” IRSR0000198415.

<sup>642</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>643</sup> Id.

**Team Leader Removed.** On April 11, 2012, William Angner, an EOD manager, sent an email to Mr. Seok and others announcing an upcoming TIGTA audit of how the agency was handling 501(c)(4) cases:

“FYI: Holly Paz and TIGTA employees will be here in Cincy 4/30-5/1/2012 to review advocacy cases (ie TIGTA audit). There will also be Congressional hearings about how we handle those cases as well. Glad those are in another group worked by other agents! Please give Stephen all the morale support you can muster :)”<sup>644</sup>

Mr. Seok responded to Mr. Angner: “Boss, You are going to save me, right?” Mr. Angner replied: “pawns in chain of command are either overlooked or sacrificed ... some one up the chain should take the heat for you :)”<sup>645</sup> In May 2012, then Deputy Commissioner for Services and Enforcement Steven Miller removed Mr. Seok from his position as advocacy team leader.<sup>646</sup>

**Lack of Development Guidance.** Development letters are the primary mechanism used by EOD determinations specialists to obtain additional information needed to apply the facts and circumstances test to 501(c)(4) cases, but the IRS failed to provide its agents with clear guidance on permissible questions. The draft guidesheet, which included guidance on appropriate questions, was never finalized. Although the advocacy team leader used the draft guidesheet to develop a list of sample questions, obtained explicit permission from his supervisors to include questions about donor information in his team’s development letters, and sought donor information that is routinely supplied in organizations’ tax returns, he was removed from his post for encouraging the inclusion of allegedly inappropriate and burdensome questions. Rattled by public criticism, senior IRS officials then went back and forth over whether to allow any 501(c)(4) development letters to be issued at all. Together, the facts demonstrate that, within the IRS in 2012, confusion and a lack of consensus about the types of information that should be obtained through development letters continued to roil the agency.

The issue that received the most attention in early 2012 involved development letters with requests for donor information. The IRS did not keep a list of the 27 organizations that received donor questions, but noted that most of those organizations did not provide the requested information in any event.<sup>647</sup> In the few cases where donor information was provided, the IRS expunged the information from the files and notified the affected organizations accordingly.<sup>648</sup> Although Mr. Seok was removed from his post for asking donor questions, both

<sup>644</sup> 4/11/2012 email from William Angner to Stephen Seok and others, “TIGTA audit 4/30-5/1/2012,” IRSR0000484246.

<sup>645</sup> 4/11/2012 emails between William Anger and Stephen Seok, “TIGTA audit 4/30-5/1/2012,” IRSR0000484246.

<sup>646</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>647</sup> See 8/16/2012 email from Holly Paz to Cheryl Medina, “Bucketing Results List,” TIGTA Bates No. 010755 (“[T]here is no list of the organizations who were sent the letter indicating that the donor information was expunged from the file. My understanding is that that letter has only been sent in one or two cases as most organizations did not provide this information.”).

<sup>648</sup> Id.; Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz noted that IRS Chief Counsel’s office was involved in approving the destruction of the donor information. See also, e.g., 6/5/2012 email from Holly Paz to Cindy Thomas, “donor info letter.doc,” IRSR0000462238 (“Attached is the letter to applicants that sent us donor info in response to our requests. We will need to destroy the information.”); 7/17/2012 draft document from Lois Lerner to Steven Miller, “Recent section 501(c)(4) activity,” IRSR0000468978 – 980, at 979 (“In cases in which the donor names were not used in making the determination, the donor information was expunged from the file.”).

Steven Miller and Judith Kindell told the Subcommittee that situations existed where asking for donor information would be appropriate, for example, if a group were potentially controlled by a 527 political organization or if someone in the group was receiving a private benefit from the group.<sup>649</sup> The donor issue is just one among many development letter issues that appear to remain unresolved.

Under current practice, the facts and circumstances test requires IRS agents to consider a wide range of material facts affecting 501(c)(4) applications. To gain an understanding of those facts, IRS agents are required to ask detailed questions that, by their nature, are likely to generate criticisms that the IRS inquiries are inappropriate, burdensome, or intrusive. To avoid that outcome, the IRS should consider replacing the facts and circumstances test with more objective standards and bright line rules that would relieve its agents of the need to ask wide-ranging, detailed questions of 501(c)(4) applicants.

#### **(4) Failing to Agree on Effective Screening Criteria**

In addition to failing to provide needed guidance on substantive issues and development letters, the IRS failed to provide effective guidance to its agents about how to screen incoming 501(c) applications to identify those that should be subject to heightened scrutiny. From 2010 to 2012, the primary BOLO entry for advocacy cases was changed four times in three years without producing consensus support for the screening criteria. Some of the screening criteria were criticized for relying on organizations' names or political views rather than indicators of campaign activity. Other criteria were criticized for being so broadly worded, that they did not facilitate electronic searches for relevant cases or convey the types of campaign and advocacy activities that warranted subjecting an application to heightened scrutiny. In addition to providing ineffective guidance to EOD screeners through the BOLOs, the IRS failed to make routine use of FEC filings that provided more direct indicators of campaign activity and less intrusive means for identifying relevant cases.

**2010 Tea Party Screening Criteria.** As explained earlier, the IRS receives about 70,000 applications for tax exempt status each year, only a small percentage of which – typically much less than 1% -- involve 501(c)(4) organizations involved with campaign activities. The IRS is required by law to determine whether 501(c)(4) organizations have engaged in too much campaign activity to retain their tax exempt status. The evidence reviewed by the Subcommittee indicates, however, that identifying the 501(c)(4) cases that ought to be subjected to that analysis is difficult. From the time that the first Tea Party application was flagged in February 2010, the IRS used primarily two tools to identify advocacy cases: (1) screening criteria which was included in email alerts or Be-on-the-Lookout (BOLO) lists; and (2) case-by-case reviews of individual applications when filed.

As explained earlier, the first BOLO, issued in August 2010, included an entry instructing EO screeners and determination specialists to be on the lookout for applications filed by “local organizations in the Tea Party movement.”<sup>650</sup> Screeners then used that BOLO entry to look for a

<sup>649</sup> Subcommittee interviews of Steven Miller, IRS (12/13/2013) and Judith Kindell, IRS (11/5/2013).

<sup>650</sup> August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 509; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196

variety of advocacy cases, both conservative and liberal, finding more than 40 the first year and over 100 by June 2011. When, in June 2011, senior EO officials asked for the exact criteria being used to identify “Tea Party” cases, as explained earlier, John Shafer, head of the EO Screening Group, surveyed three of his screeners, compiled their various approaches into a list, and provided the following four “issues that could indicate a case to be considered a potential ‘tea party’ case”:

- “1. ‘Tea Party’, ‘Patriots’ or ‘9/12 Project’ is referenced in the case file.
2. Issues include government spending, government debt and taxes.
3. Educate the public through advocacy/legislative activities to make America a better place to live.
4. Statements in the case file that are critical of how the country is being run.”<sup>651</sup>

The Shafer email shows that, more than one year after the first case was flagged, the IRS still did not have official or widely accepted criteria to identify cases falling within the Tea Party category; instead, IRS agents were using their own individual criteria to identify the cases.

**July 2011 BOLO Change.** Also as explained earlier, on June 29, 2011, EO head Lois Lerner convened a meeting of senior EO staff to discuss the advocacy cases.<sup>652</sup> Among other matters, Ms. Lerner expressed concern about using “Tea Party” to refer to the category of cases at issue and directed that, from then on, the cases should be referred to as “advocacy cases.”<sup>653</sup> In response to her instruction, beginning in July 2011, the BOLO dropped any reference to the “Tea Party” and instead described the cases, in the Emerging Issues section, as follows: “Advocacy Orgs[:] Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4).”<sup>654</sup>

**January 2012 BOLO Change.** Six months after that change was made, however, in January 2012, the BOLO entry was altered a third time. The Subcommittee was told that, in January 2012, Stephen Seok, the newly appointed advocacy case coordinator; Ronald Bell, the keeper of the BOLO lists and former Tea Party case coordinator; and their supervisor, Steven Bowling, met to “brainstorm” about the BOLO entry for advocacy cases.<sup>655</sup> According to Mr. Seok and Mr. Bell, the three believed the BOLO language was so broad that it did not effectively help screeners identify 501(c)(4) groups involved with campaign activities, and all three wanted to revise the wording.<sup>656</sup> Mr. Bell told the Subcommittee that, at the same time, none of them wanted to use “insensitive words” in the BOLO.<sup>657</sup> Mr. Bell said that the objective of their

<sup>651</sup> 6/2/2011 email from John Shafer to Cindy Thomas, “Tea Party Cases – NEED CRITERIA,” PSI-IRS-09-000048.

<sup>652</sup> Subcommittee interviews of Cindy Thomas, IRS (11/13/2013) and Holly Paz, IRS (10/30/2013).

<sup>653</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 30 (“Criteria changed ... based on the concerns the Director, EO, raised in June 2011).

<sup>654</sup> 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 – 552, at 547.

<sup>655</sup> Subcommittee interviews of Stephen Seok, IRS (11/22/2013) and Ronald Bell, IRS (1/15/2014).

<sup>656</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 30 (“Criteria changed ... based on Determinations Unit concerns that the July 2011 criteria was too generic.”).

<sup>657</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014).

discussion was to create a revised BOLO entry that would help identify 501(c)(4) applicants that might be involved with campaign activities.<sup>658</sup>

The January 2012 BOLO circulated among the Determinations Unit in Cincinnati contained, for the first time, the following new language to describe advocacy cases:

“Current political issues. Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, \$ocial economic reform/movement.”<sup>659</sup>

The new language replaced the prior language that had been in use since June 2011.<sup>660</sup>

Both Mr. Seok and Mr. Bell, two of the three participants in the January 2012 “brainstorming session,” denied authoring the revised BOLO language.<sup>661</sup> Mr. Seok told the Subcommittee that he saw the new language when he received the January 2012 BOLO, but said he did not draft or approve the change.<sup>662</sup> Mr. Bell told the Subcommittee he had not authored the new BOLO language, and did not know who did.<sup>663</sup> Cindy Thomas told the Subcommittee that she reviewed the January 2012 BOLO before it was sent out, saw the new language, and sent an email to Holly Paz alerting her to it, but when she didn’t hear back, Ms. Thomas assumed that Ms. Paz did not have a problem with it and allowed the BOLO to go forward.<sup>664</sup> Ms. Paz told the Subcommittee that she learned during the course of the TIGTA audit that she had received the email from Ms. Thomas, but did not recall looking at the revised BOLO language.<sup>665</sup>

Mr. Muthert, a screening agent, told the Subcommittee that he saw the revised entry in the January 2012 BOLO language and, thereafter, if he saw an application with the exact language used in the BOLO, sent the organization’s application to Mr. Bell.<sup>666</sup> According to Mr.

<sup>658</sup> Id.

<sup>659</sup> 1/26/2012 email from Ronald Bell circulating the BOLO, IRSR0000013533 - 538 [including redactions by IRS]; January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289.

<sup>660</sup> Id. See also February 2012 BOLO spreadsheet, prepared by IRS, IRS0000001500 - 511 and IRSR0000006705 – 709.

<sup>661</sup> Subcommittee interviews of Stephen Seok, IRS (11/22/2013) and Ronald Bell, IRS (1/15/2014). The Subcommittee staff did not interview the third participant, Mr. Bowling.

<sup>662</sup> Subcommittee interview of Stephen Seok, IRS (11/22/2013).

<sup>663</sup> Subcommittee interview of Ronald Bell, IRS (1/15/2014). As explained earlier, however, on January 25, 2012, Mr. Bell sent an email to Mr. Bowling asking why a new BOLO entry had been added for Occupy organizations, stating: “I thought the \$ocial economic reform in the updated current political issues was our ‘code word’ for the occupy organizations.” 1/25/2012 email from Ronald Bell to Steven Bowling, “BOLO,” IRSR0000013187. Mr. Bell told the Subcommittee that he had met with Mr. Bowling and Stephen Seok about revising the BOLO entry for advocacy groups, and thought that the group had agreed to use “\$ocial economic reform” as a “code” for identifying Occupy cases. Subcommittee interview of Ronald Bell, IRS (1/15/2014). His explanation suggests that the three had reached at least some level of agreement on specific BOLO language.

<sup>664</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Ms. Thomas told the Subcommittee that she elevated the BOLO entry to Ms. Paz, because she knew that the D.C. headquarters wanted to be kept informed about the advocacy cases, and that Cincinnati “wasn’t doing anything without letting D.C. know.” Id. Ms. Thomas also told the Subcommittee that she couldn’t tell if the new language was left-leaning or right-leaning. Id.

<sup>665</sup> Ms. Paz indicated she was on maternity leave from October 2011 to February 2012. Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>666</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

Muthert, however, the January 2012 language was still very broad, it was difficult to use to search for relevant organizations electronically, and he did not receive any guidance as to what was a “Political action type organization.”<sup>667</sup> Mr. Muthert said that he did not view the entry as limited to Tea Party groups.<sup>668</sup>

**May 2012 BOLO Change.** Five months later, the BOLO language was changed a fourth and final time. Ms. Paz told the Subcommittee that, in April 2012, she asked Ms. Thomas for a copy of all of the past BOLOs, reviewed the latest BOLO, and only then realized that the entry for advocacy cases had been changed to include references to the political views of applicants.<sup>669</sup> She told the Subcommittee that she immediately informed EO head Lois Lerner, and worked to revise the entry so that it would, once again, use more generic language.<sup>670</sup>

Ms. Paz also told the Subcommittee that she not only authored the new language, but also, because the advocacy entry was intended to cover all types of political groups, both conservative and liberal, directed that separate BOLO entries for two other types of advocacy groups, ACORN successor and Occupy groups, be eliminated.<sup>671</sup> The ACORN successor entry had been included in the BOLO list since 2010;<sup>672</sup> the Occupy entry had been included in the BOLO Watch List section since January 2012.<sup>673</sup>

On May 17, 2012, Ms. Paz sent the revised BOLO language to Ms. Lerner and others, explaining:

“I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to ACORN successors and Occupy groups.

Current Political Issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit).”<sup>674</sup>

Her suggested language was approved and incorporated into the Emerging Issues section of the June 2012 BOLO. The June 2012 BOLO accordingly provided a single entry for all advocacy cases.<sup>675</sup> It also omitted the separate entries for Occupy and ACORN successor groups.<sup>676</sup> In

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<sup>667</sup> Id.

<sup>668</sup> Id.

<sup>669</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013); 5/14/2013 TIGTA Audit Report, at 40.

<sup>670</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>671</sup> Id.

<sup>672</sup> See 10/8/2010 email from Sharon Camarillo to John Shafer, IRSR0000410433 - 434 (including the ACORN successor selection criteria and asking: “John: Please ask your screeners to be on the lookout for these cases.”).

<sup>673</sup> See January 2012 BOLO spreadsheet, prepared by IRS, IRSR0000630285.

<sup>674</sup> 5/17/2012 email from Holly Paz to Lois Lerner, Nancy Marks, and others, “potential revised BOLO language,” IRS0000000492.

<sup>675</sup> See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013251, at 252. See also 5/14/2013 TIGTA Audit Report, at 30.

<sup>676</sup> See, e.g., 6/14/2012 email from Ronald Bell to Tyler Chumney, “BOLO Alert 06/13/12,” IRSR0000013251 (Mr. Bell wrote: “Attached is the latest BOLO updates. ... The issue description for **Current Political Issues** located in

addition to revising the Emerging Issues entry and eliminating the separate Occupy and ACORN entries, Ms. Paz instituted a new procedure requiring management approval of all new or updated BOLO entries.<sup>677</sup>

The revised advocacy case entry remained in place for another year, until the TIGTA report was released in May 2013, after which the IRS suspended use of all EOD BOLOs.<sup>678</sup> According to screening agent Gary Muthert, the final version of the advocacy case BOLO entry used language that was so broad it could not be used effectively to search pending applications by electronic means to locate groups involved with campaign activities.<sup>679</sup> Instead, he indicated that every application had to be reviewed individually as it came in to see whether it fit within the BOLO screening criteria for groups involved with campaign activities.<sup>680</sup> In addition, according to Mr. Muthert, the BOLO screening criteria failed to provide sufficient guidance to help EO personnel determine whether an individual application should be selected for heightened scrutiny due to involvement with campaign intervention. In other words, while the BOLO entry had become inoffensive, it had also become ineffective.

**Failure to Make Use of FEC Filings.** A key criticism of the IRS has been its use of 501(c)(4) selection criteria that focused on organizations' names or political views instead of direct indicators of campaign involvement to trigger heightened review by IRS personnel. The revised criteria were also criticized for providing ineffective search terms to identify groups that were involved with campaign activities. One available alternative that would have cured both problems would have been for the IRS to make greater use of the FEC filings submitted by groups seeking 501(c)(4) status, since those filings provided direct evidence of campaign activities, but the IRS failed to make effective use of those FEC filings to identify relevant cases.

As explained earlier, the Federal Election Campaign Act (FECA) requires persons involved with campaign activities to file certain periodic reports. Non-candidate organizations, including 501(c)(4) groups, that engage in certain campaign-related spending, are required to file reports disclosing "independent expenditures" on Form 5, and expenditures on "electioneering

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the Emerging Issue Tab has been revised and the new coordinator is Sharon Light. Watch list issues #2 [REDACTED BY IRS] and #21 'Occupy' Organizations from the last BOLO Alert dated 3-26-12 have been removed and now are to be included in the description for Current Political Issues."); 3/26/2013 email from Jon Waddell to Cindy Thomas, "Sensitive Case," IRSR0000054976 - 978, at 77 ("Acorn-related cases were previously reflected on the BOLO and subsequently folded into the political advocacy category over a year ago.").

<sup>677</sup> See 5/17/2012 email from Holly Paz to Cindy Thomas, "BOLO," includes attachment "Memorandum for Manager, EO Determinations," signed by Holly Paz, IRSR0000177228 - 230 (creating a new instruction for adding or changing BOLO entries: "The procedures provide that any new entries and updates to the BOLO list must first be approved by the Emerging Issues group manager, then the EO Determinations manager and finally the EO R&A director."). Prior to this change, BOLO entries could be updated by the manager of a particular EOD group sending an email to the manager of Group 7822, the screening group. 5/11/2012 email from Cindy Thomas to Holly Paz, "BOLO Spreadsheet Description," PSI-TIGTA-01-000210 - 211.

<sup>678</sup> See 6/24/2013 "Report Outlines Changes for IRS To Ensure Accountability, Chart a Path Forward; Immediate Actions, Next Steps Outlined, the IRS announced," IRS press release, <http://www.irs.gov/uac/Newsroom/Report-Outlines-Changes-for-IRS-To-Ensure-Accountability,-Chart-a-Path-Forward;-Immediate-Actions,-Next-Steps-Outlined> (indicating that, on June 12, 2013, the IRS "suspended the use of any 'be-on-the-lookout,' or BOLO lists in the application process for tax-exempt status").

<sup>679</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>680</sup> Id.

communications” on Form 9.<sup>681</sup> The FEC told the Subcommittee, however, that it was unaware of the IRS making routine use of those filings to identify 501(c)(4) groups involved with campaign activities.<sup>682</sup> The FEC also told the Subcommittee that the IRS had never asked the FEC to include Taxpayer Identification Numbers (TINs) or 501(c) status information on its forms, even though that information would have increased the usefulness of those forms in IRS oversight efforts related to tax exempt groups engaged in campaign activities.<sup>683</sup> In addition, the FEC told the Subcommittee that it had never been asked to set up any special procedures for the IRS to obtain FECA reports of interest on an automated basis.<sup>684</sup> In a briefing, the IRS told the Subcommittee that while its agents often made use of FEC filings, it had not set up automated procedures to obtain the filings and match them to pending case files, nor had its agents routinely used FEC filings as a screening device to identify 501(c)(4) applications warranting heightened review.<sup>685</sup>

If the IRS were to ask 501(c)(4) applicants and exempt organizations to provide copies of any Form 5, Form 9, or other relevant forms filed with the FEC within a specified period of time, such as within ten days of filing an independent expenditure or electioneering communications report, the IRS would become the recipient of timely information regarding two of the largest categories of campaign spending. Receiving copies of those filings would immediately alert the agency to those campaign-related expenditures, without IRS agents having to conduct any inquiries of its own. If the IRS were to ask the 501(c)(4) organizations submitting copies of those forms to also include their TINs and 501(c) status information, EO agents could easily match the forms to any existing case files. If the IRS were also to establish a bright line rule treating those expenditures as evidence of campaign intervention activities, it would relieve EO agents of any need to perform a facts and circumstances analysis of the expenditures, and enable them to consider the total amount of expenditures when evaluating whether the organization was engaged primarily in social welfare activities.

The failure of the IRS to make efficient use of FEC filings as a screening device deprived EO agents of a useful mechanism to identify 501(c)(4) applications warranting heightened scrutiny due to campaign activities.

## **H. Addressing the Backlog**

After the January 2012 development letters focused media and Congressional attention on IRS treatment of 501(c)(4) applications, senior IRS managers learned of the growing backlog

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<sup>681</sup> Independent expenditure is “an expenditure by a person – (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” Federal Election Campaign Act of 1971, 2 U.S.C. § 431(17) (2012). “Electioneering communications” are communications which are broadcast within 30 days of a primary or 60 days of a general election and mention a clearly identified candidate to the electorate. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434 (f)(3) (2012).

<sup>682</sup> 6/12/13 briefing by the FEC of the Subcommittee.

<sup>683</sup> Id.

<sup>684</sup> Id. The FEC also said that the IRS could set up automatic feeds to obtain reports of interest without consulting the FEC, but was unaware of the IRS’ having done so. Id.

<sup>685</sup> 4/30/2013 briefing by the IRS of the Subcommittee.



of unresolved cases and the internal confusion and hesitancy about how to resolve them. In April 2012, in an effort to reduce the backlog, the TEGE Commissioner, with the approval of the IRS Deputy Commissioner, sent a task force of EOT specialists from Washington headquarters to the Cincinnati office to tackle the backlog. The team reviewed and categorized the pending cases, which by then had hit a peak of about 320 cases, in what was called a “bucketing” effort. The EOT specialists also conducted training to help the Cincinnati determinations specialists resolve the cases. A year after the special bucketing and training effort, however, the majority of 501(c)(4) cases remained unresolved, demonstrating the ongoing difficulties within the IRS over how to handle the cases.

### **(1) Backlog Discovered**

According to Steven Miller, then IRS Deputy Commissioner for Services and Enforcement, it was in February 2012, that he read the negative press reports and saw the letters from Members of Congress asking about 501(c)(4) organizations being unfairly questioned by the IRS, and asked EO head Lois Lerner to brief him on the issues.<sup>686</sup> Mr. Miller told the Subcommittee that it was around then that he learned for the first time that a backlog of advocacy cases was awaiting IRS action, some since 2010, and that the number of cases had climbed to over 300.<sup>687</sup> Mr. Miller told the Subcommittee that because the press had referred to “Tea Party” cases, he asked Ms. Lerner and EOT head Holly Paz if the cases were limited to Tea Party applicants, and learned that they instead encompassed “a wide spectrum” of groups.<sup>688</sup> According to Mr. Miller, he was told the cases involved primarily conservative groups, but some applications had also been filed by liberal groups.<sup>689</sup>

Mr. Miller told the Subcommittee that he tasked Nancy Marks, then a Senior Technical Adviser to Acting TEGE Commissioner Joseph Grant, with taking a close look at the 501(c)(4) applications process for advocacy cases.<sup>690</sup> Mr. Miller indicated that Ms. Marks put together a team of specialists who travelled to the Cincinnati office on a “fact finding tour.”<sup>691</sup> Around the same time, in March 2012, the Treasury Inspector General for Tax Administration (TIGTA) initiated an audit of the application process for advocacy cases, which also included a visit to the Cincinnati office.<sup>692</sup>

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<sup>686</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>687</sup> Id. See also 2/22/2012 email from Holly Paz to Cindy Thomas, “Tea Party application,” IRSR0000013739 - 741, (Ms. Paz: “Can you get me number of advocacy cases by 11 tomorrow? Also I think all meeting bolo criteria go to full development. Is that right? How do we currently have this described on the bolo? Sorry for the rush. Steve Miller now wants to meet with Lois tomorrow at 1.”).

<sup>688</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>689</sup> Id. Mr. Miller told the Subcommittee that it is likely he spoke to IRS Commissioner Shulman about the cases at that time, but did not recall the conversation. Id.

<sup>690</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 19, 40.

<sup>691</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 5/14/2013 TIGTA Audit Report, at 19, 40.

<sup>692</sup> For more information about the TIGTA audit, see below.

On April 20, 2012, Determinations head Cindy Thomas sent an email to her staff announcing both upcoming visits:

“Because of the hearings involving advocacy cases in which Steve Miller will need to testify, several folks from TEGE Headquarters will be in Cincinnati next week to take a tour of our operations, review advocacy cases, etc., in order to prep Steve for the hearings. While the folks from D.C. are in Cincinnati, they plan to review all of the advocacy cases. A separate email will be sent regarding these cases.

The following week three representatives from TIGTA ... will be in Cincinnati to take a tour, etc.”<sup>693</sup>

The email explained that the TIGTA representatives would visit Cincinnati on April 30 and May 1, 2012, to examine the process for screening 501(c) applications and developing cases.<sup>694</sup> The Washington team led by Ms. Marks visited the Cincinnati office on April 23, 2012, and examined about half of the advocacy cases.<sup>695</sup>

Mr. Miller told the Subcommittee that Ms. Marks reported to him in early May 2012, and indicated that what she and her team had seen in Cincinnati “wasn’t a pretty sight.”<sup>696</sup> Mr. Miller said that, among other issues, he learned that Ms. Lerner had changed the wording of the BOLO entries used to identify advocacy cases from using the phrase “Tea Party” to more generic language a year earlier, but that the language had been changed again since then, and TIGTA was looking into the issue.<sup>697</sup> Mr. Miller told the Subcommittee that he recognized there was a problem with the cases, decided that an effort should be made to accelerate their processing to reduce the backlog, and instituted weekly meetings on the project.<sup>698</sup>

## **(2) Bucketing Begins**

In May 2012, with Mr. Miller’s approval, Joseph Grant, then Acting TEGE Commissioner, ordered a team of EO experts from the Washington, D.C. office, led by Nancy Marks and Sharon Light, to return to the Cincinnati office to “bucket” the pending advocacy cases, meaning divide the 320 cases into categories, and help train the Cincinnati EOD

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<sup>693</sup> 4/20/2012 email from Cindy Thomas to Determinations staff, “Schedule for Next Two Weeks Including Tours and Action Items,” IRSR0000003152 - 155, at 153. Despite the email’s reference to upcoming hearings on advocacy cases, Mr. Miller was not asked to testify on that subject until a July 25, 2012 hearing before the House Committee on Ways and Means. See “Public Charity Organizational Issues, Unrelated Business Income Tax, and the Revised Form 990,” House Ways and Means Subcommittee on Oversight, House Serial No. 112-OS14, (7/25/2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg80340/pdf/CHRG-112hrg80340.pdf>.

<sup>694</sup> 4/20/2012 email from Cindy Thomas to Determinations staff, “Schedule for Next Two Weeks Including Tours and Action Items,” IRSR0000003152 - 155, at 154-155.

<sup>695</sup> 5/14/2013 TIGTA Audit Report, at 40.

<sup>696</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>697</sup> Id.; Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>698</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 6/28/2012 email from Lois Lerner to Sharon Light and others, “Hearing prep,” IRSR0000178714 - 715, at 714 (“I just got clarification from Nikole [Flax] that [Steven] Miller was talking about getting a briefing on how the referral process works, what issues TIGTA raised in its audit and what we have done to meet the concerns.”).

determinations specialists to process the cases in each of the buckets.<sup>699</sup> In addition, Mr. Miller directed that progress in resolving the cases be reviewed in weekly staff meetings to be attended by himself, Ms. Lerner, Ms. Paz, and Mr. Miller's chief of staff, Nikole Flax.<sup>700</sup> Mr. Miller said that he attended the weekly meetings on a regular basis at first, but then only sporadically.<sup>701</sup>

On or around May 14, 2012, a group of eight advocacy experts from Washington, D.C. traveled to the Cincinnati office to bucket all of the pending cases and help train the Cincinnati employees to work them.<sup>702</sup> They spent the first two days training a team of determinations specialists in the Cincinnati office. Then the Washington and Cincinnati employees worked together to bucket the 320 cases. They used four categories of buckets: Bucket 1 – favorable decision on the application likely; Bucket 2 – minor information needed; Bucket 3 – more development needed; and Bucket 4 – denial of application likely.<sup>703</sup>

According to one participant in the effort, to categorize the pending cases, each case was reviewed by two different people on the bucketing team, usually one from Washington and one from Cincinnati.<sup>704</sup> Initially, each reviewer decided how a particular case should be bucketed. If the reviewers agreed, the case was referred to that bucket; if they disagreed, they attempted to reach consensus on the appropriate bucket; if they were unable to reach agreement, Sharon Light made the final decision.<sup>705</sup> One of the Washington participants, Hilary Goehausen, told the Subcommittee that categorizing the cases was difficult, because under “the facts and circumstances [test,] two people can come to different conclusions” about how a case should be handled.<sup>706</sup> Ms. Goehausen indicated that, despite the disagreements, the group completed reviewing all of the cases in about three weeks.<sup>707</sup>

### (3) Case Resolutions

After the cases were bucketed, they had to be reviewed and resolved. Some of the cases placed in Bucket 1 were immediately approved, including some organizations that had failed to

<sup>699</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 5/14/2013 TIGTA Audit Report, at 41.

<sup>700</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 7/10/2012 email from Cindy Thomas to Cincinnati employees, “Advocacy Cases – Data Needed COB Every Wednesday,” IRSR000005273 (“Holly Paz and others in D.C. have regular meetings with Steve Miller regarding the political advocacy cases and they typically need data for these meetings because Steve wants to make sure these cases continue to move.”).

<sup>701</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>702</sup> The Washington employees who traveled to Cincinnati were Matthew Giuliano, Hilary Goehausen, Judith Kindell, Sharon Light, Justin Lowe, Andy Megosh, and Holly Paz, under the leadership of Nancy Marks and Sharon Light. The Cincinnati employees who participated in the bucketing were Janine Estes, Jodi Garuccio, Joseph Herr, Grant Herring, Faye Ng, Mitch Steele, and Carly Young. Two individuals from the Quality Assurance office in Cincinnati, Daniel Dragoo and Mike Ludwig, also participated. See email from Cindy Thomas to John Shafer and others, “Advocacy Cases – Next Steps – Update,” PSI-IRS-09-000064 - 065. See also 5/14/2013 TIGTA Audit Report, at 41.

<sup>703</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 5/14/2013 TIGTA Audit Report, at 41.

<sup>704</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 6/8/2012 email from Holly Paz to Cindy Thomas, “advocacy cases – next steps – revised,” IRSR0000168059 - 061 (outlining bucketing process).

<sup>705</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 6/8/2012 email from Holly Paz to Cindy Thomas, PSI-TIGTA-03-000661 - 663, at 663 (outlining bucketing process, “Sharon will be involved in any reconciliation discussions needed if Mitch and Joseph place cases in different buckets.”).

<sup>706</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>707</sup> Id. See also 5/14/2013 TIGTA Audit Report, at 41.

respond to development letters.<sup>708</sup> Over a dozen other applications were withdrawn. In July 2012, Lois Lerner, EO head, provided an update to Mr. Miller, then Deputy Commissioner for Services and Enforcement.<sup>709</sup> She indicated that the IRS had begun with 320 advocacy cases pending, including 97 501(c)(3) groups and 223 (c)(4) groups. She indicated in the document that 55 of the applications had been approved, including 51 (c)(4) applications, while 15 applications had been withdrawn; and that “no denials” had been issued other than the revocation of approvals that had been “wrongly” granted to five Emerge organizations the prior year.<sup>710</sup> Her report indicated that 70 of the 320 cases had been resolved within two months.

Resolving many of the 250 remaining advocacy cases took much longer.<sup>711</sup> In October 2012, Determinations head Cindy Thomas sent EOT head Holly Paz an email expressing her fear that: “with the pace that is taking place that they’ll be working the bucket 4 cases until they retire (this isn’t intended to be a flip comment, but rather a sincere concern).”<sup>712</sup>

One key issue was whether organizations engaged in lobbying rather than campaign activities should be included in the advocacy category of cases. In February 2013, the advocacy team leader Sharon Light contacted other EO personnel about a particular case which had initially been labeled as an advocacy case; after a flurry of email traffic analyzing the case, it was determined that the case involved lobbying rather than campaign activities and should not be considered an advocacy case.<sup>713</sup> On March 12, 2013, however, Donna Abner, head of the IRS Quality Assurance Division, wrote: “This is no different than other cases we have seen bucketed that supported or opposed particular legislation. Sorry – I’m confused as to what is and is not bucketed. Will you please clarify?” Sharon Light responded: “There has been confusion about this issue.”<sup>714</sup> Ms. Abner replied that she was satisfied that the case at issue had been adequately analyzed, but was unsure that future cases would be appropriately classified.<sup>715</sup>

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<sup>708</sup> See 5/24/2012 email exchange among Holly Paz, Cindy Thomas and others, IRSR0000005338 - 342. (Ms. Thomas wrote to Kenneth Bibb: “The wording for the favorable determination letters is attached. Per Steve Miller’s request, these cases need to be closed by COB 5/25/2012.”); 5/23/2012 email exchange among Lois Lerner, Judith Kindell, Nancy Marks and others, IRSR0000210032 - 034 (discussing a script to use when calling groups whose applications had been approved); 5/23/2012 email from Lois Lerner to Holly Paz, Nancy Marks, Sharon Light, and Judith Kindell, “Phone Script favorable advocacy case,” IRSR0000210035 - 036 (attaching telephone script).

<sup>709</sup> 7/17/2012 draft document from Lois Lerner to Steven Miller, “Recent section 501(c)(4) activity,” IRSR0000468978 – 980. Mr. Miller told the Subcommittee that it was his handwriting at the top of the document indicating the document was “from Lois.” Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>710</sup> Id. at 979.

<sup>711</sup> Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

<sup>712</sup> October 30, 2012 email from Cindy Thomas to Holly Paz, “Issue from Advocacy Team Held 10/30/2012,” IRSR0000005935.

<sup>713</sup> 3/12/2013 emails from Donna Abner and Sharon Light, “Case Returned from EODQA – Potential Political Advocacy,” IRSR0000012122 - 126.

<sup>714</sup> In the same email, Ms. Light continued, “Some cases that only involved lobbying got bucketed and worked as advocacy cases because it wasn’t clear from screening that political intervention wasn’t a problem. Cases got identified as ‘advocacy cases’ if they mentioned lobbying and someone felt the lobbying was a sign of political intervention. And sometimes cases that vaguely mentioned ‘advocacy’ got identified because it wasn’t clear on screening whether they were talking about lobbying or political intervention. But when it’s clear that lobbying, not political intervention, is the issue then they don’t fit the criteria.” Id. at 123.

<sup>715</sup> Ms. Abner wrote, “I’m ok with the explanation below that this one particular case did not need to now go through bucketing because the case has been adequately developed to the point where we now know that political

According to the TIGTA Audit Report, a decision was also made “to refer cases to the Review of Operations Unit for follow-up if there were indications of political campaign intervention but not enough to prevent approval of tax-exempt status.”<sup>716</sup>

Senior IRS officials continued to follow the advocacy cases, including Steven Miller after his November 2012 appointment as Acting IRS Commissioner. In February 2013, for example, his Chief of Staff Nikole Flax received a detailed data report on the number of advocacy cases that had come in, how the cases had been bucketed and resolved, and how many remained pending.<sup>717</sup> In May 2013, one year after the special bucketing effort was launched, about 259 advocacy cases from across the political spectrum remained unresolved, some dating back to 2010.<sup>718</sup> That so many cases remained unresolved after the concerted bucketing effort a year earlier offers additional evidence that the cases were difficult to resolve using the facts and circumstances test and more objective standards, bright line rules, and useful guidance were needed.

## I. Evaluating Campaign and Social Welfare Activities

During the three-year period from 2010 through 2012, as the IRS struggled with the growing backlog of 501(c)(4) applications raising advocacy issues, many 501(c)(4) groups deepened their involvement in campaign activities. Those activities raised a number of difficult issues for IRS agents charged with using the facts and circumstances test to evaluate the nature and extent of those activities and ensure compliance with the tax code. A brief discussion of some of the campaign-related issues helps explain why IRS agents moved so slowly to resolve the cases, and what impact those issues could have on an organization’s tax exempt status.

**Increased Campaign Expenditures.** As discussed earlier, the IRS reported that “[s]tarting in 2010,” it saw “a significant increase” in the number of section 501(c)(3) and (c)(4) applications from groups “that appeared to be, or planned to be engaged in political campaign activity.”<sup>719</sup> IRS data shows that, from 2008 to 2012, the number of 501(c)(4) applications filed with the IRS more than doubled.<sup>720</sup> IRS data also indicates that during the two-year period from 2008 to 2010 alone, the amount of campaign-related expenditures reported by 501(c)(4) groups

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intervention is not a problem. However, will this treatment be consistent? If a similar case was received by specialists today and screener noted the ‘political consultant’ issue would it/should it be bucketed? Or, would we only send to bucketing if development uncovered significant or clear political intervention? And, if so, would this be consistent?” *Id.* at 122.

<sup>716</sup> 5/14/2013 TIGTA Audit Report, at 42.

<sup>717</sup> See 2/8/2013 email from Holly Paz to Nikole Flax, Lois Lerner and others, “Advocacy Data Request,” IRSR0000468937 - 938

<sup>718</sup> See undated notes by Steven Miller, Acting IRS Commissioner, “Fact sheet-6:30 p.m.,” IRSR0000468916 - 920, at 920 (believed to be from 2013) (“Through May 9, IRS identified 472 applications for exemption for review of potential advocacy issues (including 301 §501(c)(4) applications). The balance of applications are for section 501(c)(3) status. To date, 176 applications have been approved (136 of which [are] §501(c)(4) applications). There have been 37 withdrawals, inclusive of both §501(c)(3) and (4) organizations.”) In the same document, Mr. Miller wrote: “Moreover, while it is impossible based on name alone to determine with specificity the political alignment of all organizations, in their totality it is clear that they span the entire political spectrum.” *Id.*

<sup>719</sup> 4/30/2013 “Memorandum for Deputy Inspector General for Audit,” from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43.

<sup>720</sup> *Id.*

almost tripled.<sup>721</sup> Spending data in filings with the Federal Election Commission (FEC) are consistent. They show that, in 2010 and 2012, two years in which federal elections took place, 501(c)(4) tax exempt groups spent millions of dollars on independent expenditures and electioneering communications. An analysis of FEC filings conducted by the Center for Responsive Politics found that, in 2010 alone, conservative and liberal 501(c)(4) groups reported campaign spending that totaled about \$126 million.<sup>722</sup> Two years later, in 2012, the Center determined that conservative and liberal 501(c)(4) groups reported spending twice as much, totaling nearly \$300 million.<sup>723</sup>

Press reports of 501(c)(4) organizations sponsoring election advertisements, bankrolling get-out-the-vote efforts, or making large contributions to groups engaged in campaign activities also increased. Media stories included descriptions of campaign activities and expenditures by liberal 501(c)(4) groups such as the League of Conservation Voters,<sup>724</sup> Patriot Majority USA,<sup>725</sup> Women's Voices Women Vote Action Fund,<sup>726</sup> and VoteVets Action Fund<sup>727</sup> as well as by conservative groups such as the American Action Network<sup>728</sup> and Crossroads Grassroots Policy

<sup>721</sup> See 5/7/2013 "Updated Baseline Analysis of 501(c)(4) Form 990 Filers with Political Campaign Activities," prepared by the IRS, IRSR0000507010 - 044, at 013.

<sup>722</sup> "2010 Outside Spending, by Group," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U>.

<sup>723</sup> "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>.

<sup>724</sup> According to the Center for Responsive Politics, the League of Conservation Voters (LCV), which works to elect pro-environment candidates, was the largest spending, Democratic leaning 501(c)(4) group in the 2012 election cycle. See "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>. The League of Conservation Voters is affiliated with one 501(c)(3) group, League of Conservation Voters Education Fund; one other 501(c)(4) group, Federation of State Conservation Voter Leagues; and three 527 political organizations which primarily focus on "federal electoral activity," League of Conservation Voters Action Fund, LCV Political Engagement Fund, and League of Conservation Voters Victory Fund. See LCV 2011 Form 990, Schedule R, at 1-cont. 1, Part II.

<sup>725</sup> According to the Center for Responsive Politics, Patriot Majority USA was the second largest spending, Democratic leaning 501(c)(4) group in the 2012 election cycle. See "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>. While "Patriot" has been characterized as a criteria used by the IRS to identify conservative 501(c)(4) groups, here it is part of the name of a major Democratic-leaning group. Patriot Majority USA's stated mission is to "create jobs, promote economic development and preserve the American Dream for all families." "America Back on Track," Patriot Majority, <http://www.patriotmajority.org/about>.

<sup>726</sup> Women's Voices Women Vote Action Fund is a Democratic leaning 501(c)(4) group whose stated mission is: "to promote social welfare ... including but not limited to, conducting research on determining how to increase the share of unmarried women in the electorate, developing public education campaigns that motivate the voter registration and participation of unmarried women, advocating for public policy issues that affect the lives of unmarried women, and publicizing the position of elected officials concerning these issues." Women's Voices Women Vote Action Fund Form 1024, Exhibit 2, Articles of Incorporation, at 1.

<sup>727</sup> VoteVets Action Fund is a 501(c)(4) group affiliated with VoteVets Political Action Committee, a 527 political organization. See VoteVets Action Fund 2010 Form 990, Schedule R, at 1, Part II, line 1. The stated mission of VotesVets Action Fund is to use "public issue campaigns and direct outreach to lawmakers to ensure that troops abroad have what they need to complete their missions, and receive the care they deserve when they get home." "About Us," VoteVets, <http://www.votevets.org/about?id=0001>.

<sup>728</sup> The American Action Network is a Republican leaning 501(c)(4) organization affiliated with the Congressional Leadership Fund, a 527 political organization, and the American Action Forum, a 501(c)(3) charitable organization. American Action Network's stated mission is to "create, encourage and promote center-right policies based on the

Strategies.<sup>729</sup> Their FEC filings, 1024 application forms, and 990 tax returns illustrate some of the problems that IRS agents have encountered, why many sought guidance on how to resolve them, and why the processing of these cases slowed as the IRS sought ways to ensure the cases were treated consistently.

**Issue Ads Versus Campaign Ads.** One key issue often confronting IRS agents handling 501(c)(4) applications filed by groups involved with campaign activities was distinguishing between spending on issue advocacy versus campaign activities. The IRS required its agents to use the facts and circumstances test to determine, for example, whether a broadcast advertisement sponsored by a 501(c)(4) organization should be treated as a campaign or social welfare activity.<sup>730</sup> The IRS did not allow its agents to rely on the Federal Campaign Finance Act (FECA) provision which treated any ad that is broadcast on radio or television with 30 days of a primary or 60 days of an election, and mentions a candidate to the electorate, as an “electioneering communication.”<sup>731</sup> Instead, the IRS required its agents to consider all of the facts and circumstances surrounding the advertisement, including its timing, wording, broadcast medium, audience, and context.<sup>732</sup>

One of the most difficult aspects of the required analysis involved the ad’s wording. If the ad used words that were campaign related, such as “vote for,” “elect,” or “defeat,” an IRS agent would likely treat it as evidence of a campaign activity. For example, a television ad aired by the League of Conservation Voters in October 2012, within a month of an election, urged viewers to “Help us defeat [a Republican candidate] and the Flat Earth Five.”<sup>733</sup> But other ads

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principles of freedom, limited government, American exceptionalism, and strong national security.” “About,” American Action Network, <http://americanactionnetwork.org/about>.

<sup>729</sup> Crossroads Grassroots Policy Strategies (Crossroads GPS) is a Republican-leaning 501(c)(4) group affiliated with American Crossroads, a 527 political organization. See Crossroads GPS 2011 Form 990, Schedule R, at 1, Part II. According to the Center for Responsive Politics, in 2012, Crossroads GPS spent the largest amount on political activity of any 501(c)(4) group, reporting nearly \$71 million in political expenditures. See 2012 “American Crossroads/Crossroads GPS,” prepared by Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012>.

<sup>730</sup> Rev. Rul. 2007-41.

<sup>731</sup> 2 U.S.C. §434 (f)(3)(A)(i).

<sup>732</sup> See Rev. Rul. 2007-41. See also 4/25/2012 draft guidesheet, “Reviewing Section 501(c)(3) and 501(c)(4) Exemption Applications (Political Campaign Intervention and Lobbying), at PSI-TIGTA-01-000146 - 199, at 159 – 162.

<sup>733</sup> Transcript of advertisement aired by the League of Conservation Voters, naming Congressman Dan Benishek (R) of Michigan’s 1<sup>st</sup> Congressional District:

Written on Screen: Meet the Flat Earth Five

Female Voice: Is global warming a major threat to the Great Lakes?

Written on Screen: Candidate Debate  
North Central Michigan College Library  
October 15, 2012  
Dan Benishek MI-01

aired by 501(c)(4) groups did not explicitly call for the election or defeat of a candidate, while still conveying a message about an individual running for office. For example, in September 2012, Patriot Majority USA aired an ad that named a Republican Congressman and, without using the words “defeat” or “vote against,” discussed his position on Medicare in very negative terms, ending with the statement: “He’s for them. Not us.”<sup>734</sup> It is possible that an IRS agent

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Dan Benishek: “Well frankly, I’m not sure...umm... how significant global warming is. [booing in the background] uuhh... Well, I don’t know, I’m a scientist.” [laughter in background]

Written on Screen: The National Academy of Sciences found that 98% of climate scientists accept that humans are contributing to climate change.

Written on Screen: Help us defeat Dan Benishek and the Flat Earth Five.  
lcv.org/FlatEarthFive  
Paid for by the League of Conservation Voters, www.lcv.org, and not authorized by any candidate or candidate’s committee

<sup>734</sup>Transcript of advertisement aired by Patriot Majority USA, naming Congressman Tom Latham (R) of Iowa’s 3<sup>rd</sup> Congressional District:

Male Announcer: Republicans in Congress. What are they dishing out for Iowans?

Written on Screen: Republican Diner  
Today’s Special

Male Announcer: They voted to end Medicare as we know it.

Written on Screen: Republicans in Congress voted to end Medicare as we know it.  
H Con Res 34, Vote #277, 4/15/11; Wall Street Journal, 4/4/11

Male Announcer: Forcing seniors to pay \$6,400 dollars more

Written on Screen: Republicans in Congress  
Seniors pay \$6,400 more  
USA Today, 10/3/11; Congressional Joint Economic Committee, 5/20/11

Male Announcer: While serving the average millionaire a tax break of nearly \$265,000 dollars.

Written on Screen: Republicans in Congress  
\$265,000 tax break for millionaires  
Center for Budget and Policy Priorities, 3/27/12

Male Announcer: And here’s Tom Latham. A top chef in Congress said, quote, he’d do anything for his close friend House Speaker John Boehner.

Written on Screen: “I’d do anything he asked.”  
*Politico*, 9/21/10  
Congressman Tom Latham

Male Announcer: Tom Latham. He’s for them. Not us. Patriot Majority USA is responsible for the content of this advertising.

Written on Screen: Congressman Tom Latham. He’s for them. Not us.



would view the wording of that ad as representative of issue advocacy, in particular if Medicare legislation were under consideration in the House or a vote took place in the House on a Medicare issue around the time the ad aired. But another IRS agent might treat it as a campaign ad due to its negative tone and its being broadcast within two months of an upcoming election. Either decision would be supportable under current IRS practice. By requiring consideration of all material factors when evaluating an ad, the facts and circumstances test required IRS agents to make judgments based upon a subjective analysis of a collection of various issues related to the advertisement, rather than a dispassionate analysis of objective facts not open to dispute.

**Inconsistent Tax and FEC Spending Totals.** A second issue confronting IRS agents involved inconsistent spending reports. On its 990 tax return for 2010, Women’s Voice Women Vote Action Fund (WVWVAF), a Democratic-leaning group, checked a box indicating that it did not engage in any “direct or indirect political campaign activities,” but reported on filings with the FEC for 2010, that it had spent nearly \$880,000 on electioneering communications and nearly \$250,000 on independent expenditures.<sup>735</sup> When questioned about the discrepancy, WVWVAF reported it had made an inadvertent error and would amend its 2010 tax return, which it did.<sup>736</sup> In its amended 990 tax return for 2010, WVWVAF changed its “no” response to a “yes” on political campaign activities; added a Schedule C for “Political Campaign and Lobbying Activities,” and reported about \$250,000 in political expenditures, representing about 9% of its total reported expenses for the year of \$2.73 million.

Assuming WVWVAF, in fact, made an inadvertent mistake on its tax return, a second issue is why WVWVAF then reported substantially less campaign related spending on its tax return – \$250,000 – compared to its FEC filings – \$1.1 million. A related issue is whether the IRS agent reviewing the 990 tax return would, as a standard practice, compare the group’s spending totals on its tax return versus those on its FEC filings and, if so, ask about the difference. Still another issue is how the agent will treat the information provided on the FEC filings. If the IRS had a bright line rule requiring agents to treat electioneering communications and independent expenditures as campaign spending, then the IRS, 501(c)(4) group, and tax exempt community would know how the IRS would analyze the facts. Instead, under the facts and circumstances test, the IRS, the group, and the tax exempt community cannot be sure how the group’s expenditures will be treated.

In addition, if the IRS were to determine that all of WVWVAF’s FEC reported spending, totaling about \$1.1 million, must be treated as campaign activity, then that campaign spending

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<sup>735</sup> See 2010 Women’s Voice Women Vote Action Fund form 990 at 3, Part IV, line 3; “Women’s Voice Women Vote Action Fund,” Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=C30001754>.

<sup>736</sup> Women’s Voice Women Vote Action Fund 2010 990 and amended 990. See amended 2010 990 for Women’s Voice Women Vote Action Fund 2010, at 3, Part IV, line 3; Schedule C, at 1, Part I-C, line 3. See “How Nonprofits Spend Millions on Elections and Call it Public Welfare,” *ProPublica*, Kim Barker, (8/18/2012), <http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>.

would represent about 41% of the group's total spending for 2010.<sup>737</sup> Since the IRS does not have a clear percentage test in place and instead relies on the facts and circumstances test to determine when a group is primarily engaged in social welfare activities, it is unclear whether the IRS would treat the 41% figure as evidence of excessive campaign activity, thereby disqualifying the group for a tax exemption. It is also easy to see why an IRS agent might delay resolving these issues pending receipt of written guidance about how to proceed.

This issue is not confined to WVWVAF. The American Action Network, a Republican-leaning organization, reported on its 990 tax return for 2010, that it had spent a total of about \$25.7 million during the year, of which \$5.5 million, or about 21%, was spent on political campaign activities.<sup>738</sup> On its FEC filings for 2010, however, American Action Network reported spending about \$18.9 million on electioneering communications and independent expenditures, which represented about 73% of its total expenditures for the year.<sup>739</sup> Again, the reasons for the disparate spending totals and how the IRS would treat them are unclear. In addition, under the facts and circumstances test, it is unclear whether the IRS would view American Action Network's campaign spending as representing 21% or 73% of its total expenditures for the year, and whether it would view its campaign activities as having become the group's primary activity, in violation of its tax exempt status.

The IRS has reported that, beginning in 2010, "[m]any applications included what appeared to be incomplete or inconsistent information," with some organizations indicating that they "did not plan to conduct political campaign activity, but elsewhere described activities that appeared in fact to be such activity."<sup>740</sup> The IRS attributed the problem in part to organizations not understanding "what activities would constitute political campaign intervention under the tax law."<sup>741</sup> The IRS also explained that the discrepancies required its agents to "gather additional information,"<sup>742</sup> which slowed the case resolution process.

**Vague Spending Explanations.** A third issue confronting the IRS agents involved how to categorize particular group expenditures. The IRS has reported that the applications it began to receive in 2010, "were in many cases vague as to the activities the applicants planned to conduct."<sup>743</sup> Those activities were described not only on the groups' 1024 application forms, but also on their 990 tax returns, at times using broad or vague terms that made it difficult for IRS agents to determine whether the related spending should be treated as evidence of campaign or social welfare activities.

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<sup>737</sup> "Women's Voice Women Vote Action Fund," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=C30001754>.

<sup>738</sup> See 2010 American Action Network form 990, at 1, Part I, line 18; at 3, Part IV, line 3; and Schedule C, at 1, Part I-C, line 3.

<sup>739</sup> "American Action Network," Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=American Action Network>.

<sup>740</sup> 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 44.

<sup>741</sup> Id.

<sup>742</sup> Id.

<sup>743</sup> Id.

For example, Crossroads GPS reported on its 2010 tax return that it compensated its largest independent contractor, Crossroads Media, \$18.3 million for “media services.”<sup>744</sup> In another section of the tax return, Crossroads GPS listed expenses of \$8.2 million spent on “grassroots issue advocacy,” without explaining what that phrase covered, who received the funds, or how those funds related to its contractor expenditures.<sup>745</sup> Crossroads GPS also reported on its 2010 tax return that it engaged in political campaign activities, and spent about \$15.9 million on campaign expenditures from June 2010 to June 2011, representing about 37% of its total expenses for that time period.<sup>746</sup> Crossroads GPS reported even larger figures two years later. On its 2012 tax return, Crossroads GPS reported paying about \$118.7 million for “media services” to Crossroads Media, and \$74.5 million for “grassroots issue advocacy.”<sup>747</sup> Crossroads GPS also reported spending a total of over \$74 million on campaign expenditures, or about 39% of its total expenses of \$189 million for the covered time period.<sup>748</sup> Because IRS agents must operate under the facts and circumstances test with few bright line rules, they would have to identify and analyze each of the expenditures included within the terms, “media services” and “grassroots issue advocacy,” and make case-by-case determinations about what qualified as campaign versus social welfare spending.

Another example involved VoteVets Action Fund, which reported on its 990 tax return for 2010, that it had engaged in political campaign activities, and spent about \$3.5 million on those activities, representing about 48% of its total expenses of \$7.3 million for the year.<sup>749</sup> Of the \$3.5 million spent on political campaign activities, VoteVets Action Fund indicated it had contributed \$250,000 to Patriot Majority PAC, a Super PAC, for “voter education,” and a total of \$110,000 to three other 501(c)(4) groups, including in one instance \$45,000 to WVWAF for “general support.”<sup>750</sup> In addition, it spent about \$1.1 million on “communications/media” and about \$855,000 on “consulting.”<sup>751</sup> An IRS agent would have to determine what activities were included within the terms, “communications/media,” “consulting,” and “general support,” how to categorize each type of expenditure, and then determine how to evaluate the 48% total. Again, it is easy to see why an IRS agent might want guidance on how to proceed.

**Categorizing Grants and Donations.** A fourth issue confronting the IRS involved how to categorize “grants” and “donations.” In recent years, many 501(c)(4) organizations made large grants or donations to other nonprofit groups, raising a host of difficult questions about whether the funds were being used on campaign activities. For example, in 2010, according to its 990 tax return, Patriot Majority USA, a Democratic-leaning group, spent the majority of its revenue on grants to ten 501(c)(4) groups and one 527 political organization, describing the funds as spent on “general support for grassroots advocacy,” “general support for direct

<sup>744</sup> See 2010 Crossroads GPS form 990, at 8, Part VII, Section B, line 1.

<sup>745</sup> See *id.* at 10, Part IX, line 24b.

<sup>746</sup> See *id.* at 1, Part I, line 18; at 3, Part IV, line 3; Schedule C at 1, Part I-A, line 1.

<sup>747</sup> See 2012 Crossroads GPS form 990, at 8, Part VII, Section B, line 1; at 10, Part IX, line 24a.

<sup>748</sup> See *id.* at 1, Part I, line 18; Schedule C, at 1, Part I-A, line 1.

<sup>749</sup> See 2010 VoteVets Action Fund form 990, at 1, Part I, line 18; at 3, Part IV, line 3; Schedule C at 1, Part I-A, line 1.

<sup>750</sup> See *id.*, Schedule I at 1, Part II.

<sup>751</sup> See *id.* at 10, Part IX, lines 24a-b.

advocacy,” or “general support for nonpartisan voter turnout.”<sup>752</sup> Its tax return contained no information about how the recipients actually used the funds, including whether they were ultimately spent on campaign activities. In its 2012 tax return, Crossroads GPS reported providing over \$35 million in grants to three 501(c)(3) organizations, five 501(c)(4) organizations and two 501(c)(6) organizations, all for “social welfare purposes.”<sup>753</sup> Under the facts and circumstances test with few bright line rules in place, an IRS agent required to evaluate these tax returns would have to analyze each grant, determine how far to go in finding out how the recipient used the funds that were provided, decide whether to categorize the grants as campaign spending, and analyze how that spending would affect an analysis of the group’s primary activity.

In California, the settlement of a recent case illustrated how some 501(c)(4) groups have functioned as intermediaries to transfer funds from undisclosed donors to campaign organizations. The case involved two Arizona 501(c)(4) groups, the Center to Protect Patient Rights and Americans for Responsible Leadership, which settled with the California Fair Political Practices Commission (FPPC) and the California State Attorney General’s office in 2013.<sup>754</sup> The Center to Protect Patient Rights was alleged to have accepted a total of \$15 million in contributions from undisclosed donors, and then transferred the funds to intermediary groups – either Americans for Responsible Leadership or a group called the American Future Fund – each of which, in turn, donated the funds to political action committees engaged in campaign activities.<sup>755</sup> Only the immediate contributor – Americans for Responsible Leadership or American Future Fund – was listed as a PAC contributor; in the words of the FPPC, the groups’ intermediary roles deprived “the public of the initial source of the contribution[s].”<sup>756</sup> Under the terms of the settlement, the Center to Protect Patient Rights and Americans for Responsible Leadership paid fines totaling \$1 million, but did not have to disclose the original donors. California has since enacted legislation to prevent similar situations in the future.<sup>757</sup>

**Discontinuities.** Still another issue involved how the IRS treated organizations that changed their names or employer identification numbers over time. For example, since its inception, Patriot Majority USA, a Democratic leaning group, has gone through five different

<sup>752</sup> Of \$5.2 million in total revenue, Patriot Majority USA spent about \$2.9 million on grants. See 2010 Patriot Majority USA form 990, at 1, 2, Part I, line 13; at 17, Schedule I, Part II.

<sup>753</sup> See 2012 Crossroads GPS form 990, at 2, Part III, line 4b; at 38, Schedule I, Part II, line 1a. In 2010, Crossroads GPS reported over \$15.8 million in grants, distributed to eleven 501(c)(4) organizations and one 501(c)(6) organization. See 2010 Crossroads GPS form 990, at 2, Part III, line 4b; at 38, Schedule I, Part II.

<sup>754</sup> See “FPPC Announces Record Settlement in \$11 Million Arizona Contribution Case,” prepared by California Fair Political Practices Commission (10/24/2013), [http://www.fppc.ca.gov/press\\_release.php?pr\\_id=783](http://www.fppc.ca.gov/press_release.php?pr_id=783).

<sup>755</sup> See Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, <https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html>. See also “Dark Money Groups Pay \$1 Million in Fines in California Case,” ProPublica, (10/24/2013), <http://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>.

<sup>756</sup> See Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, <https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html>.

<sup>757</sup> See California Senate Bill 27, introduced by State Senator Lou Correa, (12/3/2012), <http://fppc.ca.gov/SUNCenter/wp-content/uploads/2013/10/California-SB-27-amended-PDF1.pdf>; “Jerry Brown signs law requiring political nonprofits identify donors,” *The Sacramento Bee*, (5/14/2014), <http://blogs.sacbee.com/capitolalertlatest/2014/05/jerry-brown-signs-law-requiring-political-nonprofits-identify-donors.html>.

iterations.<sup>758</sup> It started out, in 2006, as the Midwest Alliance for Better Government, and changed its name a year later, in 2007, to Patriot Majority For a Stronger America, while operating under the same employer identification number, mission statement, and president, Craig Varoga.<sup>759</sup> In 2008, Mr. Varoga terminated Patriot Majority for a Stronger America, and formed a new 501(c)(4) group, the American Alliance for Economic Development, with a new employer identification number but located in the same office as the previous organization.<sup>760</sup> Two years later, in 2010, he formed Patriot Majority USA, using the same employer identification number as the American Alliance for Economic Development.<sup>761</sup> In 2011, Patriot Majority USA liquidated and reincorporated under the same name, changing its address and employer identification number.<sup>762</sup> Clearly, all five organizations were successors to each other, but the details were and are complex.<sup>763</sup> Since these types of changes are not unusual among

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<sup>758</sup> See, e.g., “Shape-Shifting by Liberal Dark Money Groups Seems Meant to Confuse,” Center for Responsive Politics, Robert Maguire and Viveca Novak (5/22/2013), <https://www.opensecrets.org/wp/2013/05/shape-shifting-by-liberal-dark-mone/>.

<sup>759</sup> Compare 2006 Midwest Alliance for Better Government form 990 (initial return), with 2007 Patriot Majority for a Stronger America form 990 (name change) (each listing the group’s purpose as “education of the public regarding the elimination of corruption in government.”)

<sup>760</sup> Compare 2007 Patriot Majority for a Stronger America form 990, with 2008 American Alliance for Economic Development form 990 (initial return) (both listing an address of “300 M St. SE, 1102, Washington, DC”). It is unclear whether American Alliance for Economic Development or Midwest Alliance for Better Government ever filed applications with the IRS for tax exempt status, since no application for either group is publicly available. However, a 2011 application for tax-exempt status by a successor organization indicates that American Alliance for Economic Development received recognition of its 501(c)(4) status on May 12, 2009. See 2011 Patriot Majority USA form 1024 at 3, Part II, line 4. The law allows section 501(c)(4) organizations to hold themselves out as tax-exempt whether or not they have applied for such status with the IRS. See 6/4/2012 Letter from the IRS to Subcommittee, at 1.

<sup>761</sup> See 2010 Patriot Majority USA form 990 (name change) at 1, letters B, D.

<sup>762</sup> See 2011 Patriot Majority USA form 990-EZ; 2011 Patriot Majority USA form 990; and 2011 Patriot Majority USA form 1024 application. Two organizations named Patriot Majority USA filed 2011 tax returns as tax exempt organizations, one using the old employer identification number and one using a new number, since both were in operation that year. Both organizations listed the same mailing address, officers, and records custodian. The predecessor Patriot Majority USA filed a form 990-EZ for the time period January 1-April 26, 2011, indicating that the group had terminated, liquidated its assets and made a grant of about \$17,000 to the successor Patriot Majority USA. The successor Patriot Majority USA filed a form 990 for the time period March 17-December 31, 2011, designated as an initial return. Its 2011 form 990 listed the predecessor Patriot Majority USA as a “related tax-exempt group.” Also in 2011, the successor Patriot Majority USA filed articles of incorporation in the District of Columbia, and submitted a form 1024 application to the IRS for 501(c)(4) tax exempt status, using the new employer identification number and a new address. Its application explained the group’s history as follows: “Patriot Majority USA, Inc. (PMUSA) is a successor organization to the American Alliance for Economic Development, Inc. ... which was incorporated on April 29, 2008, received its recognition of tax-exempt status under section 501(c)(4) of the Code on May 12, 2009. AAED wound down its affairs, distributed its assets in accordance with section 501(c)(4), and dissolved as of January 14, 2011. PMUSA was originally started as an unincorporated nonprofit association and was the recipient of AAED’s remaining assets. It was then incorporated in March 2011 to continue the mission of AAED, with substantially similar activities and goals.” See 2011 Patriot Majority USA form 990-E-Z at 1, letters A-D; at 2, Part IV; at 3, Part V, lines 36, 42a; Schedule N; 2011 Patriot Majority form 990 at 1, letters A-D; at 6, Part VI, Section C, line 20; at 7, Part VII; Schedule R, at 1, Part II; at 3, Part V, line 2; 2011 Patriot Majority USA form 1024, at 1, Part I; at 3, Part II, line 4; attached Articles of Incorporation of Patriot Majority USA, Inc.

<sup>763</sup> See, e.g., “Shape-Shifting by Liberal Dark Money Groups Seems Meant to Confuse,” Center for Responsive Politics, Robert Maguire and Viveca Novak (5/22/2013), <https://www.opensecrets.org/wp/2013/05/shape-shifting-by-liberal-dark-mone/> (“It’s hard to tell what is going on here,” said Marcus Owens, former head of the Internal

nonprofits, it illustrates the importance of the IRS having clear standards and bright line rules about how to track and analyze reorganizations, asset transfers, activities and expenditures.

These examples of issues that have recently confronted IRS agents assigned to 501(c)(4) advocacy cases illustrate some of the challenges they faced. They also help explain why so many cases were delayed while IRS agents awaited guidance from more senior managers on how to process the applications for tax exempt status.

## **J. Analysis**

The Subcommittee investigation into how the IRS handled 501(c)(4) applications filed by organizations engaged in campaign activity exposed extensive IRS mismanagement. The litany of management failures included delayed disposition of many applications for as long as three years; unauthorized and troubling changes in the BOLO screening criteria; use of inappropriate screening criteria; use of an inappropriate descriptor for the category of cases being subjected to heightened scrutiny; yearly turnover in the key case coordinator; slow approval of development letters; inclusion of inappropriate, intrusive, or burdensome questions in some development letters; poor coordination between IRS personnel in Cincinnati and senior managers and legal counsel in Washington, D.C.; delayed casework pending the resolution of two test cases that remained unresolved for at least three years; confusion over the standards for identifying campaign activities and determining primary activities; inadequate guidance for IRS personnel confronting complex and sensitive issues involving issue advocacy and campaign intervention; failure to finalize additional written guidance despite nearly a year of work; inadequate training on how to apply the facts and circumstances test; failure to resolve the growing backlog of advocacy cases; failure to disclose the nature and extent of the management problems in response to Congressional inquiries; and failure to develop regulations that faithfully reflected the statutory requirement that 501(c)(4) groups engage “exclusively” in social welfare activities. A number of these same management failures are described in the audit report issued by the Treasury Inspector General for Tax Administration (TIGTA).

The Subcommittee investigation also found evidence that the IRS management failures affected both conservative and liberal applicants for tax exempt status. Years-long delays, intrusive questions, and poorly coordinated reviews by IRS personnel in Cincinnati and Washington, D.C. impeded the disposition of 501(c)(4) applications filed by groups across the political spectrum, including conservative-leaning groups associated with the Tea Party, 9/12, and Patriot organizations, and liberal-leaning groups associated with ACORN, Occupy, Emerge America, and progressive organizations.

The Subcommittee investigation found no evidence that political bias influenced the decisions made by IRS personnel processing 501(c)(4) applications. A review of nearly 800,000 pages of documents and nearly two dozen interviews produced no evidence of political bias influencing IRS decisionmaking about how to process 501(c)(4) applications filed by conservative organizations, and no evidence that the IRS singled out conservative groups for harsher treatment than other groups. In fact, key IRS personnel involved with processing

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Revenue Service’s Exempt Organizations division, “but starting and terminating organizations makes it more difficult for the IRS to identify who did what when.”).

501(c)(4) applications turned out to be registered Republicans or politically aligned with the Tea Party, with no apparent animus against conservative groups. TIGTA reached the same conclusion about the lack of political bias at the IRS in processing 501(c)(4) applications, as indicated in more detail below.

Finally, the Subcommittee investigation determined that one of the key contributors to the IRS management failures was the agency's reliance on the facts and circumstances test to identify campaign activities and determine whether a 501(c)(4) group was engaged primarily in social welfare activities. Because that test was fact-intensive and led to case-by-case determinations, and because the IRS did not provide its agents with objective standards or bright line rules on how to handle common fact patterns, IRS agents were often forced to exercise discretion over how to develop and evaluate the facts of a case and apply the law. Delays were common as some IRS agents or their supervisors hesitated over how to proceed and sought guidance to ensure they were acting appropriately. In other instances, IRS agents made decisions on pending applications that, at times, produced inconsistent results, most easily seen in the cases involving Emerge America affiliates, which sought to help Democratic women candidates run for office. In 2011, different IRS agents approved tax exempt status for five Emerge organizations, and denied tax exempt status for three Emerge organizations, exposing the confusion and subjective decisionmaking over how to process those cases; in 2012, the IRS revoked the tax exempt status of the five groups previously approved. The evidence indicates that the facts and circumstances test, when applied to 501(c)(4) applications, led to lengthy delays, intrusive questions, subjective analysis regarding the relative importance of various factors, and inconsistent results. Given the sensitivities surrounding IRS treatment of politically active groups, the ongoing management problems, and the public distrust of IRS actions in this area, the evidence indicates that the facts and circumstances test should be replaced with more objective standards and bright line rules to produce more predictable and trustworthy results.

## IV. TIGTA AUDIT

The audit conducted by the Treasury Inspector General for Tax Administration (TIGTA) was initiated in March 2012, in the midst of negative media reports about IRS treatment of 501(c)(4) applications filed by organizations engaged in campaign activity, in particular groups aligned with the Tea Party. TIGTA's Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform. The work was conducted over the following year, and a final audit report was issued in May 2013.

The official TIGTA audit engagement letter stated that the audit's "overall objective" was to "assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues." It also stated: "Several accusations of inconsistent treatment towards conservative groups have been made." Despite being charged with examining the "consistency" of the IRS' actions, TIGTA auditors examined how the IRS handled applications filed by conservative groups, but did not perform any comparative analysis of how the IRS handled applications filed by liberal groups. In response to later media inquiries about why information about liberal groups was excluded, a TIGTA spokeswoman initially said, "we were asked to narrowly focus on Tea Party organizations," but later indicated she had been given incorrect information.

During the audit, TIGTA auditors focused on actions taken by IRS screeners to identify applications filed by groups whose names or application materials contained the phrases, "Tea Party," "9-12," or "Patriot," noting that the selection criteria focused on the groups' names or political views, rather than on their participation in campaign activities. The TIGTA auditors also focused on a single entry in a broader "Be-on-the-Lookout" (BOLO) list whose wording changed over time, moving from language which urged IRS personnel to identify applications filed by groups affiliated with the "Tea Party movement," to language urging them to identify applications containing "indicators of significant amounts of political campaign intervention." While the IRS admitted the earlier selection criteria were inappropriate, IRS personnel also attempted to demonstrate the criteria were not the result of political bias, by showing TIGTA that the IRS used similar BOLO listings for liberal groups, with screening criteria using the phrases "progressive," "ACORN," and "Occupy" to identify applications of interest. Despite the IRS' repeatedly drawing attention to those BOLO entries, the TIGTA auditors failed to examine either how the IRS used those BOLO entries or how the IRS handled 501(c)(4) applications filed by liberal groups in comparison to applications filed by conservative groups.

In February 2013, after receiving an allegation that an IRS email had directed IRS employees to "target" Tea Party groups, the Assistant Inspector General responsible for exempt organization issues, Gregory Kutz, asked the TIGTA Office of Investigations to conduct an email search of certain IRS employees. The Office of Investigations then searched over 2,200 emails and other documents from the email accounts of five IRS employees involved with processing 501(c)(4) applications. After conducting a thorough review, the Office of Investigations concluded that the 2,200 IRS emails and other documents contained "no indication" that the pulling of Tea Party applications for additional scrutiny by IRS personnel was "politically motivated," advising that the IRS actions were instead the result of inadequate guidance on how to process them. Even though that finding by the TIGTA Office of



Investigations analysis directly addressed the central issue TIGTA was auditing, whether there was political bias at the IRS, the documentary analysis performed by the Office of Investigations was not included in TIGTA's audit report.

In February 2013, the audit team submitted a draft audit report to the TIGTA Chief Counsel and Office of Audit head. The Chief Counsel suggested removing the word "targeted" from the report, because "targeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report." The audit team removed the word from the report except when describing the allegations that led to the audit. Later that month, TIGTA provided a draft of the report to the IRS.

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having the head of the Exempt Organizations division, Lois Lerner, disclose the audit before it was released and apologize for the agency's conduct during a conference she was scheduled to address. On May 10, 2013, at the Acting IRS Commissioner's direction and in response to a planted question, Ms. Lerner apologized for the IRS' having used "Tea Party" to identify 501(c)(4) applications subjected to heightened review. Her apology triggered a public firestorm centered on the allegation that the IRS had shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner and other senior IRS officials were required to resign.

The apology generated intense interest in the TIGTA audit report which was released the following week, on May 14, 2013. The audit report found that the IRS had used "inappropriate criteria" to flag 501(c)(4) applications for heightened review, and "ineffective management" had caused delays and subjected applicants to burdensome information requests. TIGTA Inspector General George was asked to testify at multiple Congressional hearings about the audit findings. When pressed about whether the IRS had unfairly targeted conservative groups, Mr. George testified that TIGTA had found no sign of political bias at the IRS, but offered as evidence only the denials of the IRS officials involved. He made no mention of the email review conducted by the TIGTA Office of Investigations or its conclusion that the documents contained "no indication" that the IRS' actions were "politically motivated," even though that investigative finding directly addressed the issue of political bias at the IRS. Mr. George told the Subcommittee that he did not mention the Office of Investigations' finding, because no one on his staff had told him about it. On June 6, 2014, Mr. George wrote in a letter to the Subcommittee that the TIGTA audit had "found no evidence of political bias," also stating "it is important to note that the matter is being further reviewed."

On May 21, 2013, the night before the third Congressional hearing at which the Inspector General testified about the audit, the TIGTA Chief Counsel decided to review the IRS BOLOs before providing copies to Congress. During his review, he saw, for the first time, BOLO entries naming two liberal groups, ACORN and Occupy. He promptly informed Inspector General George and Assistant Inspector General Kutz, both of whom told the Subcommittee they had previously been unaware of any BOLO listings for liberal groups, even though the IRS had provided copies and repeatedly informed the TIGTA audit team about them. Even after learning about them, the senior TIGTA officials remained silent for weeks about the BOLO entries for liberal groups, and provided incomplete and inaccurate testimony about them at Congressional

hearings. When the BOLO listings for liberal groups were finally disclosed by Members of Congress and the media, senior TIGTA officials insisted that the IRS had not disclosed those listings during the TIGTA audit, despite ample evidence to the contrary.

During their Subcommittee interviews, Mr. George and Mr. Kutz indicated they had since reconsidered how the TIGTA audit report treated 501(c)(4) applications filed by liberal groups. Mr. George told the Subcommittee that the audit report should have acknowledged the existence of the other BOLO entries and the auditors should have looked into the other groups; Mr. Kutz indicated TIGTA potentially should have included the progressive, ACORN, and Occupy BOLO listings in its analysis, although he thought it might have delayed completion of the audit for another year. TIGTA has since initiated an audit into how those and other BOLO entries were used, but has put that audit on hold pending other law enforcement investigative efforts related to Lois Lerner and IRS.

### **A. TIGTA In General**

The office of the Treasury Inspector General for Tax Administration (TIGTA), first established in 1999, is charged with overseeing the IRS.<sup>764</sup> TIGTA's stated mission is to "[p]rovide quality professional audit, investigative, and inspections and evaluations services that promote integrity, economy, and efficiency in the administration of the Nation's tax system."<sup>765</sup> While the TIGTA office is organizationally part of the U.S. Department of the Treasury, the TIGTA Inspector General has authority to act independently in its audits.<sup>766</sup>

The current TIGTA Inspector General is J. Russell George, who has been in office since November 2004.<sup>767</sup> Mr. George oversees a staff of about 960 employees, including auditors, investigators, attorneys, and support staff.<sup>768</sup> Two key TIGTA subdivisions are the Office of Audit and the Office of Investigations.<sup>769</sup> The Office of Audit is charged with conducting "performance and financial audits of IRS programs, operations, and activities" to identify "opportunities to improve the administration of the nation's tax laws," while the Office of Investigations is charged with conducting investigations to combat "fraud, waste, abuse and mismanagement" in IRS activities as well as attempts to "corrupt or threaten" IRS personnel.<sup>770</sup>

During the three-year period reviewed by this Report, 2010 to 2013, the Office of Audit was led first by Deputy Inspector General for Audit Michael Phillips and then, starting in June 2012, by Deputy Inspector General for Audit Michael McKenney. Within the office, five Assistant Inspectors General oversaw various aspects of the IRS, including an Assistant

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<sup>764</sup> TIGTA was created by the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105–206, 112 Stat. 685, to provide independent oversight of the IRS. See "Introducing the Treasury Investigator General for Tax Administration," prepared by TIGTA, [http://www.treasury.gov/tigta/about/tigta\\_brochure.pdf](http://www.treasury.gov/tigta/about/tigta_brochure.pdf); "What is TIGTA," prepared by TIGTA, [http://www.treasury.gov/tigta/about\\_what.shtml](http://www.treasury.gov/tigta/about_what.shtml).

<sup>765</sup> "About TIGTA," prepared by TIGTA, <http://www.treasury.gov/tigta/about.shtml>.

<sup>766</sup> See Inspector General Act of 1978, 5 U.S.C. App. 3, § 8D (2012).

<sup>767</sup> "Meet the IG: J. Russell George," prepared by TIGTA, [http://www.treasury.gov/tigta/about\\_ig.shtml](http://www.treasury.gov/tigta/about_ig.shtml).

<sup>768</sup> "Introducing the Treasury Investigator General for Tax Administration," prepared by TIGTA, [http://www.treasury.gov/tigta/about/tigta\\_brochure.pdf](http://www.treasury.gov/tigta/about/tigta_brochure.pdf).

<sup>769</sup> Id.

<sup>770</sup> Id.

Inspector General for Audit, Management Services, and Exempt Organizations, a position which Gregory Kutz assumed in 2012.<sup>771</sup> The Office of Investigations was led by Deputy Inspector General for Investigations, Timothy Camus.<sup>772</sup> A third Deputy Inspector General in charge of Inspections and Evaluations was David Holmgren. In addition, TIGTA obtained legal advice from its Chief Counsel Michael McCarthy and from Counselor Matthew Sutphen.<sup>773</sup>

**TIGTA Audit Plans.** Each year, the TIGTA Office of Audit develops and publishes an Annual Audit Plan.<sup>774</sup> As part of that plan, TIGTA identifies major management and performance challenges confronting the IRS, and develops audits to focus on those concerns.<sup>775</sup> In addition, TIGTA performs audits mandated by statute or regulation, as well as audits requested by Congress, the IRS, or the IRS Oversight Board.<sup>776</sup> TIGTA uses the Annual Audit Plan as a guide, but may modify its audit plans in response to staffing needs or unforeseen risk areas that require immediate attention.<sup>777</sup> In recent years, TIGTA has allocated roughly 10% of its staff days to suggested audits, 14% to mandatory audits, and the remaining 76% to risk-based audits.<sup>778</sup>

## B. Requesting the Audit

The TIGTA audit of how the IRS processed 501(c)(4) applications filed by groups associated with the Tea Party was initiated at the request of the House of Representatives Committee on Oversight and Government Reform (OGR). On March 8, 2012, three senior TIGTA officials, Matthew Sutphen, Counselor to the Inspector General, Nancy Nakamura, Assistant Inspector General for Audit, Management Services, and Exempt Organizations, and Troy Paterson, an Audit Director in the TIGTA Office of Audit, traveled to Capitol Hill and met with OGR staff.<sup>779</sup> The Committee staff expressed concern “that the IRS is biased in how it is processing 501(c)(4) applications from Tea Parties versus other organizations.”<sup>780</sup> OGR staff

<sup>771</sup> “Organizational Chart,” prepared by TIGTA, [http://www.treasury.gov/tigta/about\\_orgchart.shtml](http://www.treasury.gov/tigta/about_orgchart.shtml).

<sup>772</sup> Id.

<sup>773</sup> Id.

<sup>774</sup> “Introducing the Treasury Investigator General for Tax Administration,” prepared by TIGTA, [http://www.treasury.gov/tigta/about/tigta\\_brochure.pdf](http://www.treasury.gov/tigta/about/tigta_brochure.pdf).

<sup>775</sup> See “Fiscal Year 2014 Annual Audit Plan,” TIGTA Office of Audit, at 1-4, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2014.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2014.pdf).

<sup>776</sup> Id.

<sup>777</sup> Subcommittee interview of Greg Kutz, TIGTA (3/26/2014).

<sup>778</sup> “Fiscal Year 2014 Annual Audit Plan,” TIGTA Office of Audit, at 11, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2014.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2014.pdf); “Fiscal Year 2013 Annual Audit Plan,” TIGTA Office of Audit, at 13, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2013.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2013.pdf); “Fiscal Year 2012 Annual Audit Plan,” TIGTA Office of Audit, at 15, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2012.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2012.pdf); “Fiscal Year 2011 Annual Audit Plan,” TIGTA Office of Audit, at 70, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2011.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2011.pdf).

<sup>779</sup> See “Note to File,” prepared by Troy Paterson, TIGTA Bates No. 007221 – 222 (describing meeting with House Committee on Oversight and Government Reform staff). See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); 3/22/2014 email from Troy Paterson to Russell Martin, TIGTA Bates No. 004297 – 299 (indicating the meeting took place in the OGR Committee offices).

<sup>780</sup> “Note to File,” prepared by Troy Paterson, TIGTA Bates No. 007221 – 222. See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); 3/22/2014 email from Troy Paterson to Russell Martin, TIGTA Bates No. 004297 – 299.

highlighted, in particular, concerns that the IRS was targeting Tea Party organizations by asking inappropriate, burdensome, and intrusive questions.<sup>781</sup>

After the March 8, 2012 meeting, TIGTA personnel in the Office of Audit began looking into the concerns raised by the OGR Committee. A June 2012 letter signed by OGR Committee Chairman Darrell Issa and Subcommittee Chairman Jim Jordan acknowledged those inquiries at the time and described them as a result of the March meeting.<sup>782</sup> A letter by the TIGTA Inspector General in response noted: “As stated in your letter, after our meeting with the Committee staff, our Office of Audit recently began work on this issue.”<sup>783</sup> The TIGTA audit report also stated: “TIGTA initiated this audit based on concerns expressed by members of Congress,”<sup>784</sup> without mentioning OGR Committee Chairman Issa or Subcommittee Chairman Jordan. At another point, the audit report stated TIGTA had initiated the audit “based on concerns expressed by Congress and reported in the media regarding the IRS’s treatment of organizations applying for tax-exempt status.”<sup>785</sup> In testimony before that Committee, TIGTA Inspector General George testified that the audit was initiated as a result of Chairman Issa’s concerns.<sup>786</sup>

Although the OGR Committee allegations appear to have been the primary motivator for the TIGTA audit, the Landmark Legal Foundation also asked TIGTA to look into the allegations

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<sup>781</sup> “Note to File,” prepared by Troy Paterson, TIGTA Bates No. 007221 – 222. (“The staffers are concerned about whether the questions being asked of potential 501(c)(4) organizations have gone over the line (e.g., requests for names of donors and future speakers). The staffers are also concerned about the application process for 501(c)(4)s. What is the IRS trying to achieve with the actions it is taking?”).

<sup>782</sup> 6/28/2012 letter from Committee Chairman Issa and Subcommittee Chairman Jordan to TIGTA, PSI-TIGTA-03-001404 – 405 (“On March 8, 2012, Committee staff and Treasury Inspector General for Tax Administration (TIGTA) staff discussed potential problems with IRS’s recent effort to increase scrutiny of organizations operating under 501(c)(4) status. We understand that because of our March meeting, TIGTA is conducting ongoing work to better understand this IRS initiative.”). Congressman Jordan was the Chairman of the OGR Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs.

<sup>783</sup> 7/11/2012 letter from TIGTA Inspector General George to Chairman Issa, with an identical letter to Subcommittee Chairman Jordan, PSI-TIGTA-03-001409 – 410.

<sup>784</sup> 5/14/2013 TIGTA audit report, “Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review,” (hereinafter “5/14/2013 TIGTA Audit Report”), at Highlights, <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>785</sup> *Id.* at 3.

<sup>786</sup> Testimony of J. Russell George, “The IRS: Targeting Americans for Their Political Beliefs,” hearing before U.S. House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013), at 10, <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81742/pdf/CHRG-113hhrg81742.pdf> (“[A]s you are aware, Mr. Chairman, our audit was initiated based on concerns that you expressed due to taxpayer allegations that they were subjected to unfair treatment by the IRS.”). See also 4/19/2013 email from Matthew Sutphen to Russell George, “Congressional Update,” TIGTA Bates No. 015966 (TIGTA Counselor Matthew Sutphen: “[T]his report was initiated as a result of meeting with the committee staff last spring, and Chairman Issa sent a follow-up letter expressing his interest in the matter.”). The week prior to the release of the TIGTA audit report, the head of the TIGTA Audit Office, Michael McKenney, questioned why the TIGTA audit report did not clearly state that it had been performed at Congressman Issa’s request. See 5/8/2013 email from Michael McKenney to Gregory Kutz, “Final Report 201210022 – Inappropriate Criteria Were Used to Identify Tax Exempt Applications for Review,” TIGTA Bates No. 016072 (“Greg, why is it that that we don’t say that this review was performed at the request of the Chairman of the House Oversight and Government Reform Committee?”) See also 5/7/2013 email from John Anderson, TIGTA, to Michael McKenney, “Final Report 201210022 – Inappropriate Criteria Were Used to Identify Tax Exempt Applications for Review,” TIGTA Bates No. 016073 (“TIGTA initiated this audit based on concerns expressed by members of Congress.”).

that Tea Party groups were being unfairly targeted.<sup>787</sup> According to TIGTA, its decision to initiate the audit was also influenced by negative media reports on the IRS' handling of Tea Party applications.<sup>788</sup> TIGTA told the Subcommittee that none of the Tea Party groups themselves requested an audit of the IRS.<sup>789</sup>

In addition to inducing the TIGTA audit, OGR Committee staff apparently asked the TIGTA audit team to provide regular briefings about the status of its work, but TIGTA told the Subcommittee that it declined to provide those briefings. As the director of the TIGTA 501(c) audit, Troy Paterson, noted in an email to his supervisor, Russell Martin:

“Hmm ... I’ve never provided regular updates on audits where we have not issued a report. Are we allowed to say what we are finding to outside stakeholders, such as staffers, without issuing a report? I’ve never heard of us doing that before. From our previous meeting with Mr. Hixon and other staffers, I’m certain the first question in the meeting will be ‘Have you found any indications that the IRS is targeting Tea Party groups?’ If we are not prepared to provide an answer to that question without issuing a report, I think we should limit the request to providing a briefing on the scope of our review and providing a copy of the final report.”<sup>790</sup>

Mr. Paterson told the Subcommittee that TIGTA decided not to provide ongoing briefings to the OGR Committee staff on the audit work, but to wait until the audit was complete and a report prepared.<sup>791</sup> When asked about a TIGTA audit log entry stating: “Office of Audit agreed to brief the Government Oversight Sub-committee by September 2012,”<sup>792</sup> Mr. Paterson stated that the proposed briefing did not occur.<sup>793</sup>

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<sup>787</sup> TIGTA auditor Thomas Seidell told the Subcommittee that he recalled Landmark Legal Foundation’s writing to TIGTA with a request to look into the allegations that the Tea Party was being targeted by the IRS. Subcommittee interview of Thomas Seidell, TIGTA (3/19/14). See also 3/26/2012 email from Karen Kraushaar to Russell George, “TIGTA in the News March 26, 2012 (revised),” TIGTA Bates No. 015855 (sending a copy of a press article about the Landmark Legal Foundation’s letter to TIGTA); 3/26/2012 email from Joseph Urban to Lois Lerner and others, “Referral to TIGTA on (c)(4),” IRSR0000218372 – 375 (circulating copy of Landmark Legal Foundation letter); 3/23/2012 letter from Landmark Legal Foundation to TIGTA, “REQUEST FOR INVESTIGATION INTO IRS AGENCY MISCONDUCT,” <http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf>.

<sup>788</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>789</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>790</sup> 6/22/2012 email from Troy Paterson to Russell Martin, “TIGTA Letter,” TIGTA Bates No. 011343.

<sup>791</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>792</sup> “TIGTA OA: Process for Reviewing Applications for Tax Exemption,” TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 927.

<sup>793</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014). See also 1/14/2013 email from Lois Lerner to Troy Paterson, with copies to Holly Paz and Dawn Marx, “Advocacy discussion,” IRSR0000441700 – 701 (indicating the TIGTA auditors appeared to be “preparing for a meeting with Congressman Issa, where they may be opining on their preliminary take on the review”).

### C. Conducting the Audit

Troy Paterson, one of three senior directors in the Office of Audit's division of Audit, Management Services, and Exempt Organizations, was given responsibility for heading up the 501(c) audit effort.<sup>794</sup> He asked four TIGTA employees to conduct the audit, Thomas Seidell who served as the "Audit Manager"; Cheryl Medina who served as the "Lead Auditor"; and Michael McGovern and Evan Close who served as the "Auditors."<sup>795</sup>

According to Mr. Paterson, the TIGTA auditors began by conducting general research into 501(c)(4) issues, and then focused on the allegations of unfair treatment of Tea Party groups, which had been made by the OGR Committee and were also the subject of ongoing media reports.<sup>796</sup> On March 19, 2012, in one of the earliest emails TIGTA produced to the Subcommittee, Mr. Paterson circulated a report to his team and recommended their reading it for background, with the following explanation:

"Proving that there is nothing new under the sun, here is a March 2000 report from the Joint Committee on Taxation regarding allegations that the IRS was biased when reviewing applications and conducting examinations of politically active organizations that were tax-exempt or applying to be tax-exempt. Sound familiar? I haven't read this yet, but I'm thinking we might be able to glean some bits of wisdom from an investigation that has already been down the path we are heading."<sup>797</sup>

The report circulated by Mr. Paterson described an extensive investigation by the Joint Committee on Taxation (JCT) into allegations of "politically motivated treatment" of 501(c) applications by the IRS; after an examination that included reviews of organizations across the political spectrum, the JCT found "no credible evidence" of political bias at the IRS.<sup>798</sup>

On March 29, 2012, Ms. Medina sent Mr. Paterson and Mr. Seidell a press article noting that, while conservatives were denouncing the IRS for targeting Tea Party organizations, progressive groups were complaining about similar experiences. The article stated in part:

"Conservative activists and some Republican lawmakers are up in arms about what they describe as the Internal Revenue Service conducting a partisan and ideologically driven campaign against tea party groups around the country. They claim that progressive organizations are not experiencing the same level of scrutiny. However, some

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<sup>794</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>795</sup> Id. See also 5/1/2012 Memorandum of Discussion, "Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 – 898, at 892 (listing participating auditors).

<sup>796</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>797</sup> 3/19/2012 email from Troy Paterson to Cheryl Medina, Thomas Seidell, and Michael McGovern, "JCT Report on Allegations of Bias Surrounding Applications for Tax Exemption and Examinations of Tax-Exempt Organizations," TIGTA Bates No. 003991.

<sup>798</sup> 3/16/2000 Joint Committee on Taxation Press Release No. 00-02, <http://www.jct.gov/pr00-02.pdf>; 3/6/2000 "Report Of Investigation Of Allegations Relating To Internal Revenue Service Handling Of Tax-Exempt Organization Matters," Report No. JCS-3-00, prepared by Joint Committee on Taxation, <https://www.jct.gov/publications.html?func=startdown&id=2545>.

progressive groups say they have had similar experiences with the IRS, and at least one expert dismisses the notion that the government is engaged in an ideological witch hunt.”<sup>799</sup>

Ms. Medina commented: “Here is the first article I’ve seen that actually compares letters from the IRS to both conservative and progressive groups – letters ask similar questions.”<sup>800</sup> This email indicates that, from the inception of the audit, the TIGTA audit team was aware that a factual question at issue was whether liberal groups had experienced the same treatment as conservative groups and that at least some evidence suggested they had.

### **(1) Determining the Audit Focus**

Mr. Paterson told the Subcommittee that he originally recommended conducting two audits, one looking at how the IRS managed the 501(c)(4) application process and the other looking at how the IRS monitored tax exempt groups engaged in campaign activity, but was given approval for only the audit of the application process.<sup>801</sup> On March 22, 2012, Mr. Paterson sent the following email to his supervisor, Russell Martin:

“Nancy [Nakamura] and I were up on the hill about a week and a half ago to discuss concerns one of the House Ways and Means subcommittees had with the way the IRS is processing requests from tax exemption from potential section 501(c)(4) organizations related to the Tea Party. Basically, the staffers we met with allege that the IRS has been sitting on requests for a long time and, during an election year, asking a massive amount of unreasonable questions before deciding on whether to grant tax exemption to Tea Party-related groups. At the same time, the IRS is getting a lot of heat from the Democrat side who allege that the IRS is not cracking down hard enough on organizations funneling money to super PACS that are masquerading as tax-exempt social welfare organizations (section 501(c)(4) organizations). In response, we’ve decided to look at both sides of it (how the IRS is processing applications for tax exemption by potential 501(c)(4) organizations and how the IRS is overseeing 501(c)(4) organizations that are already in business and filing information returns).”<sup>802</sup>

The TIGTA Audit Plan for Fiscal Year 2013 included an entry indicating that TIGTA planned to conduct both audits.<sup>803</sup> According to Mr. Paterson, however, due to resource

<sup>799</sup> 3/29/2012 email from Cheryl Medina to Troy Paterson, Thomas Seidell, and Michael McGovern, “Articles on Determs,” TIGTA Bates No. 004603 - 606 (forwarding copy of “Does the IRS really have it in for the tea party groups?” The Colorado Independent, Teddy Wilson, (3/28/2012), <http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups>).

<sup>800</sup> Id.

<sup>801</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>802</sup> 3/22/2012 email from Troy Paterson to Russell Martin, “501(c)(4) Briefing Paper,” TIGTA Bates No. 004297 - 299. Although his email references “Ways and Means subcommittees,” TIGTA indicted that Mr. Paterson meant to refer to the House OGR Committee, the only Committee that TIGTA staff met with prior to the audit.

<sup>803</sup> See “Fiscal Year 2013 Annual Audit Plan,” TIGTA Office of Audit, at 18, 22, [http://www.treasury.gov/tigta/auditplans/auditplans\\_fy2013.pdf](http://www.treasury.gov/tigta/auditplans/auditplans_fy2013.pdf) (stating TIGTA would be conducting two audits: 1) “*Oversight of 501(c)(4)–(6) Organizations That Are Politically Active* (FY 2013 – New Start – Audit Number: 201310016) Audit Objective: Assess how the EO Function monitors Internal Revenue Code § 501(c)(4), (c)(5), and (c)(6) organizations to ensure political advocacy activities do not constitute their primary activity.” 2) “*Consistency*

constraints and concern that the audit scope would be too large if the issues were combined, Nancy Nakamura, then Assistant Inspector General for Audit, Management Services, and Exempt Organizations, actually approved only the audit focusing on the application process.<sup>804</sup> TIGTA's subsequent "engagement letter" providing official internal notice of the audit, its scope, and what the auditors hoped to accomplish, stated in part:

"Our overall objective is to assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues. ... Several accusations of inconsistent treatment towards conservative groups have been made."<sup>805</sup>

After the audit report was released more than a year later, in May 2013, media questions arose regarding the scope of the audit, which examined only 501(c)(4) organizations associated with the Tea Party and did not consider 501(c)(4) applications filed by liberal groups, despite information indicating that some liberal groups may have experienced the same treatment as some conservative organizations.

As part of TIGTA's effort to respond to those media questions, on June 25, 2013, TIGTA's Director of Communications, Karen Kraushaar and her staff sent emails to some reporters stating that "TIGTA was asked to narrowly focus on Tea Party organizations."<sup>806</sup> When pressed by a Washington Post reporter to explain who asked TIGTA to focus narrowly on Tea Party organizations, Ms. Kraushaar responded by email that her statement had been based on "erroneous information."<sup>807</sup> Ms. Kraushaar told the Subcommittee that she had made her original statement after asking the TIGTA auditors how to respond to a question concerning the scope of the audit, and the auditors told her they had been asked to look at Tea Party organizations and the delays those groups encountered.<sup>808</sup> Ms. Kraushaar told Subcommittee that, in hindsight, the information she received from the auditors was not erroneous but "imprecise."<sup>809</sup> Ms. Kraushaar stated that when she said "narrowly," she meant "intensively," and that the word "narrowly" had been misconstrued, adding that she had not intended for

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*in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Advocacy Issues* (FY 2012 – Work in Process – Audit Number: 201210022) Audit Objective: Assess the consistency of the EO function's identification and review of applications for tax-exempt status involving potential political advocacy issues.").

<sup>804</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>805</sup> 6/22/2012 memorandum from Michael McKenney, TIGTA Auditor, to TIGTA Acting Commissioner, Tax Exempt and Government Entities Division, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status involving Political Advocacy Issues (Audit # 201210022)," IRSR0000444445 - 447, at 445. See also 6/22/2012 email from Russell Martin to Michael McKenney, TIGTA Audit Office head, "TIGTA letter," TIGTA Bates No.010384 ("I just signed the audit plan and Engagement Letter will be coming up for your review and signature. ... (We will now be focusing on whether the identified applicants were treated inconsistently with applicants that did not relate to a Tea Party Organization.)").

<sup>806</sup> 6/25/2013 email from Karen Kraushaar, TIGTA, to Sam Stein, Huffington Post, "Response to your inquiry," TIGTA June 2013 emails Bates No. 000307 - 308; 6/25/2013 email from TIGTA Media Liaison, David Barnes, to Bernie Becker, The Hill, "TIGTA Statement on 'Be On the Look Out' Listings," TIGTA June 2013 emails Bates No. 000241 – 245, at 242 ("TIGTA was asked to narrowly focus on Tea Party organizations.").

<sup>807</sup> 6/27/2013 email from Karen Kraushaar to Josh Hicks, Washington Post, "Tax-Exempt audit objective," TIGTA June 2013 emails Bates No.000434 – 437, at 434 (Ms. Kraushaar wrote: "Regrettably, erroneous information was provided to my office. It happens.").

<sup>808</sup> Subcommittee interview of Karen Kraushaar, TIGTA (4/11/2014).

<sup>809</sup> Id.



“narrowly” to be interpreted as “exclusively.”<sup>810</sup> On July 18, 2013, at a Congressional hearing, TIGTA Inspector General Russell George testified that Ms. Kraushaar’s original statement had been “incorrect” and that she “misspoke.”<sup>811</sup>

## (2) Initiating the Audit

On March 29, 2012, Mr. Paterson sent an email to the IRS informing it of TIGTA’s plan to audit the application process. The email stated that the audit would examine “the IRS’s process for reviewing applications for tax exemption by potential section 501(c)(4), 501(c)(5), and 501(c)(6) organizations.”<sup>812</sup> Holly Paz, who was by then head of the Exempt Organization’s Rulings and Agreements Unit, described herself as the “point person” at the IRS for the TIGTA audit, with responsibility to provide TIGTA with the documents and information it requested.<sup>813</sup>

On May 1, 2012, three TIGTA auditors, Thomas Seidell, Cheryl Medina, and Michael McGovern, began the 501(c) audit by conducting what they described as a “walkthrough” of the Cincinnati IRS office to better understand the process by which the IRS reviews 501(c) applications for tax exempt status.<sup>814</sup> According to Thomas Seidell, as part of the site visit to the Cincinnati office, senior EO personnel, including Holly Paz, Cindy Thomas, and John Shafer, explained the application process.<sup>815</sup> The auditors also reviewed the relevant law, regulations,

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<sup>810</sup> Id.

<sup>811</sup> Testimony of J. Russell George, “The IRS’s Systematic Delay and Scrutiny of Tea Party Applications,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 81-82, <http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf>. (“Mr. CONNOLLY: Mr. George, there have been reports with respect to the scope of your audit or review, including by the spokesperson in your office, that you met with the chairman of this committee and, essentially, he helped limit the scope of the review. Mr. GEORGE: That’s incorrect, sir. Mr. CONNOLLY: That is incorrect? Mr. GEORGE: The report I did see, but that did not occur. Mr. CONNOLLY: So Karen Kraushaar, your spokesperson who quoted—who said, and I quote, that Darrell Issa had specifically requested that investigators, ‘narrowly focus on Tea Party organizations,’ so they did just that, according to Kraushaar, that is an inaccurate statement? Mr. GEORGE: That is correct. Mr. CONNOLLY: On what basis would she make such a statement on your behalf to the press? Mr. GEORGE: Well, it was not without my authorization, and she misspoke, sir.”).

<sup>812</sup> See 3/29/2012 email from Troy Paterson to Joel Rutstein, “Planning/Research Activities: Review of Internal Revenue Service’s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) organizations,” IRSR0000168115 – 116 (“This email is to inform you of an audit we plan to conduct of the IRS’s process for reviewing applications for tax exemption by potential section 501(c)(4), 501(c)(5), and 501(c)(6) organizations, which will be included in our Fiscal Year 2013 Annual Audit Plan.”); 3/26/2012 email from Cheryl Medina, TIGTA, to Michael McGovern, TIGTA, “c4s,” TIGTA Bates No. 004451 (“Tom [Seidell] called me this morning to say that Nancy [Nakamura] has given Troy [Paterson] the ok to contact legislative affairs informing them of this review.”). Although Mr. Paterson indicated that the audit would examine applications filed by 501(c)(5) and (6) organizations, TIGTA did not review any of those applications during the audit.

<sup>813</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>814</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also 5/1/2012 Memorandum of Discussion, “Review of Internal Revenue Service’s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations,” prepared by TIGTA, PSI-TIGTA-05-000892 – 898.

<sup>815</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

court rulings, and a draft “guidesheet” that the EO Technical Unit had been working on. After the site visit, the auditors prepared a memorandum summarizing what they had learned.<sup>816</sup>

On May 4, 2012, in response to the auditors’ request, Ms. Paz provided a copy of the BOLO list then being used to identify 501(c) applications of interest.<sup>817</sup> At that time, the BOLO did not include the phrase “Tea Party”; instead it asked screeners to look for “[p]olitical action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, \$ocial economic reform / movement.”<sup>818</sup> The BOLO also included listings asking IRS screeners to look for applications filed by “progressive” groups, “ACORN successors,” “Occupy” groups, “Medical Marijuana” groups, and “Green Energy Organizations,” among others.<sup>819</sup> Later, some TIGTA officials claimed that the IRS had failed to disclose to the TIGTA auditors the BOLO entries for liberal groups; this email and the BOLO attachment show that the IRS provided copies of those entries from the beginning of the audit.

After receiving the BOLO, the TIGTA auditors asked the IRS for earlier versions of the BOLO listings and received, among others, the original August 2010 BOLO asking screeners to be on the lookout for “organizations in the Tea Party movement.”<sup>820</sup> The TIGTA auditors examined that original BOLO entry, and traced the changes in its wording over time. As explained earlier, that BOLO entry was changed four times in three years, from the original version in August 2010, to a more generic version in June 2011, then a January 2012 version using the language in the BOLO that was first provided to TIGTA on May 4, and finally to another generic version that began to be circulated in June 2012.<sup>821</sup> The TIGTA documentation contains no evidence that the auditors conducted a similar analysis of any other BOLO entries, despite being aware the BOLO had multiple sections with entries asking screeners to be on the lookout for a variety of applications and organizations, including liberal groups.

On May 17, 2012, the TIGTA auditors held a conference call with the IRS to discuss possible audit issues, including the BOLO entries related to the Tea Party.<sup>822</sup> The participants

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<sup>816</sup> See 5/3/2012 Memorandum of Discussion, “Review of Internal Revenue Service’s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations,” prepared by TIGTA, PSI-TIGTA-05-000892 - 898.

<sup>817</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014); 5/4/2012 email from Holly Paz to Cheryl Medina, Thomas Seidell, and Michael McGovern, with copy to Cindy Thomas, “BOLO Alert,” IRSR0000014253, attaching a copy of “BOLO Spreadsheet 03262012.xls.” See also 5/1/2012 Memorandum of Discussion, “Review of Internal Revenue Service’s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations,” prepared by TIGTA, at PSI-TIGTA-05-000892 – 898, at 897 (showing the auditors were already aware that the BOLO contained multiple sections, citing the “Watch List, Coordinated Processing, Emerging Issues, and Potential Abusive Transactions” sections).

<sup>818</sup> “BOLO Spreadsheet 03262012.xls,” IRSR0000014254 – 258 (later reproduced to the Subcommittee in an enlarged format), provided to TIGTA as an attachment to 5/4/2012 email from Holly Paz to Cheryl Medina, Thomas Seidell, and Michael McGovern, with copy to Cindy Thomas, “BOLO Alert,” IRSR0000014253.

<sup>819</sup> Id.

<sup>820</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

<sup>821</sup> See, e.g., 5/13/2013 email from Holly Paz to Nikole Flax and others, “Be on the Lookout List (BOLO) description of advocacy cases over time (including phrases and issues treated as falling within the BOLO description,” IRSR0000168058. For more information on the BOLO wording changes, see Report section on Failing to Agree on Effective Screening Criteria. See also 5/14/2013 TIGTA Audit Report at 6-7, 30.

<sup>822</sup> See 5/17/2012 “Memo of Contact,” prepared by Cheryl Medina, TIGTA, “Determinations Process Planning,” PSI-TIGTA-04-000016 - 018.

were Thomas Seidell and Cheryl Medina from TIGTA, and Holly Paz and David Fish from the IRS. A summary of the conference call, prepared by TIGTA lead auditor, Ms. Medina, stated:

“AM [Audit Manager] Seidell then turned to our concerns with the nature of the criteria in the briefing paper. Based upon this criteria, it appears the complaints being made in the media by certain groups are valid. In addition, it appears to contradict the testimony of the Commissioner before Congress. Ms. Paz agreed that the initial criteria was not a good way to identify advocacy cases. However, it is common to refer to certain groups by name for identification purposes in Determinations. For example, the ‘Occupy’ and [REDACTED BY TIGTA] groups are listed specifically on the BOLO.”<sup>823</sup>

This summary indicates, in the words of TIGTA’s own lead auditor, that on May 17, 2012, IRS personnel explicitly drew the attention of TIGTA auditors to the liberal groups identified in the BOLOs that had been provided to the audit team, explained that names of both conservative and liberal groups were used to flag applications for heightened scrutiny, and pointed out that the BOLOs had not singled out only conservative groups. While senior TIGTA officials later claimed that the IRS had not disclosed the BOLO entries for liberal groups to the audit team during the audit period, this conference call summary shows that the IRS identified those BOLO entries to the audit team in the earliest stages of the audit process.

On May 22, 2012, the director of the TIGTA 501(c) audit, Troy Paterson, called EO head Lois Lerner to inform her that the audit team viewed the BOLO entries related to the Tea Party and other conservative groups as a concern, because they “targeted” those groups for added scrutiny. In his notes of the conversation, Mr. Paterson wrote that he told Ms. Lerner the following:

“I’m just calling to let you know that we will be raising an issue to our IG [Inspector General] regarding § 501(c)(4) applications. We have received documentation showing that certain organizations (Tea Party, organizations criticizing how the country is being run) were targeted for additional scrutiny in part of the EO function.”<sup>824</sup>

Mr. Paterson’s notes contained no acknowledgement of the existence of the BOLO entries for liberal groups or of the contention made by the IRS that the BOLO’s many entries demonstrated the IRS was not singling out conservative groups.

On May 30, 2012, the auditors gave Russell Martin, who had become Acting Assistant Inspector General for Audit, Management Services, and Exempt Organizations after Ms. Nakamura took another position, a briefing paper discussing the key audit issues that had been identified and describing the audit’s objective as focusing on “the process used by the IRS when

<sup>823</sup> Id. at 017. See also TIGTA Audit Log, at PSI-TIGTA-05-000909 – 949, at 913. The redacted group is believed to be the ACORN successor groups.

<sup>824</sup> 5/22/2012 memorandum prepared by Troy Paterson, TIGTA, “To Document Discussion of the IG Briefing Paper that we Prepared on Certain § 501(c)(4) Application Being ‘Targeted,’” TIGTA Bates No. 006699 (describing discussion between Mr. Paterson and Lois Lerner).

reviewing applications for tax-exempt status by §501 (c)(4) organizations.”<sup>825</sup> The briefing paper did not mention 501(c)(5) or (c)(6) organizations, even though they had been part of the initial audit planning.

On June 22, 2012, the then acting head of the TIGTA Office of Audit, Michael McKenney, issued the official engagement letter for the 501(c)(4) audit.<sup>826</sup> The two-page engagement letter stated that the audit’s “overall objective” was “to assess the Internal Revenue Service (IRS) Exempt Organizations function’s consistency in the identification and review of applications for tax-exempt status involving political advocacy issues.”<sup>827</sup> The engagement letter also stated: “Several accusations of inconsistent treatment towards conservative groups have been made.”<sup>828</sup> By focusing on “consistency” and “inconsistent treatment towards conservative groups,” the engagement letter seemed to indicate that the audit would focus on how conservative groups were treated compared to non-conservative groups, although it contained no explicit direction to gather comparative data.

In July 2012, according to TIGTA’s official audit log, the auditors held an “opening conference” with IRS officials to outline the steps the Office of Audit planned to take to complete the audit.<sup>829</sup> By then, however, the TIGTA auditors had already conducted a site visit, obtained key documents, and identified the key issues of concern.

### (3) Collecting and Analyzing Information

For a one-year period, from May 2012 until May 2013, the TIGTA auditors collected and analyzed information in connection with the 501(c) audit.<sup>830</sup> Among other steps, the auditors obtained from the IRS a list of 298 501(c)(4) applications that had been referred for heightened scrutiny over a two-year period, reviewed two groups of closed 501(c)(4) cases to determine whether they should have been referred for heightened scrutiny, conducted multiple interviews of IRS personnel, and submitted written questions to the IRS. Throughout the audit period, IRS personnel repeatedly pointed out to the TIGTA auditors that the Exempt Organizations Determinations (EOD) Unit subjected both conservative and liberal groups to heightened review, and did not single out Tea Party organizations, but the TIGTA auditors failed to provide any audit analysis focused on how the IRS processed applications filed by non-conservative groups.

**Analysis of 298 Cases.** An early step taken by the TIGTA audit team during the audit period was to ask the IRS for a list of all of the advocacy cases that were subjected to heightened scrutiny by EOD determinations specialists over the prior two years. On June 1, 2012, TIGTA

<sup>825</sup> 5/30/2012 “Process for Reviewing Applications for Tax Exemption,” TIGTA Office of Audit Briefing Paper, TIGTA Bates No. 006651 – 652. See also “TIGTA OA: Process for Reviewing Applications for Tax Exemption,” TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 913.

<sup>826</sup> 6/22/2012 memorandum from Michael McKenney to TIGTA Acting Commissioner, Tax Exempt and Government Entities Division, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Advocacy Issues (Audit # 201210022),” IRSR0000444445 – 447.

<sup>827</sup> Id. at 445.

<sup>828</sup> Id.

<sup>829</sup> See “TIGTA OA: Process for Reviewing Applications for Tax Exemption,” TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 920.

<sup>830</sup> See 5/14/2013 TIGTA Audit Report, at 4.

lead auditor Cheryl Medina sent an email to Determinations Unit Head Cindy Thomas requesting “an updated copy of the advocacy case tracking sheet used by the advocacy team.”<sup>831</sup> In response, the IRS supplied a list of 298 advocacy cases with 501(c)(4) and (c)(3) applications that had been flagged under the “Emerging Issues” section of the BOLO as of May 2012.<sup>832</sup> At other times, as indicated above and below, IRS personnel asked the TIGTA auditors also to consider cases involving liberal groups, such as the ACORN successor and Occupy groups, but TIGTA failed to do so, and the IRS did not supply a list of those additional advocacy cases.

TIGTA examined all 298 cases on the Emerging Issues list to determine their status as open or closed, and how long each case took to be processed. In addition, of those 298 cases, TIGTA determined that 96, or about one-third of the cases, involved applications filed by organizations with “Tea Party,” “9-12,” or “Patriot” in their names.<sup>833</sup> The audit report did not categorize or characterize the remaining 202 cases, however, explain how they were selected, or acknowledge that they included non-conservative groups. When asked why, Mr. Paterson told the Subcommittee that TIGTA concentrated on the cases that were flagged using what looked to be inappropriate selection criteria using the three names, and did not characterize the other 200 cases.<sup>834</sup> Mr. Seidell told the Subcommittee that the auditors were uncertain why the other cases had been flagged for heightened scrutiny, couldn’t tell much from their names, and so did not analyze them, other than to determine their status and how long each case took to be processed.<sup>835</sup> At a hearing, Inspector General George said that the “vast majority of the other organizations” had names that “were so innocuous that we did not deem it possible to determine whether or not they were conservative groups, or whether or not they were groups that might be on the other side of the political spectrum.”<sup>836</sup>

<sup>831</sup> 6/1/2012 email from Cheryl Medina to Cindy Thomas, “TIGTA request –updated case data,” TIGTA Bates No. 011102 – 103.

<sup>832</sup> 6/11/2012 email from Holly Paz to Cheryl Medina, “TIGTA request – updated case data,” TIGTA Bates No. 011102 – 103. TIGTA was unable to review two of the 298 cases due to incomplete documentation in the case files. See 5/14/2013 TIGTA Audit Report, at 10, footnote 27. TIGTA later disclosed that 89 of the 298 cases, or nearly one-third, involved 501(c)(3) rather than (c)(4) applications, which was significant since 501(c)(3) groups are not allowed to engage in any substantial campaign activities and their applications would have been denied on that basis. See testimony of J. Russell George, “Oversight Hearing – Internal Revenue Service,” hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013), 219-284, at 262-263.

<sup>833</sup> See 5/14/2013 TIGTA Audit Report, at 8. At a hearing, TIGTA also disclosed that, of those 96 cases, “[t]here were 72 Tea Party groups, there were 13 groups identified under the Patriot category, and there were 11 that were identified under the 9/12 category.” Testimony of J. Russell George, “Oversight Hearing – Internal Revenue Service,” hearing before Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013), 219-284, at 264.

<sup>834</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>835</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also 1/31/2013 email from Lois Lerner to Troy Paterson, “Follow-Up,” IRSR0000466814 - 815, at 815 (noting the TIGTA auditors were aware of and had “acknowledged that there are both conservative and liberal organizations on the list of advocacy cases”). The TIGTA Audit Report contained no specific information about the other 202 cases, and no acknowledgement that they included potentially liberal groups as well as conservative groups. See 5/14/2013 TIGTA Audit Report.

<sup>836</sup> Testimony of J. Russell George, “Oversight Hearing – Internal Revenue Service,” hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 263.

Six months later, when drafting the audit report, two senior TIGTA officials noted the audit team's lack of knowledge about why the category of 298 advocacy cases included 202 groups that did not have "Tea Party," "9-12," or "Patriot" in their names. In an internal draft of the audit report, TIGTA Assistant Inspector General Gregory Kutz wrote a comment that the team needed "to discuss whether the other 200 (100 tea party/9/12/patriot) and other 200 – how the 'other 200' were selected?"<sup>837</sup> TIGTA audit director Troy Paterson responded:

"We do not know. Either the IRS was using 'Tea Party' as shorthand and selecting any organization that was involved in political campaign intervention or the other 200 had something to do with the 'values' in the criteria. We could not determine either way."<sup>838</sup>

This exchange indicates that, after spending nearly a year on the audit, two of the senior TIGTA officials realized the IRS was using "Tea Party" as "shorthand" for a broader category of groups, but still had no clear idea why many of those other groups had been selected for heightened scrutiny.

The final version of the audit report explicitly acknowledged that IRS personnel used the "Tea Party" phrase as "shorthand" for a broader category of cases.<sup>839</sup> The report also observed that, according to the IRS, "the fact that the team of specialists worked applications that did not involve the Tea Party, Patriots, or 9/12 groups demonstrated that the IRS was not politically biased in its identification of applications for processing by the team of specialists."<sup>840</sup> The TIGTA audit team did not take the next step, however, and present an analysis of the remaining 202 cases, explain how they were selected, or acknowledge that they likely included liberal groups.

A later outside analysis shed more light on the composition of the 298 advocacy cases. In May 2013, the IRS released a list of 176 501(c)(4) organizations that had been approved for tax exempt status since 2010.<sup>841</sup> Tax Analysts, a publication specializing in tax issues, reasoned that, given the time period covered and number of groups included, the list of 176 organizations likely substantially overlapped with the list of 298 cases analyzed by TIGTA.<sup>842</sup> Tax Analysts

<sup>837</sup> Undated TIGTA draft of the audit report, "Ineffective Oversight Resulted in Delayed Processing of Tax-Exempt Applications DRAFT," prepared by TIGTA, PSI-TIGTA-06-000686 – 754, at 702.

<sup>838</sup> Id. at 702.

<sup>839</sup> See, e.g., 5/14/2013 TIGTA Audit Report, at 7 ("Determinations Unit employees stated that they considered the Tea Party criterion as a shorthand term for all potential political cases.").

<sup>840</sup> Id. at 8.

<sup>841</sup> 5/15/2013 "Approved Tax-Exempt Applications For Advocacy Organizations through May 9, 2013," prepared by IRS,

<http://www.irs.gov/PUP/newsroom/Approved%20Tax%20Exempt%20Applications%20For%20Advocacy%20Organizations%20through%20May%209%202013.pdf>. The IRS has interpreted the law as allowing it to release the names of 501(c) applicants that have been approved for tax exempt status, but not the names of those denied tax exemption. For that reason, the IRS has never released the names of all of the 298 groups reviewed by the IRS from May 2010 to May 2012, since some of them may have been denied tax exempt status or are still pending resolution.

<sup>842</sup> See 5/30/2013 "Substantial Minority of Scrutinized EOs Were Not Conservative," Tax Analysts, Martin Sullivan, <http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAF7A9085257B7B004C0D90?OpenDocument> ("Because the IRS is prohibited by law from releasing information on applications either denied or not yet approved, we will probably never know the political persuasions of all of the 298 advocacy cases selected for extra scrutiny and of the additional 170 or so applications selected since then. We can, however, try to assess the political persuasion of the 176 approved organizations that the IRS identified on May 15.").

then analyzed the 176 groups and concluded that, while most involved conservative groups, nearly one third did not.<sup>843</sup> It found that, of the 176 groups, only 46 had Tea Party, Patriot, or 9/12 in their names; 76 were associated with other conservative organizations; 48 were non-conservative – including liberal – organizations; and 6 were organizations about which no determination could be made.<sup>844</sup> The analysis also showed that the IRS had granted tax exempt status to groups across the political spectrum.<sup>845</sup> Had TIGTA done a similar analysis as part of its audit, the audit would have found that the IRS had not singled out only conservative groups for heightened scrutiny.

In addition, had TIGTA researched the issue, it might have determined that the list of 298 cases contained more conservative than liberal groups, not because conservative groups were being singled out, but because during the relevant time period, more conservative 501(c)(3) and 501(c)(4) organizations were being formed and applying for tax exempt status. The list of 176 organizations released by the IRS showed that twice as many conservative organizations as non-conservative organizations obtained tax exempt status from 2010 to May 2013.<sup>846</sup> A later analysis by the House Committee on Ways and Means determined that, of the 298 cases provided to TIGTA, by September 2013, 111 “right-leaning” groups had received tax exempt status, while only 20 “left-leaning” groups did, meaning more than five times as many conservative as liberal groups had gained tax exemption.<sup>847</sup> Rather than demonstrate IRS favoritism of conservative groups, however, those disparate numbers likely reflect the fact that many more conservative than liberal groups had requested tax exempt status.

In addition to the data on the groups that obtained tax exempt status, several IRS employees told the Subcommittee that the IRS saw a surge in applications from conservative groups from 2010 to 2013.<sup>848</sup> Spending data in FEC filings showing that, in 2010 and 2012, conservative groups spent almost ten times as much as liberal groups, also suggest conservative

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<sup>843</sup> Id. (“[T]he list suggests that the majority of groups selected for extra scrutiny probably matched the political criteria the IRS used and backed conservative causes, the Tea Party, or limited government generally. But a substantial minority – almost one-third of the subset – did not fit that description.”).

<sup>844</sup> Id. TIGTA later acknowledged that six of the 298 cases subjected to heightened scrutiny by the IRS had the word “progress” or “progressive” in their names. See 6/26/2013 letter from TIGTA to Congressman Sander Levin, at 1-2, <http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf>. TIGTA justified ignoring those cases in its analysis, by asserting that the audit did not find evidence that the term “Progressives,” was actually used by the IRS to select cases for heightened review during the 2010 to 2012 timeframe, even though the term was included in the BOLOs and groups with “progress or “progressive” in their names were included in the 298 cases. Id. TIGTA admitted that it “did not audit” the Progressives entry to determine how that entry was developed, whether it included inappropriate criteria, or whether the affected groups were subjected to the same delays and intrusive questioning as the conservative groups. Id.

<sup>845</sup> See 5/30/2013 “Substantial Minority of Scrutinized EOs Were Not Conservative,” *Tax Analysts*, Martin Sullivan.

<sup>846</sup> Id.

<sup>847</sup> See Opening Statement of Congressman Boustany, “Internal Revenue Service’s Exempt Organizations Division,” hearing before House Committee on Ways and Means (9/18/2013), <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>; chart entitled, “Review of Applications Subject to Inappropriate Scrutiny (May 2010-May 31, 2012),” prepared by the House Committee on Ways and Means Majority Staff, reprinted at House Republicans website, “Accountability: Investigation of the IRS,” section entitled, “House Committee on Ways and Means,” under “Reports,” through link entitled, “Committee on Ways and Means Majority Staff Statistical Overview – ‘IRS Targeting By the Numbers’ Slideshow,” [http://www.gop.gov/solution\\_content/irs-investigation/](http://www.gop.gov/solution_content/irs-investigation/).

<sup>848</sup> Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/2013).

groups may have outnumbered their liberal counterparts during that time period.<sup>849</sup> In addition, media reports depicted conservative groups as the leaders in the 501(c)(4) area at the time, with liberal groups working to catch up.<sup>850</sup> TIGTA did not, however, look into whether more conservative groups versus liberal groups had filed applications with the IRS.<sup>851</sup>

It is difficult to understand why TIGTA did not, when it was provided with a list of 298 cases, create a randomly selected, statistically valid subset containing both conservative and non-conservative groups, which it could have then used to develop comparative data on how the two groups were handled by the IRS. TIGTA could have used those cases to meet the stated audit objective of determining whether “conservative groups” experienced “inconsistent treatment.” Instead, TIGTA failed to analyze IRS treatment of any non-conservative cases.

**Statistical Analysis of Closed Cases.** TIGTA also conducted an analysis of two sets of closed 501(c)(4) cases to test whether the IRS had accurately identified applications with “indications of significant political campaign intervention” that should have been subjected to heightened review.<sup>852</sup> TIGTA found that the IRS should have but failed to identify 2 out of 94 cases in one statistical sample and 14 out of 244 cases in a second sample as cases warranting heightened scrutiny, while noting that none of the cases that avoided scrutiny involved groups with the words “Tea Party,” “9/12,” or “Patriot” in their names.<sup>853</sup> The audit report also

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<sup>849</sup> An analysis conducted by the Center for Responsive Politics found, for example, that in 2010, conservative 501(c)(4) spending was \$115.2 million (88.1%), liberal 501(c)(4) spending was \$10.7 million (8.2%) and “other” spending was \$4.8 million (3.6%). In 2012, the Center determined that conservative 501(c)(4) spending was \$265.2 million (85.3%), liberal spending was \$34.7 million (11.2%) and “other” spending was \$10.9 million (3.5%). “2010 Outside Spending, by Group,” and “2012 Outside Spending, by Group,” Center for Responsive Politics, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U>, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U>.

<sup>850</sup> See, e.g., 11/6/2013 “Secret Persuasion: How Big Campaign Donors Stay Anonymous,” National Public Radio, Peter Overby, Viveca Novak and Robert Maguire, <http://www.npr.org/2013/11/06/243022966/secret-persuasion-how-big-campaign-donors-stay-anonymous> (“So far, conservatives have predominated in social welfare politics. In the 2012 federal campaigns, 20 groups on the right ran up a million dollars or more in disclosed spending, compared with seven on the left. Now liberals are working to catch up.”).

<sup>851</sup> Tax Analysts has observed: “[I]f there were a surge in the creation of potentially political conservative organizations in the last few years (that was disproportionate to the creation of nonconservative organizations), more conservative groups would be targeted than nonconservative groups even if there were no political bias among IRS officials.” 5/30/2013 “Substantial Minority of Scrutinized EOs Were Not Conservative,” Tax Analysts, Martin Sullivan, <http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAF7A9085257B7B004C0D90?OpenDocument>.

<sup>852</sup> 5/14/2013 TIGTA Audit Report, at 9.

<sup>853</sup> *Id.* at 8, 9, footnotes 21 and 23. In its audit report and in a later letter to Ways and Means Ranking Member Sander Levin, TIGTA asserted that all groups with “Tea Party,” “9/12,” or “Patriot” in their names were subjected to heightened IRS review. See TIGTA Audit Report, at 8; 6/26/2013 letter from TIGTA to Congressman Sander Levin, at 2, <http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf> (“[O]ur audit found that 100 percent of the tax-exempt applications with Tea Party, Patriots, or 9/12 in their names were processed as potential political cases during the timeframe of our audit.”). Those assertions, however, were incorrect. A subsequent analysis by the IRS Chief Risk Officer identified a dozen instances in which groups with the words “Tea Party,” “9/12” or “Patriot” were not referred to an IRS specialist for heightened review, including two groups with “Tea Party” in their names, three groups with “9/12,” “9-12,” “9 12,” or “912” in their names, and seven groups with “patriot” in their names. See 6/11/2012 “PA6.ee EDS 501c4 Case Universe Open and Closed,” prepared by IRS Chief Risk Officer David Fisher, PSI-IRS-37-000004 - 014. In a later letter to Congressman Levin, TIGTA justified its earlier assertion by explaining: “100 percent of the Section 501(c)(4) tax-exempt applications in our *statistical samples* with the words ‘Tea Party,’ ‘Patriots,’ or ‘9/12’ in their names were processed as potential



determined that 91 out of the 298 advocacy cases, about one-third, that had been subjected to heightened scrutiny by the IRS should not have been, because, in TIGTA's view, their application materials did not contain "indications of significant political campaign intervention."<sup>854</sup> Of those 91 cases, the audit report noted that 17 "involved Tea Party, Patriots, or 9/12 organizations," which meant that 74 of the cases did not.

The report did not explain how TIGTA determined which applications contained or did not contain evidence of "significant political campaign intervention," in light of the facts and circumstances test requiring activities to be evaluated on a fact-intensive, case-by-case basis. In January 2013, EO head Lois Lerner sent an email to TIGTA challenging TIGTA's methodology and legal analysis of cases that allegedly did not require heightened scrutiny, explaining:

"Because the legal analysis of whether specific advocacy is political intervention requires analyzing all the facts and circumstances surround that advocacy in light of the formal guidance provided in this area, we included all organizations indicating they were engaged in potentially problematic advocacy, so that they would be worked by specialists who have a better understanding of the facts and circumstances to be considered, and who would be able to analyze the cases in a consistent manner."<sup>855</sup>

The next day, Mr. Paterson responded that, to facilitate the discussion of the cases, he was forwarding the criteria used by the audit team to analyze whether the closed cases should have been treated as advocacy cases and subjected to heightened scrutiny.<sup>856</sup> According to the TIGTA auditors, to analyze the closed cases, they had gone through the hard copy file for each application as well as any supporting documentation.<sup>857</sup> In his email, Mr. Paterson provided what appeared to be essentially a checklist of nine factors that the audit team had taken into consideration when evaluating a group's application materials. Most posed factual questions, such as whether or not a particular activity, such as a voter drive, voter guide, or candidate forum, had failed to state that it was nonpartisan; whether the group's funds had been commingled with funds from a political organization; and whether the group had answered certain tax return or application questions with a "yes," "no," or a blank. The ninth and final factor was whether the audit team had determined that the group had engaged in "[a]ny political campaign activity that totals 35 percent or more," with no further explanation of how specific activity was identified as campaign related or how expenditures were determined.<sup>858</sup> If at the end of the review of each case, the auditors could not determine how the IRS had decided that the application presented indications of "significant political campaign intervention," the auditors concluded it had not been properly forwarded to IRS personnel for enhanced scrutiny.

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political cases." 7/19/2013 letter from TIGTA to Congressman Sander Levin, at 2 (emphasis in original), <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf>.

<sup>854</sup> Id. at 10.

<sup>855</sup> 1/14/2013 email from Lois Lerner to Troy Paterson, with copies to Holly Paz and Dawn Marx, "Advocacy discussion," IRSR0000441700 – 701.

<sup>856</sup> 1/15/2013 email from Troy Paterson to Lois Lerner, "TIGTA Case Review Criteria," IRSR0000354397. See also Subcommittee interview of Thomas Seidell (3/19/2014).

<sup>857</sup> Subcommittee interviews of Troy Paterson, TIGTA (3/21/2014) and Thomas Seidell, TIGTA (3/19/2014).

<sup>858</sup> 1/15/2013 email from Troy Paterson to Lois Lerner, "TIGTA Case Review Criteria," IRSR0000354397.

Neither the TIGTA email nor audit report acknowledged that, under IRS regulations, finding “significant political campaign intervention” was a complex determination that did not permit the decisionmaker to use a checklist of objective factors. Nevertheless, using its own checklist criteria, the TIGTA Audit Report concluded that the IRS had made a number of incorrect decisions on which applications should have been subjected to enhanced scrutiny, while noting IRS disagreement with its analysis.<sup>859</sup> The audit report did not offer any comparative analysis of how the IRS treated the 17 “Tea Party, Patriots, or 9/12 organizations” that the audit team concluded should not have been subjected to heightened review versus the 74 other organizations that were also, in TIGTA’s view, incorrectly selected for heightened review. Nor did the audit report acknowledge or offer any explanation of why four times as many groups were allegedly incorrectly subjected to heightened scrutiny by the IRS compared to groups with “Tea Party, Patriots, or 9/12” in their names.

**TIGTA Interviews of IRS Personnel.** In addition to its statistical analyses, in July and August 2012, TIGTA auditors interviewed a number of IRS employees in both Cincinnati and Washington, regarding why the BOLO entries had been changed over time, how 501(c)(4) cases were selected for heightened review, and whether political bias at the IRS had motivated its decisionmaking with respect to Tea Party cases.<sup>860</sup> During the course of those interviews, several IRS employees told the TIGTA auditors that the BOLOs sought to identify all types of advocacy groups suspected of involvement with campaign activity, not just Tea Party groups. For example, in his interview with TIGTA auditors, Stephen Seok, who became the advocacy case coordinator in late 2011, pointed out that the BOLO identifying advocacy groups contained both Tea Party groups and Occupy organizations, which were liberal groups.<sup>861</sup> The head of the Rulings and Agreements Unit Holly Paz told the Subcommittee that, on several occasions, she told TIGTA auditors Seidell and Medina that ACORN and other liberal groups were also subjected to specialist reviews.<sup>862</sup> Both Ms. Paz and EOT specialist Judith Kindell told the

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<sup>859</sup> 5/14/2013 TIGTA Audit Report, at 10.

<sup>860</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also handwritten notes and typed transcripts of TIGTA interviews conducted on various dates during July and August 2012, IRSR0000168024 – 054, including TIGTA interviews of Carter Hull (7/30/2012), PSI-TIGTA-03-000666-667; Michael Seto (7/30/2012), PSI-TIGTA-03-000668; Justin Lowe (7/30/2012), PSI-TIGTA-03-000669; Nancy Marks (7/31/2012), PSI-TIGTA-03-000673-677; Holly Paz (7/31/2012), PSI-TIGTA-03-000678-681; Steven Grodnitzky (7/31/2012), PSI-TIGTA-03-000683; Sharon Light (7/31/2012), PSI-TIGTA-03-000685-686; Judith Kindell (7/31/2012), PSI-TIGTA-03-000687-688; Ron Shoemaker (7/31/2012), PSI-TIGTA-03-000689; Hilary Goehausen (7/31/2012), PSI-TIGTA-03-000690; John Shafer (8/6/2012 and 8/7/2012), PSI-TIGTA-03-000691-692; Elizabeth Hofacre (8/6/2012), PSI-TIGTA-03-000693-694; Joseph Herr (8/6/2012), PSI-TIGTA-03-000695-696; Steven Bowling (8/7/2012), PSI-TIGTA-03-000699-700; Ronald Bell (8/7/2012), PSI-TIGTA-03-000701-702; Tyler Chumney (8/7/2012), PSI-TIGTA-03-000703-704; Cindy Thomas (8/7/2012), PSI-TIGTA-000705-707; and Gary Muthert (8/15/2012), PSI-TIGTA-03-000710-711.

<sup>861</sup> See 8/9/2012 “Memo of Contact” prepared by Cheryl Medina, TIGTA, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” PSI-TIGTA-05-000002 - 003, at 003 (summarizing Seok interview: “He had input to the January 2012 BOLO criteria change. It was discussed during a meeting. The BOLO changes as issues arise during case reviews. Other types of cases may be identified as participating in political activities. For example, it started with Tea Party cases, but eventually included Occupy cases.”).

<sup>862</sup> Subcommittee interview of Holly Paz, IRS (10/30/13).

Subcommittee that during the course of the audit, TIGTA auditors even acknowledged that the cases contained both conservative and liberal organizations.<sup>863</sup>

According to Ms. Paz, she asked the TIGTA auditors outright whether they would be reporting that liberal groups and organizations with all kinds of political leanings were subjected to heightened scrutiny by IRS personnel, and was told by the auditors that wasn't the focus of the audit and that the auditors were not in a position to determine what groups were conservative or liberal.<sup>864</sup> Mr. Seidell told the Subcommittee that he recalled discussing liberal groups with Ms. Paz, but did not recall specifically what was discussed.<sup>865</sup>

During its interviews, the TIGTA auditors did not inquire into the political leanings of the IRS personnel and so failed to discover that self-declared Republicans played key roles in the review of Tea Party and other advocacy cases. For example, the manager of the IRS screening group in Cincinnati that conducted the initial screenings of 501(c)(4) applications was a self-described "conservative Republican" who said there was no bias in the IRS treatment of Tea Party cases.<sup>866</sup> The senior IRS screener who took the lead role in identifying applications filed by Tea Party and other conservative groups described himself as aligned politically with the Tea Party.<sup>867</sup> The EO Technical Unit attorney who conducted a 2011 assessment of the advocacy cases was a registered Republican.<sup>868</sup> Still another IRS attorney in the Chief Counsel's office told the Subcommittee there was no reason to believe one side was being singled out over the other because, from 2010 to 2013, he was asked to work on seven 501(c) cases, and four involved groups associated with the Democratic party.<sup>869</sup>

**Another Set of BOLOs.** During July and August 2012, Ms. Paz sent TIGTA additional copies of the BOLOs used by the EOD to flag applications for heightened scrutiny, from the earliest BOLO in August 2010, through the latest in July 2012.<sup>870</sup> As mentioned earlier, those

<sup>863</sup> Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/13). See also 1/31/2013 email from Lois Lerner to Troy Paterson, "Follow-Up," IRSR0000466813 - 815, at 815 (noting TIGTA auditors "have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases").

<sup>864</sup> Subcommittee interview of Holly Paz, IRS (10/30/13). See also TIGTA interview of Holly Paz (7/31/2012), PSI-TIGTA-03-000678.

<sup>865</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

<sup>866</sup> Transcript of 6/6/2013 interview of John Shafer by House Committee on Oversight and Government Reform, at 28, [http://democrats.oversight.house.gov/images/user\\_images/gt/stories/IRS\\_Screening\\_Manager\\_Part\\_I.pdf](http://democrats.oversight.house.gov/images/user_images/gt/stories/IRS_Screening_Manager_Part_I.pdf). See also Subcommittee interview of John Shafer, IRS (1/17/2014).

<sup>867</sup> Subcommittee interview of Gary Muthert, IRS (1/15/2014).

<sup>868</sup> See transcript of 7/2/2013 interview of Hilary Goehausen, IRS, by House Committee on Ways and Means and House Committee on Oversight and Government Reform, <http://democrats.waysandmeans.house.gov/press-release/gop-leaked-document-undermines-its-case-and-highlights-lack-irs-political-motivation>. Ms. Goehausen's testimony was as follows:

Q: Do you have a party affiliation when you're voting, registration?

A: Yes.

Q: What is your party affiliation?

A: Republican Party.

<sup>869</sup> Subcommittee interview of Donald Spellman, IRS (12/18/2013).

<sup>870</sup> See 7/23/2012 email from Holly Paz to Thomas Seidell and Cheryl Medina, "TIGTA Document Request," IRSR0000066973 (providing BOLOs with ACORN and Occupy entries at IRSR0000066977 - 981); 8/8/2012 email from Holly Paz to Thomas Seidell and Cheryl Medina, "Watch List Alerts," IRSR0000014013 (supplying August 2010 BOLO with Tea Party and Progressive entries at IRSR0000014014 - 028, 016, 018, 021). See also 8/8/2012

BOLOs included entries for not only Tea Party organizations, but also progressive, ACORN, and Occupy groups, offering concrete evidence that the IRS was using screening criteria to flag both conservative and liberal groups. TIGTA officials later claimed the IRS had not alerted its audit team to the BOLO entries for liberal groups included in those lists, but even a cursory review of the BOLOs would have provided notice of those entries.

On July 23, 2012, TIGTA audit director Troy Paterson forwarded his audit team a press article recounting how a “watchdog” group was urging TIGTA to investigate two ACORN successor groups in Texas,<sup>871</sup> demonstrating again the auditors’ awareness of issues related to liberal groups filing 501(c)(4) applications. The next day, July 24, 2012, Ms. Paz forwarded to the audit team an email she had written two months earlier, in May 2012, showing that she had insisted on the use of generic language in the BOLO entry to identify advocacy cases and that the generic entry was intended to include both conservative and liberal groups, referring to ACORN successor and Occupy groups by name.<sup>872</sup> Her email again provided the audit team with documentary evidence that the EOD was flagging applications filed by both conservative and liberal groups, and again attempted to draw their attention to the BOLO entries for liberal groups.

**Briefing New Audit Leadership.** In August 2012, Gregory Kutz joined the TIGTA Audit Office as the new Assistant Inspector General for Audit handling Management Services and Exempt Organizations, replacing Russell Martin.<sup>873</sup> Soon after, Troy Paterson briefed Mr. Kutz on the status of the 501(c) audit. In an email to Mr. Martin, Mr. Paterson summarized his discussion with Mr. Kutz as follows:

“Greg called me this morning to introduce himself. ... He also asked if there was anything ‘big’ going on that he should know about right away. I told him that the biggest thing on the horizon in our directorate had to do with a commitment we made to meet with congressional staff before September 30th on the political advocacy applications job. I gave him some background on the job and suggested that we would need to get together and determine the timing of the briefing and what we would like to discuss. He

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emails from Holly Paz to Thomas Seidell and Cheryl Medina, “BOLO Alerts,” TIGTA Bates No. 010609 – 611 (noting BOLO spreadsheets dated 6/16/2012, 6/25/2012, 7/10/2012, 07/11/2012, 08/12/2010, and 12/13/2010 were supplied to TIGTA).

<sup>871</sup> See 7/23/2012 email from Troy Paterson to Thomas Seidell and others, “Article on Political Advocacy,” TIGTA Bates No. 010433 - 434 (forwarding a copy of “Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch,” a 7/19/2012 article from Fox News, <http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/>). See also 5/31/2012 letter from Cause of Action to TIGTA requesting the investigation of two Texas nonprofit groups, reprinted at <http://www.foxnews.com/politics/interactive/2012/07/18/cause-action-call-for-investigation-into-acorn-spin-off-texas-organizing/>.

<sup>872</sup> 7/24/2012 email from Holly Paz, IRS, to Thomas Seidell and Cheryl Medina, TIGTA, “potential revised BOLO language,” IRSR0000013981 (forwarding 5/17/2012 email from Holly Paz to Lois Lerner and others, “potential revised BOLO language,” in which Ms. Paz wrote: “I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to [REDACTED BY IRS] and Occupy groups.”). See also 5/17/2012 email from Holly Paz to Lois Lerner, “potential revised BOLO language,” IRS0000000492 (containing an unredacted version of the Paz email which indicates the redacted words were “ACORN successors”).

<sup>873</sup> Subcommittee interview of Greg Kutz, TIGTA, (3/26/2014). Prior to working at TIGTA, Mr. Kutz had been a long time auditor at the Government Accountability Office. *Id.*

agreed that this would be something we would need to plan in advance due to the political sensitivity of the issue and the fact that we are in fieldwork.”<sup>874</sup>

In September 2012, the TIGTA auditors met with Mr. Kutz to discuss the audit and a plan to issue an interim report.<sup>875</sup> The meeting participants were Mr. Kutz and audit team members Troy Paterson, Thomas Seidell, Cheryl Medina, Michael McGovern, and Evan Close.<sup>876</sup> Among other issues, the meeting discussed whether the interim report should include information on liberal groups as well as Tea Party organizations in its analysis. A meeting summary described the discussion as follows:

“Director Paterson mentioned the interim report we plan on issuing. It would include information on whether the IRS targeted Tea Party organizations, whether more liberal organizations were referred to the advocacy group. A discussion on how to word issues in the report was had. It was decided we need to state the facts – other organizations with political campaign intervention issues were not sent to the advocacy group (objective IIIA and IIIB). We cannot definitively identify liberal vs. conservative organizations, so we want to stay away from using ‘heated’ jargon.”<sup>877</sup>

This meeting summary indicates that the TIGTA auditors were not only aware of, but also discussed, the issue of whether liberal groups were being referred to the advocacy group for heightened review. The summary also suggests that the auditors may have decided not to discuss liberal groups in the audit report, to avoid having to label certain groups as liberal or conservative.

In October 2012, Mr. Kutz wrote directly to the TIGTA Inspector General about the sensitivity of the ongoing audit. He wrote: “[G]iven the highly sensitive nature of this ongoing audit (politically active non-profits) a more in depth discussion would be useful for you.”<sup>878</sup>

**Written Questions and Answers.** In November 2012, EO head Lois Lerner provided written responses to questions posed by the TIGTA auditors.<sup>879</sup> In response to a question about why the BOLO entries had been changed over time, Ms. Lerner explained what happened, while also reminding the TIGTA auditors once more that the BOLO lists had included entries for liberal groups as well as conservative groups: “The separate entries for Occupy groups and

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<sup>874</sup> 8/14/2012 email from Troy Paterson to Russell Martin, “Discussion with Greg,” TIGTA Bates No. 010710. Mr. Paterson told the Subcommittee that the September briefing of Congressional staff was later cancelled. Subcommittee interview of Troy Paterson (3/21/2014).

<sup>875</sup> See 9/25/2012 “Memo of Contact,” prepared by TIGTA, “Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases,” TIGTA Bates No. 003084 - 085.

<sup>876</sup> Id.

<sup>877</sup> Id. at 085.

<sup>878</sup> 10/23/2012 email from Gregory Kutz to Russell George, “Greetings to you from Emilia,” TIGTA Bates No. 016007. Mr. Kutz told the Subcommittee that he and Mr. Paterson personally briefed the Inspector General about the audit in January 2013. Subcommittee interviews of Gregory Kutz (3/26/2014) and Troy Paterson (3/21/2014).

<sup>879</sup> See 11/2/2012 email from Lois Lerner to Troy Paterson, “Responses,” IRSR0000013545 – 565.

ACORN successors were deleted and the advocacy organization description was revised ....”<sup>880</sup> She also wrote:

“In addition, in light of the diversity of applications selected under this ‘tea party’ label (e.g., some had ‘tea party’ in their name but others did not, some stated that they were affiliated with the ‘tea party’ movement while others stated they were affiliated with the Democratic or Republican party, etc.), the Acting Director, EO Rulings & Agreements sought clarification as to the criteria being used to identify these cases.”<sup>881</sup>

Ms. Lerner asked TIGTA to include that information in the audit report, but TIGTA declined.<sup>882</sup>

**TIGTA Failure to Examine Liberal Groups.** During the audit period, TIGTA auditors were repeatedly exposed to issues related to whether liberal groups, such as the progressive, ACORN, and Occupy organizations, were subjected to the same heightened scrutiny as Tea Party and other conservative groups. The TIGTA auditors failed, however, to examine any BOLO entry that named a group other than the one that named the Tea Party.<sup>883</sup> The TIGTA auditors also failed to acknowledge that groups in the 298 cases with “Progressive” or “Progress” in their names were subjected to inappropriate selection criteria and other improper treatment.

When asked why, the TIGTA auditors offered a number of reasons. The TIGTA audit director, Troy Paterson, told the Subcommittee that the auditors did not actually make a decision not to analyze the progressive, ACORN, and Occupy BOLO entries, but viewed them as not relevant to the audit.<sup>884</sup> He did not explain, however, why BOLO entries with overtly political search terms were seen as irrelevant to an audit designed to “assess the consistency of the Exempt Organizations function’s identification and review of applications for tax-exempt status involving political advocacy issues.”<sup>885</sup>

The BOLO entry for “progressive” organizations urged EOD personnel to be on the lookout for groups with “progressive political activities” that “appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to ‘blue’ as being ‘progressive.’”<sup>886</sup> The BOLO entry for Occupy groups urged EOD personnel to be on the lookout for groups claiming “social injustices due to ‘big money’ influence” or concerns that

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<sup>880</sup> Id. at 548.

<sup>881</sup> Id. at 547. See also Audit Log, prepared by TIGTA, PSI-TIGTA-05-000909 – 949, at 934 (entry dated 11/9/2012 noting receipt of the same information).

<sup>882</sup> Ms. Lerner proposed including the identical sentence she had written in the timeline prepared for the TIGTA audit report, but TIGTA chose not to include it. See comments by EO Director Lois Lerner on a draft timeline supplied by TIGTA, PSI-TIGTA-03-000081 – 098, at 089.

<sup>883</sup> See TIGTA Audit Report, at 6, footnote 16 (“We did not review the use of other named organizations on the BOLO listing to determine if their use was appropriate.”). The footnote did not explain why.

<sup>884</sup> Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>885</sup> 6/22/2012 memorandum from Michael McKenney, TIGTA Office of Audit, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status involving Political Advocacy Issues (Audit # 201210022),” IRSR0000444445 - 447, at 445 (providing the official “engagement letter” for the audit).

<sup>886</sup> 2010 August BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515.

“the democratic process is controlled by wall street/banks/multinational corporations.”<sup>887</sup> While the IRS redacted most of the wording of the BOLO entry for ACORN successor groups, a 2010 email indicated that EOD personnel were looking for groups called “Neighborhoods for Social Justice” or “Communities Organizing for Change,” as well as groups advocating for “Voter Mobilization of the Low-Income/ Disenfranchised” or “Housing Justice for the poor.”<sup>888</sup> IRS personnel repeatedly urged the audit team to examine those BOLO entries, since they would have helped demonstrate that the IRS was not unfairly singling out conservative groups, but TIGTA failed to do so.

Several of the TIGTA auditors told the Subcommittee staff that the audit team had simply examined the BOLO entries that the IRS advised them to examine.<sup>889</sup> That explanation ignores the evidence cited above, however, showing that the IRS also asked the auditors to examine the BOLO entries for progressive, Occupy, and ACORN groups. One auditor told the Subcommittee that the audit team did not look at the BOLO entries for liberal groups because no organizations had pending applications.<sup>890</sup> In fact, as shown earlier, applications were pending from both ACORN successor and progressive groups during the entire period Tea Party groups were under review, and the first Occupy group application was filed in February 2012, more than one year before the release of the TIGTA audit.<sup>891</sup>

Two of the auditors told the Subcommittee that the Tea Party cases were the only groups with potentially problematic screening criteria used to search for additional cases.<sup>892</sup> But IRS screeners named liberal groups, including progressive, ACORN and Occupy groups, in the BOLO entries just as they had named the Tea Party groups. They also used screening criteria for ACORN successor organizations which cited the groups’ political positions in ways that both the

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<sup>887</sup> February 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000006705 -719, at 710 (The BOLO Watch List entry for Occupy organizations read in its entirety: “Occupy Organizations involve organizations occupying public space protesting in various cities, call people to assemble (people’s assemblies) claiming social injustices due to ‘big money’ influence, claim the democratic process is controlled by wall street/banks/multinational corporations, could be linked globally. Claim to represent the 99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy.”).

<sup>888</sup> 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, “BOLO Tab Update,” IRSR0000410433 (The BOLO Watch list entry for ACORN successor groups was described as including these selection criteria:

1. “The name(s) Neighborhoods for Social Justice or Communities Organizing for Change.
2. Activities that mention Voter Mobilization of the Low-Income/Disenfranchised.
3. Advocating for Legislation to Provide for Economic, Healthcare, and Housing Justice for the poor.
4. Educating Public Policy Makers (i.e. Politicians) on the above subjects.”).

<sup>889</sup> Subcommittee interviews of Gregory Kutz, TIGTA (3/26/14); Thomas Seidell, TIGTA (3/19/2014); and Troy Paterson, TIGTA (3/21/2014).

<sup>890</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/9/2014).

<sup>891</sup> See Report section on “Handling Liberal Groups.” The first ACORN case was assigned in February 2010. See 2/26/2010 email from Richie Heidenreich to Nancy Todd, “Investigation,” IRSR0000458439 - 447, at 441. The first Occupy case was assigned in February 2012. See 2/29/2012 email from Steven Bowling to Stephen Seok, “BOLO case,” IRSR000 00014173 - 174 (Mr. Bowling wrote: “We have our first ‘occupy’ type organization. We were thinking that these could be worked by the same agents working the political type cases.”). See also Report section on Flagging Tea Party Groups, which shows that, from the beginning in 2010, IRS personnel urged EO screeners to look for “Progressive” groups at the same time and in the same documents used to urge them to look for Tea Party groups, and which discusses how the IRS actively flagged applications from groups with “Progressive” or “Progress” in their names and subjected them to heightened review.

<sup>892</sup> Subcommittee interviews of Thomas Seidell, TIGTA (3/19/2014) and Troy Paterson, TIGTA (3/21/2014).

TIGTA auditor director and TIGTA Chief Counsel acknowledged looked similar to the criteria used for Tea Party groups.<sup>893</sup> The Occupy and progressive criteria also used phrases taken from the groups' political views. The TIGTA auditors told the Subcommittee that they had not seen the ACORN screening criteria during the audit, nor had they looked for any screening criteria other than what was used for the Tea Party groups,<sup>894</sup> even though one key focus of the audit had been to identify problematic screening criteria.<sup>895</sup>

The TIGTA auditors took one year to collect and analyze information related to the IRS review of 501(c)(4) applications. They did not examine how the IRS processed applications filed by liberal organizations engaged in advocacy activities, despite being continually asked by the IRS to do so. Since the audit was designed to identify and review how the IRS handled “applications for tax-exempt status involving political advocacy issues,” sought to evaluate the “consistency” of IRS actions, and was undertaken amid allegations that the IRS had unfairly targeted Tea Party groups, TIGTA’s failure to obtain and examine comparative data related to how the IRS handled liberal groups is inexplicable.

#### **(4) Looking for Political Bias**

In February 2013, Assistant Inspector General Gregory Kutz in the TIGTA Office of Audit asked the TIGTA Office of Investigations to search the email of ten IRS employees in the EOD Unit to look for an email that allegedly directed IRS employees to “target” Tea Party groups. The Office of Investigations declined to conduct the search, until directed to do so by the TIGTA Inspector General who also caused Mr. Kutz to reduce the number of IRS employees subject to the email search to five individuals. After a subsequent search of over 2,200 IRS emails and other documents, the Office of Investigations concluded that the documents contained “no indication” that the pulling of the Tea Party applications for additional scrutiny by IRS personnel was “politically motivated,” advising that they instead appeared to be the result of inadequate guidance on how to process the cases. That conclusion by the Office of Investigations was not mentioned in TIGTA’s audit report, however, even though it was directly relevant to the issue of political bias at the IRS and was based on a documentary review of key emails.

**Involving the Office of Investigations.** At some point during early 2013, a TIGTA auditor was told that an email existed at the IRS directing IRS employees to “target” Tea Party

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<sup>893</sup> See 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, “BOLO Tab Update,” IRSR0000410433 – 434 (recommending ACORN selection criteria) cited in footnote 888 above. When asked about the ACORN criteria, TIGTA Chief Counsel Michael McCarthy said that it “looks very similar” to the Tea Party criteria. Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014). See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

<sup>894</sup> Subcommittee interviews of Thomas Seidell, TIGTA (3/19/2014) and Troy Paterson, TIGTA (3/21/2014).

<sup>895</sup> See, e.g., 7/13/2012 email from Cheryl Medina, TIGTA, to Michael McGovern, TIGTA, “case review criteria,” TIGTA Bates No. 010404 (“The focus is on the bad criteria used and if it caused cases to be missed or misidentified.”).



organizations; the auditor passed on that information to Gregory Kutz, the Assistant Inspector General.<sup>896</sup> In response, Mr. Kutz took action to try to find the alleged “smoking gun” email.<sup>897</sup>

On February 13, 2013, Mr. Kutz sent a memorandum to Timothy Camus, head of the TIGTA Office of Investigations, the agency’s law enforcement arm, asking for assistance in looking for the email.<sup>898</sup> He sought Mr. Camus’ assistance, because the Office of Audit did not have the authority to retrieve IRS emails from the agency’s servers that had not been produced to it by the IRS.<sup>899</sup> The memorandum provided ten names of IRS personnel and specific search terms that Mr. Kutz wanted the Office of Investigations to use to search and retrieve the IRS employee emails.<sup>900</sup>

Mr. Camus told the Subcommittee that he had felt “uncomfortable” conducting the type of IRS email search, retrieval, and review that Mr. Kutz wanted, describing it as a “fishing expedition.”<sup>901</sup> Mr. Camus told the Subcommittee that, at the time, he responded to Mr. Kutz by indicating that he did not feel comfortable using law enforcement tools to search and retrieve the emails of ten IRS employees, until Mr. Kutz provided more specificity as to who wrote or received the “smoking gun” email.<sup>902</sup> Mr. Camus indicated that Mr. Kutz was unable to provide the name of any IRS employee who was suspected of writing or receiving the email.<sup>903</sup> When asked about Mr. Camus’ reaction, Mr. Kutz disagreed that the request was a “fishing expedition,” explaining that it was “prudent to look through emails for the reasons stated in the February referral letter.”<sup>904</sup>

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<sup>896</sup> Mr. Kutz told the Subcommittee that either Mr. Seidell or Mr. Paterson had been told about the email. Subcommittee interview of Greg Kutz, TIGTA (3/26/2014). See also 5/3/2013 email from Timothy Camus to Gregory Kutz and others, “Review of E-mails,” PSI-IRS-37-000001 (stating that the Office of Investigations had been asked to determine “[i]f an e-mail existed that directed the [IRS] staff to ‘target’ Tea Party and other political organizations”).

<sup>897</sup> Both TIGTA Inspector General George and Office of Investigations head Timothy Camus told the Subcommittee that Mr. Kutz had described the email as a “smoking gun” email. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Timothy Camus, TIGTA (4/7/2014). See also testimony of J. Russell George, “The IRS’s Systematic Delay and Scrutiny of Tea Party Applications,” hearing before the House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 99 (“I was told by my staff that there was a smoking gun email.”).

<sup>898</sup> See 2/13/2013 memorandum from Gregory Kutz to Timothy Camus, “Memorandum for Deputy Assistant Inspector General for Investigations,” PSI-IRS-37-000002 - 003 (asking the Office of Investigations to “determine who at the Internal Revenue Service (IRS) EO function Determinations Unit in Cincinnati, Ohio originally developed and who authorized the policy to improperly target applications of certain organizations based on their names and political views”).

<sup>899</sup> Subcommittee interviews of Gregory Kutz, TIGTA (3/26/2014) and Timothy Camus, TIGTA (4/7/2014).

<sup>900</sup> Id.

<sup>901</sup> Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

<sup>902</sup> Id.

<sup>903</sup> Mr. Camus told the Subcommittee that he viewed the proper course of action to be that the Office of Audit finish its pending audit and then, if an issue warranted review by the Office of Investigations, to task his office with that review. Subcommittee interview of Timothy Camus, TIGTA (4/7/2014). Mr. Camus also stated that he thought the Office of Audit could have conducted the email search itself, a point that was disputed by Mr. Kutz. Subcommittee interviews of Timothy Camus, TIGTA (4/7/2014) and Gregory Kutz, TIGTA (3/26/2014).

<sup>904</sup> 4/24/2014 email from TIGTA counsel to the Subcommittee, “HSGAC PSI Question,” PSI-TIGTA-21-000001-002.

In early April 2013, Mr. Kutz set up a meeting with Inspector General George and Mr. Camus to discuss his request for the Office of Investigations email review.<sup>905</sup> According to Mr. Camus, at the meeting, he expressed his concern about using law enforcement tools to search and retrieve IRS employee emails without the knowledge or consent of the IRS, and his hesitance to act without getting additional specificity regarding who and what to search for from Mr. Kutz.<sup>906</sup> Mr. Camus told the Subcommittee that Inspector General George directed the Office of Investigations to conduct the requested email review, but also brokered a “compromise” in which Mr. Kutz agreed to narrow the list of IRS employees whose emails would be searched from ten to five individuals.<sup>907</sup> When asked about the meeting, the TIGTA Inspector General told the Subcommittee that he did not recall a disagreement between the Office of Audit and the Office of Investigations over the matter, but did recall asking the Office of Investigations to undertake the review.<sup>908</sup> Mr. Camus told the Subcommittee that he was not pleased with having to conduct the review, but felt it had been narrowed so that it was “not a broad fishing expedition.”<sup>909</sup>

**Conducting the Review.** Mr. Camus told the Subcommittee that he tasked one of his technical experts, James Jackson, with conducting the search, retrieval, and review of the specified emails from the five IRS employees.<sup>910</sup> According to Mr. Jackson, Mr. Camus instructed him to review the IRS employees’ emails, using the key search terms provided by Mr. Kutz, and look for any political direction related to delaying or targeting the processing of 501(c) applications, for example, in response to direction from the White House.<sup>911</sup> Using Mr. Kutz’s search terms of “Tea,” “Patriots,” “9/12”, and “(c)(4),” Mr. Jackson’s email search produced 5,617 total hits involving 2,277 emails and other documents.<sup>912</sup> Mr. Jackson told the Subcommittee that he personally reviewed all 2,277 emails and documents, but did not find a “smoking gun” email.<sup>913</sup> He said that, instead, he found the emails and documents demonstrated a great deal of confusion about the application process, with IRS employees “begging for guidance” as to how to determine whether organizations were engaged in campaign activity.<sup>914</sup>

Mr. Jackson told the Subcommittee that he found no evidence of political bias in the IRS’ processing of the 501(c)(4) applications.<sup>915</sup> Mr. Jackson summarized his findings in a memorandum dated May 3, 2013, which he prepared after concluding his review and emailed to Mr. Camus, head of the Office of Investigations:

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<sup>905</sup> Subcommittee interviews of Timothy Camus, TIGTA (4/7/2014) and Russell George, TIGTA (4/22/2014). Other meeting participants included Lori Creswell from the TIGTA Chief Counsel’s office, Randy Silvis from the TIGTA Office of Investigations, and Michael Phillips from the TIGTA Office of Audit. Id.

<sup>906</sup> Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

<sup>907</sup> Id.

<sup>908</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>909</sup> Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

<sup>910</sup> Id. The five individuals identified by Mr. Kutz and whose emails were reviewed by Mr. Jackson were Joseph Herr, Elizabeth Hofacre, Gary Muthert, John Shafer, and Cindy Thomas. See undated “EO Email Review,” prepared by James Jackson, PSI-TIGTA-04-000015. All five of the IRS employees selected by Mr. Kutz for the email search worked in the Cincinnati office; none worked in Washington, D.C.

<sup>911</sup> Subcommittee interview of James Jackson, TIGTA (4/2/2014).

<sup>912</sup> Id.

<sup>913</sup> Id.

<sup>914</sup> Id.

<sup>915</sup> Id.

“This review revealed that there was a lot of discussion between the employees identified above, as well as other EO employees on how to process ‘Tea Party’ and other political organization’s tax exempt applications. The search also revealed that there was a Be On the Lookout (BOLO) list specifically naming these groups; however, the e-mails indicated the organizations needed to be pulled because the group charged with reviewing these applications was not sure how to process them, not because they wanted to stall or hinder the application process. There was no indication from this electronic mail review that the pulling of these selected applications was politically motivated. The electronic mail traffic available indicated that there were unclear processing directions and the group wanted to make sure they had guidance on processing the applications, so they pulled them in order to ensure they were all processed in a consistent manner.”<sup>916</sup>

**Conveying the Review Results.** That same day, May 3, 2013, Mr. Camus summarized the findings of the review in an email he sent to other senior TIGTA executives, Gregory Kutz, Michael McCarthy, Michael Phillips, and Michael McKenney:

“As a result of our meeting with Russell [George] a couple of weeks ago, we agreed to pull e-mails from identified staff members of the EO organization in Cincinnati to find out 1). If an e-mail existed that directed the staff to ‘target’ Tea Party and other political organizations and 2). If there was a conspiracy or effort to hide e-mails about the alleged directive. ... Review of these e-mails revealed that there was a lot of discussion between the employees on how to process the Tea Party and other political organization applications. There was a Be On the Lookout (BOLO) list specifically naming these groups; however, the e-mails indicated the organizations needed to be pulled because the IRS employees were not sure how to process them, not because they wanted to stall or hinder the application. There was no indication that pulling these selected applications was politically motivated. The e-mail traffic indicated there were unclear processing directions and the group wanted to make sure they had guidance on processing the applications so they pulled them. This is a very important nuance.”<sup>917</sup>

The Camus email was sent eleven days before the audit report was released to the public. According to TIGTA Inspector General George, none of the senior TIGTA managers who received the email forwarded it to him or informed him of the review’s results.<sup>918</sup>

**Excluding the Finding from the Audit Report.** Although the Office of Investigations found in its review that “there was no indication that pulling these selected applications was politically motivated,” addressing an issue that was central to the TIGTA audit, its finding was not included in the TIGTA audit report. When asked why, Mr. Kutz told Subcommittee that the TIGTA report had already shown there was no evidence of political bias in the application

<sup>916</sup> 5/3/2013 memorandum from James Jackson, “Memorandum of Interview or Activity,” PSI-TIGTA-18-000002-003.

<sup>917</sup> 5/3/2013 email from Timothy Camus to Gregory Kutz, Michael McCarthy, Michael Phillips, and Michael McKenney, “Review of E-mails,” PSI-IRS-37-000001. TIGTA Inspector General George told the Subcommittee that he did not see this email at the time it was sent, and learned of the Office of Investigation’s finding for the first time when the email was made public by a Member of Congress. Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>918</sup> Subcommittee interview of Russell George (4/22/2014).

process, and the Office of Investigations had simply confirmed the audit results, so there was no need to include its finding in the report.<sup>919</sup>

The TIGTA audit report did not contain, however, an explicit finding that there was no political bias in the IRS application process. When the Subcommittee examined the part of the audit report which Mr. Kutz indicated already showed there was no political bias at the IRS in the application process, it consisted of a description by TIGTA of statements made by IRS employees regarding the absence of political bias, rather than an analysis or statement by TIGTA itself concluding that no political bias had been present.<sup>920</sup>

When asked about the issue in Congressional hearings, TIGTA Inspector General George repeatedly testified that the audit had found no evidence of political bias at the IRS.<sup>921</sup> At the same time, he cited little or no evidence to support that conclusion. Had TIGTA included the TIGTA Office of Investigations finding in the audit report, it would have included information directly relevant to the audit and provided important additional evidence to support TIGTA's conclusion regarding the absence of political bias at the IRS. Given that the Office of Investigations finding was among the strongest evidence developed by the audit on the issue of whether the IRS had shown political bias in processing 501(c)(4) applications, it is difficult to understand why it was excluded from the report.<sup>922</sup>

Documents reviewed by the Subcommittee show that an earlier draft of the TIGTA audit report, a copy of which was sent to EO head Lois Lerner and IRS Chief Counsel William Wilkins in early April 2013, had included two references to the Office of Investigations

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<sup>919</sup> Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014). See also testimony of Mr. Kutz, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 102 ("[W]e were told that what they found validated the facts in our report, and we thought that made us feel good that our report was accurate. And we didn't say something in addition to what we already said, because we'd already said what he found.").

<sup>920</sup> Mr. Kutz referred the Subcommittee to the following statements in the TIGTA audit report as showing the lack of political bias at the IRS:

"We asked the Acting Commissioner, Tax Exempt and Government Entities Division; the Director, EO; and Determinations Unit personnel if the criteria were influenced by any individual or organization outside the IRS. All of these officials stated that the criteria were not influenced by any individual or organization outside the IRS. ... According to the Director, Rulings and Agreements, the fact that the team of specialists worked applications that did not involve the Tea Party, Patriots, or 9/12 groups demonstrated that the IRS was not politically biased in its identification of applications for processing by the team of specialists."

5/14/2013 TIGTA Audit Report, at 7-8.

<sup>921</sup> More information about TIGTA testimony on this point during Congressional hearings is provided below.

<sup>922</sup> The Minority Staff's Dissenting Views state at one point that the email review was "a limited search of only five employees' emails," "did not include a search of *any* emails from *any* DC based employees," and "was not a general search for evidence of political bias." Dissenting Views at 196 (emphasis in original). That reasoning, however, misses the point of TIGTA's explanation for omitting the review from the audit report, which is not that the email review was too limited, but that it reached the same conclusion that the Office of Audit had already reached after considering all of the available information -- that there was no evidence of political bias in how the IRS treated the 501(c)(4) applications. Subsequent broader email productions have not changed TIGTA's view. In June 2014, TIGTA sent a letter to the Subcommittee confirming Mr. George's testimony that the TIGTA audit "found no evidence of political bias" at the IRS. 6/6/2014 letter from TIGTA to Subcommittee, PSI-TIGTA-22-000001 – 004, at 001.

review.<sup>923</sup> Since the draft was sent to the IRS before that review had concluded, neither reference described what the Office of Investigations had found. In an email, Ms. Lerner expressed concern to TIGTA personnel about what she thought were two separate referrals to the Office of Investigations described in the draft report.<sup>924</sup> Mr. Camus told the Subcommittee that he had asked that the final audit report remove any reference to an Office of Investigations referral, because he viewed any reference to be misleading, since his office had not conducted a formal investigation in connection with the audit.<sup>925</sup> The footnotes referencing the Office of Investigations were removed from the final report.<sup>926</sup>

**Making the Investigative Results Public.** The existence of the Office of Investigations review and its conclusion were finally made public, not by TIGTA, but by a Member of Congress. On July 12, 2013, Congressman Elijah Cummings, Ranking Member of the House Committee on Oversight and Government Reform, released a letter disclosing that the Committee had received new TIGTA documents, and those documents had disclosed that TIGTA’s Office of Investigations had conducted an email review of IRS employees and found “no indication” that the pulling of 501(c)(4) applications was “politically motivated.”<sup>927</sup>

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<sup>923</sup> See 4/12/2013 draft audit report, “Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review DRAFT,” prepared by TIGTA, IRSR0000014721, at 732, footnotes 15 and 17 (“Initially, EO function officials stated that the Determinations Unit sent out an informal e-mail to all Determinations Unit specialists in May 2010 instructing them to forward all Tea Party applications to another specialist. Since EO function officials could not locate a copy of this e-mail, we requested assistance from our Office of Investigations in the matter. EO function officials later determined that an e-mail was not distributed to Determinations Unit specialists in May 2010. ... During interviews with Determinations Unit specialists and managers, we could not specifically determine who had been involved in creating the criteria. EO function officials later clarified that the expanded criteria were a compilation of various Determinations Unit specialist responses on how they were identifying Tea Party cases. Since we could not determine specifically who was involved in creating the expanded criteria, we referred this matter to our Office of Investigations.”).

<sup>924</sup> See 4/2/2013 email from Lois Lerner to Greg Kutz and Troy Paterson, “TIGTA report – draft email,” IRSR0000195635 (“As you know, we are a bit concerned about the 2 referrals for investigation in the draft report, and want to do all we can to clear up your concerns.”).

<sup>925</sup> Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

<sup>926</sup> See 5/14/2013 TIGTA Audit Report. See also 5/7/2013 email from Gregory Kutz to Troy Paterson and Thomas Seidell, “Review of E-mails,” PSI-IRS-37-000001 (“I forgot to ask, but did we remove reference to OI [Office of Investigations] in the footnotes and the related referral?”). Mr. Kutz also provided the Subcommittee with another reason the Office of Investigations’ finding was not included in the final audit report. His memorandum requesting the Office of Investigations review indicated that, if the review discovered “material” evidence, that information might be disclosed in the audit report. See 2/13/2013 memorandum from Gregory Kutz, TIGTA, “Memorandum for Deputy Assistant Inspector General for Investigations,” PSI-IRS-37-000002 - 003 (“If you identify evidence material to our audit report before it is issued, we will work with you on any additional disclosures we should make.”). Mr. Kutz told the Subcommittee that he did not view the Office of Investigations’ finding regarding a lack of evidence of politically motivated actions by the IRS to be material evidence, since he believed it simply confirmed what the audit report already said, and so did not include it in the audit report for that reason. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

<sup>927</sup> See 7/12/2013 letter from Oversight of Government Reform Committee Ranking Member Cummings to Chairman Issa, at 1-2, [http://democrats.oversight.house.gov/images/user\\_images/gt/Letter.pdf](http://democrats.oversight.house.gov/images/user_images/gt/Letter.pdf) (“New documents obtained by the Committee indicate that Mr. George did not disclose to the Committee—either in his report or during his testimony—that he met personally with his top investigator and tasked him to conduct a review of 5,500 emails of IRS employees, and that this official concluded after this review that there was ‘no indication that pulling these selected applications was politically motivated’—a fact this official reported was ‘very important.’ New

By that time, TIGTA Inspector General George had testified at four Congressional hearings about the audit's results, but had not disclosed the existence of the Office of Investigations email review or the conclusion it had reached.<sup>928</sup> Mr. George told the Subcommittee that he had not brought it up in his testimony, because while he was aware of the email review, he had been unaware that the Office of Investigations had reached a conclusion that the IRS documents showed the IRS had not been politically motivated when it subjected applications from conservative groups to additional review, until Congressman Cummings released the key TIGTA email.<sup>929</sup> Mr. George told the Subcommittee that no one on his staff had informed him of the Office of Investigations conclusion or forwarded the Camus email to him, even though the finding directly addressed an issue central to the TIGTA audit, whether there had been political bias at the IRS.<sup>930</sup>

The TIGTA personnel who knew about the Office of Investigations finding, not only excluded the finding from the May 2013 audit report and failed to inform the Inspector General about the finding, they remained silent about the review's results for another two months, despite mounting public and Congressional concern about allegations that the IRS had showed political bias in the processing of tax-exempt applications. Had TIGTA personnel briefed Inspector General George during his hearing preparation about the Office of Investigations' finding, Mr. George could have used it to buttress TIGTA's conclusion about a lack of political bias at the IRS. For example, on May 21, 2013, at a Senate Finance hearing, when asked whether TIGTA was basing its conclusion that "there was no political motivation" in how the IRS processed Tea Party applications on "simply the statement of those engaging in the conduct," the Inspector General responded "yes."<sup>931</sup> According to Mr. George, he did not also cite the TIGTA Office of Investigation's email review that found no indication of political bias, because his staff had not informed him of that conclusion. Mr. George also told the Subcommittee that, when he finally reviewed Mr. Camus' email, he had been "very disappointed" with it.<sup>932</sup> He indicated that, in his view, the email contained a conclusion that Mr. Camus should not have reached; instead, Mr.

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documents also indicate that all references to work conducted by this official and his team of investigators were scrubbed from an earlier draft of the Inspector General's report.").

<sup>928</sup> TIGTA Inspector General Russell George had testified on 5/17/2013 before the House Ways and Means Committee, on 5/21/2013 before the Senate Finance Committee, on 5/22/2013 before the House Oversight and Government Reform Committee, and on 6/3/2013 before the House Appropriations Subcommittee on Financial Services and General Government.

<sup>929</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>930</sup> Id. See also testimony of Inspector General George before the House Appropriations Subcommittee on Financial Services and General Government (2/26/2014) (Congressman Serrano: "This was a member of your staff who came to this conclusion but didn't tell you?" Mr. George: "Did not tell me directly, correct. That is correct.").

<sup>931</sup> See testimony of J. Russell George, "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," hearing before Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013) at 19-20, <http://www.finance.senate.gov/hearings/hearing/?id=9b0a1cc8-5056-a032-5219-3e11fc44d504> (providing this testimony:

"Senator Crapo: So, in other words, you have simply the statements of those who were engaging in the conduct saying they were not politically motivated?

Mr. George: That is correct, sir.

Senator Crapo: And based on that, and statements not under oath, you have reached the conclusion there was no political motivation.

Mr. George: Yes.").

<sup>932</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

George indicated that the documentary review should have confined itself to determining whether or not a “smoking gun” email existed at the IRS.<sup>933</sup>

## **(5) Communicating the Audit Results**

By January 2013, the TIGTA auditors had tentatively concluded that, when the EO Determinations Unit used “Tea Party,” “9/12,” “Patriot,” or phrases reflecting the political views of those organizations, the IRS used inappropriate criteria to identify applications that were then subjected to heightened scrutiny.<sup>934</sup> The auditors had also analyzed several groups of applications and reached a preliminary conclusion that the IRS had failed to identify some applications that should have been treated as advocacy cases, and treated others as advocacy cases when they should not have been. The TIGTA auditors informed IRS officials of their preliminary conclusions and discussed those and other audit issues in a series of meetings.

On January 14, 2013, EO head Lois Lerner sent an email to TIGTA audit director Troy Paterson expressing concern about some of the preliminary audit results and urging that the discussion include more senior personnel.<sup>935</sup> On January 25, 2013, TIGTA auditors Troy Paterson, Thomas Seidell, and Cheryl Medina met with IRS officials Holly Paz, Judith Kindell, and Hilary Goehausen to discuss the audit.<sup>936</sup> Six days later, on January 31, 2013, TIGTA auditors Thomas Seidell and Cheryl Medina met with IRS officials Lois Lerner, Holly Paz, Judith Kindell and Hilary Goehausen.

IRS personnel were taken aback by TIGTA’s analysis which they interpreted as indicating that IRS personnel had shown political “bias” against Tea Party organizations by “targeting” them for heightened scrutiny. According to contemporaneous notes of the January 31 meeting taken by IRS personnel, Ms. Lerner objected to that characterization of IRS actions:

“[T]here was never institutional IRS bias. There was never direction from anyone in management to target anyone. She said it was less targeting than not providing them [EOD personnel] with the tools needed early on.”<sup>937</sup>

That same day, January 31, 2013, Ms. Lerner sent a long email to Audit Director Troy Paterson, who wasn’t present at the January 31 meeting she had attended. Her email described the audit as “the toughest one you and I have worked on together,” and asserted that the TIGTA

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<sup>933</sup> Id.

<sup>934</sup> See, e.g., 1/16/2013 Memorandum of Discussion, “Overall Concerns with Case Review Results,” prepared by Troy Paterson, TIGTA, PSI-TIGTA-05-000441.

<sup>935</sup> 1/14/2013 email from Lois Lerner to Troy Paterson, copies to Holly Paz and Dawn Marx, “Advocacy discussion,” IRSR0000441700 – 701 (“As you know, the issues here are very sensitive and I know we both recognize that they are not as black and white as some of the issues we deal with, so I think it is important that higher levels on both sides hear the discussion to ensure the best result.”).

<sup>936</sup> 1/25/2013 memorandum, “Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity,” prepared by TIGTA, PSI-TIGTA-05-000443 (discussing the meeting).

<sup>937</sup> IRS Notes from Meeting with TIGTA on January 31, 2013, prepared by Megan Biss, IRS Technical Advisor, IRSR0000428195 – 203, at 203.

auditors could not explain how they defined “targeting” or what they meant by saying that the targeting under review “wasn’t necessarily political.”<sup>938</sup> Ms. Lerner wrote:

“We feel your folks are being too narrow in their view and have decided that because of the language on the earlier BOLO list regarding Tea Party, everything that followed was tainted. They seem to believe that if a case was initially sent to the advocacy group, but ultimately determined to be an approval, that our action in putting it into the advocacy group in the first place is incorrect, and illustrates ‘targeting.’ I think they remain confused about the purpose of screening vs. bucketing – and we have tried to explain several time[s]. They also don’t seem to be taking a big picture look at what we have done. That is, we’ve already owned up to the fact that we recognized in mid-process that Cincinnati was struggling with the issues. That is why we sent our experts in this area to Cincinnati for 3 weeks to work hand in hand with the Determ folks to train them and then walk through their post training assessments to ensure they understood and we were getting the right treatment for the cases. When we describe that process, they acknowledge that that approach sounds reasonable, but seem to be saying that reasonableness is overshadowed by the fact that the criteria look bad to folks on the outside, so there is no way we could cure the initial bad impression. ...

I met with the group today and asked your folks what they thought the TIGTA audit was all about. The response was that they were here because there allegations that the IRS was ‘targeting.’ When asked, they didn’t seem able to provide me with a clear definition of what they meant by targeting, and they confused me when they said it wasn’t necessarily political. I told them my understanding is that the audit was to determine whether the IRS was acting in a politically motivated manner – not whether the earlier articulation of the criteria looked bad. However, that doesn’t seem to be the focus. They have said they aren’t looking at whether the organizations are conservative or liberal because that is too difficult to figure out. They have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases.

So, I’m not sure how they are looking at whether we were politically motivated, or what they are looking for with regard to targeting. They didn’t seem to understand the difference between IRS acting in a politically motivated manner and front line staff people using less than stellar judgment. I am willing to take the blame for not having provided sufficient direction initially, which may have resulted in front line staff doing things that appeared to be politically motivated, but I am not on board that anything that occurred here shows that the IRS was politically motivated in the actions taken.”<sup>939</sup>

This January 2013 email shows that the IRS again brought its treatment of liberal groups to the attention of senior TIGTA personnel, noting that the TIGTA auditors had “acknowledged that there are both conservative and liberal organizations on the list of advocacy cases.”<sup>940</sup>

<sup>938</sup> 1/31/2013 email from Lois Lerner to Troy Paterson, “Follow-Up,” IRSR0000466814 - 815.

<sup>939</sup> Id.

<sup>940</sup> Id. at 815. The Minority Staff’s Dissenting Views state that, when given opportunities to comment on drafts of the audit report, the IRS “did not assert that it had impartially targeted both conservative and liberal groups,”



The same day that TIGTA auditors met with the IRS, on January 31, 2013, Mr. Kutz and Mr. Paterson briefed the TIGTA Inspector General about the audit. Mr. Kutz told the Subcommittee that he and Mr. Paterson personally met with Inspector General George and described the audit findings, including the changes in the wording of the BOLO entries used to flag applications filed by the Tea Party and other conservative groups.<sup>941</sup>

On February 5, 2013, Ms. Lerner sent an email about the TIGTA audit to senior EO officials, including Joseph Grant, then head of the Tax Exempt and Government Entities division, and Nikole Flax, Chief of Staff to then Acting IRS Commissioner Steven Miller, warning them about the audit outcome. Ms. Lerner wrote:

“We have met with TIGTA on this several times. ... I think we have a basic difference in our view of their audit. We thought it was to determine whether IRS has a biased program, which would include looking at every aspect. [T]hey seem to think the question is narrower – did we ‘target based on the articulation of the BOLO?’<sup>942</sup>

Her email indicates that, by early February 2013, the Acting IRS Commissioner’s office had been alerted to the potentially negative audit report.

## (6) Drafting the Audit Report

By February, the TIGTA audit team had prepared a draft audit report. On February 25, 2013, audit director Troy Paterson wrote to a colleague: “Everyone is a bit anxious about this report due to its subject matter.”<sup>943</sup> Due to the perceived sensitivity regarding the report, TIGTA asked the TIGTA Chief Counsel to review the draft prior to providing it to the IRS, which was not generally done, and later provided the IRS with the opportunity to comment on three different drafts of the audit report prior to its issuance, instead of the usual two.<sup>944</sup>

**TIGTA Chief Counsel Comments.** On February 25, 2013, Mr. Paterson sent the draft audit report to TIGTA Chief Counsel Michael McCarthy and the head of the Office of Audit, Assistant Inspector General Michael McKenney, explaining: “Greg [Kutz] mentioned that, due

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Dissenting Views at 193, but in this email to the senior TIGTA auditor as well as in other instances recounted earlier, the IRS did make that assertion, only to be told that the TIGTA auditors were not “looking at whether the organizations are conservative or liberal.” This email as well as other evidence showed that the IRS clearly and repeatedly objected to the failure of the TIGTA audit to mention the inclusion of liberal organizations in the list of advocacy cases.

<sup>941</sup> According to Mr. Kutz, the issue of whether liberal groups were also identified using inappropriate criteria and then subjected to heightened scrutiny by the IRS did not come up at the meeting. Subcommittee interviews of Gregory Kutz (3/26/2014) and Troy Paterson (3/21/2014). See also TIGTA Audit log, at PSI-TIGTA-05-000944.

<sup>942</sup> 2/5/2013 email from Lois Lerner to Joseph Grant, Nancy Marks, with copy to Nikole Flax and Holly Paz, “Follow-Up,” IRSR0000202644. See also 2/8/2013 email from Lois Lerner to Nikole Flax, “Follow-Up,” IRSR0000202703.

<sup>943</sup> 2/25/2013 email from Troy Paterson to Thomas Dori, “Audit # 2012100022 – Outcome Measure Review,” TIGTA Bates No. 009498.

<sup>944</sup> Subcommittee interviews of Greg Kutz, TIGTA (3/26/2014) and Troy Paterson, TIGTA (3/21/2014).

to the sensitivity of the attached report, he would like for us to obtain your feedback before we issue a discussion draft report to the IRS.”<sup>945</sup>

After reading the draft audit report, TIGTA’s Chief Counsel Michael McCarthy wrote to Mr. Kutz and Mr. Paterson expressing several concerns.<sup>946</sup> First, Mr. McCarthy counseled against the draft’s using the word “targeted,” explaining: “[T]argeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report.”<sup>947</sup> Mr. McCarthy was also curious about why TIGTA made the claim that the IRS “used inappropriate criteria,” since without using some type of identifier: “[t]hat would seem to make it difficult for the IRS to identify potential political applications for referral to the specialized unit.”<sup>948</sup> Mr. McCarthy recommended that TIGTA focus more attention on the fact that the IRS used identifying names for non-political groups as well as political ones, “since it suggests both that the IRS was not politically motivated in this case, and that our recommendation might need to be broader.”<sup>949</sup> Finally, Mr. McCarthy expressed concern about whether the TIGTA auditors had looked at whether the IRS had named “similarly situated groups from the left side of the political spectrum.”<sup>950</sup> Mr. McCarthy told the Subcommittee that when he asked the auditors if the IRS had used any BOLO entries that named liberal groups, the auditors told him there were none,<sup>951</sup> which was inaccurate.

On March 8, 2013, the TIGTA auditors met with the TIGTA Chief Counsel to discuss his concerns with the draft report.<sup>952</sup> Mr. Kutz told the Subcommittee that the meeting was “part of the iterative process of a report.”<sup>953</sup> Auditor Thomas Seidell told the Subcommittee that he recalled the TIGTA Chief Counsel asking about whether the IRS looked at liberal groups, but did not recall how the matter was resolved.<sup>954</sup> TIGTA Inspector General George told the Subcommittee that the Chief Counsel’s comments on the report and his concern about whether

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<sup>945</sup> 2/25/2013 email from Troy Paterson to Michael McCarthy and Michael McKenney, “Tax-Exempt Applications Audit Report for your Review and Feedback,” TIGTA Bates No. 008273.

<sup>946</sup> See 2/28/2013 email from Michael McCarthy to Gregory Kutz, Troy Paterson, and others, “Tax Exempt Applications Audit Report for your Review and Feedback,” TIGTA Bates No. 008272 - 273.

<sup>947</sup> Id.

<sup>948</sup> Id.

<sup>949</sup> Id.

<sup>950</sup> Id. Mr. McCarthy wrote: “Or are we saying it was inappropriate because the use of names was one sided, i.e. name criteria included only certain types of groups seen as conservative, and names of other political groups with different policies should have also been included? If that is the rationale, do we have evidence that similarly situated groups from the left side of the political spectrum should have been included by name in the criteria, but were not? The later sections of the report seem to suggest this, but it is not clear.” Id.

<sup>951</sup> Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

<sup>952</sup> After the meeting, Mr. Kutz wrote to Mr. Seidell and Mr. Paterson: “I thought we had a good meeting with Counsel today.” 3/8/2013 email from Gregory Kutz to Thomas Seidell and Troy Paterson, “EO Draft,” TIGTA Bates No. 008136. Mr. Paterson wrote to Mr. Seidell and Ms. Medina: “I took off for lunch and tried to clear my head after the Counsel meeting. How do you think we should proceed?” 3/8/2013 email from Troy Paterson to Thomas Seidell and Cheryl Medina, “Well...,” TIGTA Bates No. 008185. Three days later, Mr. Paterson wrote to his auditors: “I reviewed the revised report over the weekend and have some minor revisions throughout and a few questions. Fortunately, I believe it will not be difficult to make any needed changes and get this up to Greg today!” 3/11/2013 email from Troy Paterson to Thomas Seidell and Cheryl Medina, “Well...,” TIGTA Bates No. 008185.

<sup>953</sup> Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

<sup>954</sup> Subcommittee interview of Thomas Seidell, TIGTA (3/19/2013).

the IRS also looked at “similarly situated groups from the left side of the political spectrum” were not made known to him at the time.<sup>955</sup>

Ten days later, on March 18, 2013, the TIGTA Chief Counsel signed off on the report. Lori Creswell of Mr. McCarthy’s staff sent an email to Troy Paterson thanking the audit team for making requested changes:

“We wanted to thank you all for meeting with us to discuss Counsel’s comments concerning the draft audit report pertaining to applications for tax-exempt status. We have reviewed the revised draft that you provided to our office last week and appreciate the changes that have been made to the draft report. We believe that the revisions address and/or resolve the comments and concerns that we have offered. At this time, we have no further comments to offer concerning this matter.”<sup>956</sup>

One key change made to the draft was to remove the word “targeted” from the text, except when describing the allegations made by the initiators of the report who thought Tea Party groups were being targeted.<sup>957</sup> Mr. McCarthy told the Subcommittee that he signed off on the report, because his concerns had been addressed.<sup>958</sup>

**Draft Provided to IRS.** On March 19, 2013, TIGTA provided copies of the revised draft audit report to the IRS.<sup>959</sup> On March 25, 2013, EO Rulings and Agreements Head Holly Paz sent an email to EO head Lois Lerner criticizing the draft:

“The report lacks any reference to or information regarding the broader context (such as how difficult it is to determine what constitutes political activity and whether political activity is a c4’s primary activity). Without this broader context, the report could appear slanted in one direction.”<sup>960</sup>

That same day, March 25, 2013, Ms. Lerner and Meghan Biss, a Technical Advisor at the IRS, met with Mr. Kutz, Mr. Paterson, Mr. Seidell, and Ms. Medina from TIGTA to discuss the draft.<sup>961</sup> Later that day, Ms. Lerner described the meeting to Ms. Paz, who was unable to attend. Ms. Lerner wrote:

“I asked Greg [Kutz] and [T]roy [Paterson] to stay on afterwards. I told them flat out the report felt politically motivated with some of the inflammatory descriptions. ... Greg

<sup>955</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>956</sup> 3/18/2013 email from Lori Creswell to Troy Paterson, “Tax-Exempt Applications Audit Report for your Review and Feedback,” TIGTA Bates No. 008271.

<sup>957</sup> See 5/14/2013 “Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review,” prepared by TIGTA (hereinafter “5/14/2013 TIGTA Audit Report”), <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>

<sup>958</sup> Subcommittee interview of Mike McCarthy, TIGTA (4/30/2014).

<sup>959</sup> See “TIGTA OA: Process for Reviewing Applications for Tax Exemption,” TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 948 (noting a pre-discussion draft of the report had been sent to Lois Lerner and Holly Paz).

<sup>960</sup> 3/25/2013 email from Holly Paz to Lois Lerner, “TIGTA,” IRSR0000428212.

<sup>961</sup> See March 25, 2013, “Memo of Contact,” prepared by TIGTA, “Process for Reviewing Applications for Tax Exemption Closing Conference,” PSI-TIGTA-05-000957-58; 3/26/2013 email from Lois Lerner to Nikole Flax “TIGTA,” IRSR0000182659.

and I had a longer conversation in general, and I think he gets what's been going on and where this sits in the middle of things. Not sure he can do a whole lot, but I did feel like he was going to go back and think about this. All we can ask for.”<sup>962</sup>

The next day, March 26, 2013, Ms. Lerner sent an email to the Acting IRS Commissioner's Chief of Staff Nikole Flax warning her about the draft:

“I'll send the draft – don't freak out because we had a good talk and I believe there will be another draft to comment on – we had a higher up guy this time. I told him that there were several areas where the way they had provided the information made the report look political. He said it isn't political. I said, I didn't think it was, but they may want to take another look because it was coming across that way. We talked a bit about the larger context of what was going on in the world – I think he got it, but we'll have to see.”<sup>963</sup>

On April 2, 2013, Ms. Lerner sent a lengthy email to the TIGTA auditors expressing concerns about the draft report.<sup>964</sup> Among other matters, she expressed concern about references to apparent referrals to TIGTA's Office of Investigations. She also forwarded a presentation that included a smiling picture of an acorn – a reference to ACORN successor groups – providing TIGTA with another document showing that the IRS was looking at liberal as well as conservative groups.<sup>965</sup>

**Concealing the Audit.** During the first quarter of 2013, TIGTA informed the IRS about the negative 501(c) audit results and provided a copy of the draft audit report. In the meantime, the IRS continued to struggle with how to process the 501(c)(4) applications amid negative press reports and Congressional inquiries. On April 30, 2013, a team of eight IRS EO employees, led by Lois Lerner, met with Subcommittee staff for six hours to discuss the 501(c)(4) application process, how the IRS determined when activities qualified as campaign intervention and when a group was engaged primarily in social welfare activities, and how the IRS enforced the legal constraints on tax exempt groups.<sup>966</sup> During the meeting, neither Ms. Lerner nor her staff mentioned the Tea Party, the TIGTA audit, or the upcoming TIGTA audit report.

Ms. Lerner and her staff also downplayed the ongoing problems with the 501(c)(4) cases. When Subcommittee staff asked about how the IRS analyzed campaign activity by 501(c)(4) groups and determined whether groups were engaged primarily in social welfare activities, Ms. Lerner told the Subcommittee that additional guidance in those areas was not necessary, because additional training had been provided to the IRS employees. She dismissed the value of bright line rules, stating: “If I have 10 bright line rules, someone will come up with 11.”<sup>967</sup> Yet three weeks earlier, in an April 4, 2013 email to the EO Technical Unit, Mr. Lerner had written: “We need guidance on c4, we need guidance on c4, we need guidance on c4 ... IRS is getting

<sup>962</sup> 3/25/2013 email from Lois Lerner to Holly Paz, “TIGTA,” IRSR0000180969.

<sup>963</sup> 3/26/2013 email from Lois Lerner to Nikole Flax, IRS, “TIGTA,” IRSR0000182659.

<sup>964</sup> 4/2/2013 email from Lois Lerner to Gregory Kutz and Troy Paterson, “TIGTA report – draft email,” IRSR0000195585 – 586.

<sup>965</sup> Id., forwarding “Heightened Awareness Issues,” prepared by the IRS, IRSR0000195600 - 617, at 613.

<sup>966</sup> IRS participants included Lois Lerner, Nikole Flax, Nancy Marks, Judith Kindell, Susan Brown, Janine Cook, Suzanne Sinno, and Catherine Barre.

<sup>967</sup> 4/30/2013 IRS briefing of Subcommittee, led by Lois Lerner.

hammered!”<sup>968</sup> A year earlier, in March 2012, Ms. Lerner pleaded with the Chief Counsel’s attorneys to complete work on a draft guidesheet: “[M]y staff can’t wait for formal guidance to do their jobs. ... These are live cases and if all we can give them is published guidance on the extreme ends of the spectrum, they will get themselves in trouble.”<sup>969</sup>

## (7) Apologizing for IRS Conduct

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having Lois Lerner disclose the audit before it was released and apologize for the agency’s conduct during a conference she was scheduled to address. On May 10, 2013, at the direction of Mr. Miller and in response to a planted question, Ms. Lerner apologized for the IRS’ having used “Tea Party” to identify 501(c)(4) applications that were then subjected to heightened scrutiny. Her apology triggered a firestorm of criticism centered on the concern that the IRS may have shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner was asked to resign and most of the EO senior leadership was replaced. The apology also generated intense interest in the TIGTA audit report which was released the following week.

**Planning the Apology.** Acting IRS Commissioner Miller was given a copy of the draft TIGTA audit report in April 2013.<sup>970</sup> Mr. Miller told the Subcommittee that he wanted to release information about the audit results before the TIGTA report was actually issued, because he knew it would be a negative report and he wanted the IRS to get out in front of the report.<sup>971</sup> He said that, at the time, although the report seemed to suggest that the IRS had been targeting Tea Party groups when it wasn’t, he did not fully recognize the “toxic nature” of the report and the impact it would have on the reputation of the IRS.<sup>972</sup>

Mr. Miller told the Subcommittee that he knew Ms. Lerner was speaking at a conference sponsored by the American Bar Association on May 10, 2013, and he thought it might make sense to plant a question for her at the conference which she could use to mention the audit report and apologize for agency missteps.<sup>973</sup> According to Mr. Miller, he realized that the Lerner apology was “not my best management performance.”<sup>974</sup>

Mr. Miller told the Subcommittee that he spent several weeks prior to the ABA conference working on the apology language with senior level IRS officials. Mr. Miller indicated that he discussed the apology with members of his staff, including his Chief of Staff

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<sup>968</sup> 4/4/2013 email from Lois Lerner to Janine Cook, copy to Holly Paz, “EO Enforcement Guidance Priority,” IRSR0000054399.

<sup>969</sup> 3/26/2012 email from Lois Lerner to Victoria Judson, “Thanks,” IRSR0000411078.

<sup>970</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>971</sup> Id.

<sup>972</sup> Id. See also undated “Steven Miller Hand-written Notes,” prepared by Steven Miller, IRSR0000380096 (“[f]ront line folk collected based on name – Tea Party and Patriot were used”).

<sup>973</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013). Mr. Miller apparently also considered using an April 25 conference where Ms. Lerner was scheduled to speak. See 4/18/2013 email exchange between Steven Miller and Nikole Flax, “speech,” IRSR0000468870 - 871 (Mr. Miller wrote that Ms. Lerner “can apologize for undermanaging.”).

<sup>974</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

Nikole Flax, EO head Lois Lerner, Director of Legislative Affairs Catherine Barre, and Chief of IRS National Media Relations Michelle Eldridge, and did not receive any negative feedback.<sup>975</sup> He said that Ms. Lerner suggested having tax attorney, Celia Roady, ask the planted question.<sup>976</sup>

IRS documents indicate that, in the three weeks leading up to the conference, several IRS officials worked on the apology language. For example, on April 21, 2013, draft apology language was circulated among Chief of Staff Nikole Flax, Director of Specialty Operations Jennifer Vozne, and Chief of the Communications and Liaison office Terry Lemons. Mr. Lemons wrote at the time: “So it’s close .... But I don’t think it’s quite there.”<sup>977</sup> On May 9, 2013, the day before the conference, Mr. Miller sent another version of the apology to his staff for their review.<sup>978</sup> The final apology given by Ms. Lerner was similar to the final draft.<sup>979</sup> According to Holly Paz, Ms. Lerner told her about the apology prior to the conference, and Ms. Paz advised against it.<sup>980</sup>

IRS Chief Counsel, William Wilkins, told the Subcommittee that Mr. Miller informed him that Ms. Lerner would be making an apology at the upcoming ABA conference.<sup>981</sup> Mr. Wilkins told the Subcommittee that Mr. Miller had indicated to him that a controversial TIGTA audit report would be issued concerning “a provocative subject matter that would portray the IRS in a bad light.”<sup>982</sup> According to Mr. Wilkins, a few days before the ABA conference, Mr. Miller told Mr. Wilkins he was going to tell Congressman Boustany’s staff about the TIGTA report on the same day as the Lerner apology.<sup>983</sup> Mr. Miller told the Subcommittee that, while he had

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<sup>975</sup> Id.

<sup>976</sup> Id.

<sup>977</sup> 4/21/2013 email from Terry Lemons, IRS, to Steven Miller, Nikole Flax, and Jennifer Vozne, IRS, “Emailing: draft c4 comments 4-18-13.doc,” IRSR0000468891 - 894. Mr. Lemons continued: “For the people in the room at Georgetown, it’s fine. But it’s not clear enough for people who won’t be there and will be combing through the speech afterward. Think current version will create a lot of questions coming in after the speech and actually amplify attention on the upcoming report. Think we need to frame up better – goal should be having a text that stands on its own for reporters and others coming in later and minimizing follow-up questions.” Id.

<sup>978</sup> See 5/9/2013 email from Steven Miller to Nikole Flax, Terry Lemons, Jennifer Vozne, and Michelle Eldridge, “050613C4 talking points STM version.doc,” IRSR0000468907 – 909. The email provided the following draft statement: “Between 2010 and 2012, the IRS saw the number of applications for section 501(c)(4) status double. As a result, local career employees in Cincinnati sought to centralize work and assign cases to designated employees in an effort to promote consistency and quality. This approach has worked in other areas. However, the IRS recognizes we should have done a better job of handling the influx of advocacy applications. While centralizing cases for consistency made sense, the way we centralized did not. Mistakes were made, but they were in no way due to any political or partisan rationale. We have fixed the situation and worked to move the centralized cases through the system.” Id. at 908. This draft did not mention the Tea Party by name.

<sup>979</sup> See “Transcript of the May 2010, 2013, ABA Tax Section’s Exempt Organizations Committee Meeting,” Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, Tax Analysts, [http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest\\_files/may\\_2013\\_aba.pdf](http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf).

<sup>980</sup> Subcommittee interview of Holly Paz, IRS (10/30/2013).

<sup>981</sup> Subcommittee interview of William Wilkins, IRS (12/4/2013).

<sup>982</sup> Id.

<sup>983</sup> Id. Mr. Wilkins told the Subcommittee that he received a copy of the draft report on April 29, 2013, but could not recall if he read the report then or after it was publicly released. See 4/29/2013 email from Christopher Sterner to William Wilkins, “TIGTA Draft (c)(4) Report,” IRSR0000014719 (providing a copy of the TIGTA draft report). Mr. Wilkins also told the Subcommittee that he did not provide advance notice of the TIGTA report to Treasury General Counsel, Christopher Meade. Subcommittee interviews of William Wilkins, IRS (12/4/2013) and Christopher Meade, Treasury (2/20/2014).

intended the IRS to inform key Congressional committees at the same time the information was released at the ABA conference, that did not happen, which he attributed to having not provided his staff with enough time to contact the committees.<sup>984</sup>

Mr. Miller told the Subcommittee that, at some point prior to May 10, he also spoke by telephone with Mark Patterson, the Chief of Staff to the Secretary of the Treasury, alerting him to the upcoming TIGTA report and indicating his plan to release information about the report prior to its issuance.<sup>985</sup> Mr. Miller told the Subcommittee that he asked Mr. Patterson for his reaction to the idea of a planted question at the ABA conference, and read to Mr. Patterson over the telephone a draft question and possible answer.<sup>986</sup> Mr. Miller said that Mr. Patterson did not give him a reaction, but told him he wanted to think about it, and the two did not discuss the matter again.<sup>987</sup>

Mr. Miller told the Subcommittee that he also talked to Mark Mazur, Treasury Assistant Secretary for Tax Policy, about the upcoming TIGTA report and his idea of planting a question at the ABA conference, but Mr. Mazur did not give Mr. Miller a reaction to the idea.<sup>988</sup> Mr. Miller acknowledged that, as Acting IRS Commissioner, he did not need the approval of Mr. Mazur or Mr. Patterson, but he said that had they objected, he probably would not have gone forward with his plan.<sup>989</sup> Mr. Miller told the Subcommittee that he did not speak with anyone at the White House about the planned apology.<sup>990</sup>

**Giving the Apology.** On May 10, 2013, EO head Lois Lerner spoke before the Exempt Organizations Committee of the Tax Section of the American Bar Association in Washington, D.C. After her remarks, as planned, a member of the audience asked her the following question:

“Lois, a few months ago there was some concern about IRS review of 501(c)(4) organizations, 501(c)(4) applications by Tea Party organizations. And I’m just wondering if you can provide any update on any of that.”<sup>991</sup>

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<sup>984</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>985</sup> Id.

<sup>986</sup> Id.

<sup>987</sup> Id.

<sup>988</sup> Id.

<sup>989</sup> Id.

<sup>990</sup> Id.

<sup>991</sup> “Transcript of the May 2010, 2013, ABA Tax Section’s Exempt Organizations Committee Meeting,” Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, Tax Analysts, [http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest\\_files/may\\_2013\\_aba.pdf](http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf). The question was asked by Celia Roady, a Washington tax attorney. After the conference, Ms. Roady released the following statement: “On May 9, I received a call from Lois Lerner, who told me that she wanted to address an issue after her prepared remarks at the ABA Tax Section’s Exempt Organizations Committee Meeting, and asked if I would pose a question to her after her remarks. I agreed to do so, and she then gave me the question that I asked at the meeting the next day. We had no discussion thereafter on the topic of the question, nor had we spoken about any of this before I received her call. She did not tell me, and I did not know, how she would answer the question.” 5/18/2013 “Here’s How the IRS Planted the Question That Sparked the Tea Party Scandal,” Business Insider, Brett Logiurato, <http://www.businessinsider.com/irs-scandal-celia-roady-planted-question-tea-party-conservatives-obama-2013-5> (reprinting Roady statement).

Ms. Lerner responded as follows:

“So our line people in Cincinnati that handle the applications did what we call centralization of these cases. They centralized work on these in one particular group. ... So centralization was perfectly fine. However, in this case the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party, or Patriots. They selected cases simply because the application had those names in the title. That was wrong, that was absolutely incorrect, it was insensitive, and it was inappropriate. That’s not how we go about selecting cases for further review. We select them for further review because they need further review, not because they have a particular name. ... So I guess my bottom line here is, we, I think the IRS, would like to apologize for that. It was not intentional.”<sup>992</sup>

**Reacting to the Apology.** Ms. Lerner’s apology generated an immediate press reaction, with numerous negative press stories written about the IRS’ inappropriate scrutiny of Tea Party organizations.

In addition, the Subcommittee was told that many IRS employees in the Cincinnati office were furious at Ms. Lerner’s apology, believing she sought to blame lower level workers instead of management for the agency’s missteps.<sup>993</sup> A few hours after the apology, Determinations head Cindy Thomas sent the following email to Ms. Lerner:

“As you can imagine, employees and managers in EO Determinations are furious. ... [I]t appears as though all the blame is being placed on Cincinnati. Joseph Grant and others who came to Cincinnati last year specially told the **low-level workers** in Cincinnati that no one would be ‘thrown under the bus.’ Based on the articles, Cincinnati wasn’t publicly ‘thrown under the bus’ instead was hit by a convoy of mack trucks.”<sup>994</sup>

Ms. Thomas told the Subcommittee that she also spoke with Ms. Lerner to convey her anger, but Ms. Lerner did not express regret at giving the apology.<sup>995</sup>

On the day of the apology, May 10, 2013, Ms. Lerner sent an email to senior IRS officials about the negative press coverage:

“As you both know, we are getting beaten up in the press for all the wrong reasons. Not sure there is much we can do about it – other than hang in and ride it through. When the

<sup>992</sup> “Transcript of the May 2010, 2013, ABA Tax Section’s Exempt Organizations Committee Meeting,” Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, [Tax Analysts](http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf), [http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest\\_files/may\\_2013\\_aba.pdf](http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf).

<sup>993</sup> EOD employees Ronald Bell, Elizabeth Hofacre, Gary Muthert, Stephen Seok, John Shafer, and Cindy Thomas all reported deep disappointment with the Lerner apology. Subcommittee interviews of Ronald Bell, IRS (1/15/2014), Elizabeth Hofacre, IRS (10/25/2013), Gary Muthert, IRS (1/15/2014), Stephen Seok, IRS (11/22/2013), John Shafer, IRS (1/17/2014), and Cindy Thomas, IRS (11/13/2013).

<sup>994</sup> 5/10/2013 email from Cindy Thomas to Lois Lerner, “Low-Level Workers thrown under the Bus,” IRSR0000218202 (emphasis in original).

<sup>995</sup> Subcommittee interview of Cindy Thomas, IRS (11/13/2013).



report comes out, it will start all over again. We need to keep remembering, we did not do what they are alleging.”<sup>996</sup>

On May 12, 2013, prior to leaving for a previously scheduled trip to Canada, Ms. Lerner wrote to a colleague: “I’m afraid I have little confidence that most folks making the stink care about what is true. They’ve already decided they know without regard to the facts.”<sup>997</sup>

TIGTA personnel had a mixed reaction to the apology that had been arranged by Acting IRS Commissioner Miller. At least some at TIGTA initially believed the apology represented a well designed response to the audit report. On May 10, 2013, after the apology, David Holmgren, then TIGTA Deputy Inspector General for Inspections and Evaluations, wrote to a colleague: “Mike, this is a brilliant preemptive strike by the IRS; when we release next week it will be old news.”<sup>998</sup> On May 12, 2013, TIGTA’s communications director Karen Kraushaar sent an email to TIGTA Inspector General George recommending a quick release of the audit report in response to the apology:

“I have not responded to any reporters this weekend. At this point I do not see the merit in engaging with reporters until we have something concrete to share, such as a date and time for a media briefing. I am hopeful that TIGTA may be able to offer that tomorrow or Tuesday, and have suggested expedited disclosure review so that we can schedule briefings on the final report in an orderly fashion for congressionals and media as soon as possible. By jumping the gun with its public apology, the IRS created some confusion and inaccuracy about the nature of our report and findings, which we can set straight by releasing the final report without delay. Should be an interesting week!”<sup>999</sup>

The next day, after receiving a request for Mr. George to appear on a television show, Ms. Kraushaar wrote: “I recommend a strategy of politely declining until such time as we are ready to release our report. I think it is important that you be able to remain above the political fray until then.” Mr. George responded: “I agree with you.”<sup>1000</sup>

**Dismissing IRS Leadership.** On May 15, 2013, Acting IRS Commissioner Miller met with Congressional staff on Capitol Hill, and blamed what was becoming a full-blown scandal on two “rogue agents” in the IRS Cincinnati office, whom he said had been disciplined.<sup>1001</sup> Mr.

<sup>996</sup> 5/10/2013 email from Lois Lerner to Nannette Downing, Holly Paz, and others, “Stuff,” IRSR0000411586.

<sup>997</sup> 5/12/2013 email from Lois Lerner to Sharon Light “Congressional Response with SHORT Turnaround,” IRSR0000411587.

<sup>998</sup> 5/10/2013 email from David Holmgren to Michael Phillips, “[MARKETING] News Alert: IRS apologizes for inappropriately targeting conservative political groups,” TIGTA Bates No. 007751. Gladys Hernandez, TIGTA’s Deputy Chief Counsel, also viewed the apology as a “smart strategy on their part.” 5/10/2013 email from Gladys Hernandez to Michael Phillips, “[MARKETING] News Alert: IRS apologizes for inappropriately targeting conservative political groups,” TIGTA Bates No. 007791.

<sup>999</sup> 5/12/2013 email from Karen Kraushaar to Russell George “Communication Report 05-12-2013,” TIGTA Bates No. 007794 - 795.

<sup>1000</sup> 5/13/2013 email exchange between Karen Kraushaar and Russell George, “Cavuto Request,” TIGTA Bates No. 007840.

<sup>1001</sup> See “Source: Two ‘rogue’ workers principally behind IRS targeting of conservatives,” CNN, Dana Bash and Thomas Cohen, <http://politicalticker.blogs.cnn.com/2013/05/15/breaking-irs-acting-commissioner-says-two-employees-off-reservation/>. Mr. Miller indicated to the Subcommittee that he did not recall using the terms “rogue”

Miller told the Subcommittee that, in hindsight, it was a mistake to have tried to blame lower level IRS employees.<sup>1002</sup> He also said that, in retrospect, the IRS should not have mentioned only conservative groups in its apology, since liberal groups had been subjected to heightened scrutiny in the same ways.<sup>1003</sup>

Later on May 15, 2013, President Obama announced Mr. Miller's resignation.<sup>1004</sup> That evening, President Obama addressed the nation on television, calling the IRS' actions "inexcusable." He stated: "Americans are right to be angry about it, and I'm angry about it," adding that he "will not tolerate this kind of behavior in any agency, but especially in the IRS, given the power that it has and the reach that it has." He continued: "[A]s I said earlier, it should not matter what political stripe you're from. The fact of the matter is the I.R.S. has to operate with absolute integrity."<sup>1005</sup>

On May 23, 2013, Ms. Lerner was placed on administrative leave.<sup>1006</sup> Later that month, Ken Corbin replaced her as EO Director.<sup>1007</sup> By June, most of the IRS leadership responsible for exempt organizations had been replaced.<sup>1008</sup>

### **(8) Releasing the Audit Report**

On May 14, 2013, TIGTA released its 501(c)(4) audit report, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review." The report's primary findings were as follows:

"The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Ineffective management 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued."<sup>1009</sup>

The audit report noted that some 501(c) applications had been pending for more than three years.<sup>1010</sup> It also found that, while the IRS had failed to subject some applications to heightened

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or "off the reservation" during the meeting, as indicated in the article, nor did he believe he would have done so. 4/11/2014 response by Mr. Miller's legal counsel to Subcommittee questions.

<sup>1002</sup> Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>1003</sup> Id.

<sup>1004</sup> Mr. Miller was permitted to retire from the IRS. Subcommittee interview of Steven Miller, IRS (12/11/2013).

<sup>1005</sup> 5/15/2013 Statement by the President, White House Office of the Press Secretary,

<http://www.whitehouse.gov/the-press-office/2013/05/15/statement-president>.

<sup>1006</sup> "Lois Lerner Placed on Administrative Leave", ABC News, John Parkinson, (5/23/2013),

<http://abcnews.go.com/blogs/politics/2013/05/lois-lerner-placed-on-administrative-leave/>.

<sup>1007</sup> Id.

<sup>1008</sup> See testimony of Acting IRS Commissioner Daniel Werfel, "Oversight Hearing – Internal Revenue Service," hearing before the House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, (6/3/2013), 219-284, at 257-258.

<sup>1009</sup> 5/14/2013 TIGTA Audit Report, at Highlights.

<sup>1010</sup> Id.

scrutiny when it should have, the IRS had also subjected others to heightened scrutiny when it should not have.<sup>1011</sup> In addition, the audit report observed that “there appeared to be some confusion by Determinations Unit specialists and applicants on what activities are allowed by I.R.C. § 501(c)(4) organizations ... due to the lack of specific guidance on how to determine the ‘primary activity’ of an I.R.C. § 501(c)(4) organization.”<sup>1012</sup>

Although the TIGTA audit engagement letter had indicated that the audit’s “overall objective” was to “assess the consistency of the Exempt Organizations function’s identification and review of applications for tax-exempt status involving political advocacy issues,” including whether “conservative groups” experienced “inconsistent treatment,” the audit report did not contain any explicit finding on whether political bias had influenced the IRS’ actions.<sup>1013</sup> In a June 6, 2014 letter responding to a Subcommittee question asking about political bias, TIGTA Inspector General George wrote: “I also testified before Congress that TIGTA found no evidence of political bias during this audit. However, it is important to note that the matter is being further reviewed.”<sup>1014</sup> Despite that determination by TIGTA addressing the most important issue under examination, the TIGTA audit report inexplicably failed to include that finding.

The report did contain a number of recommendations to remedy problems with the 501(c) application process, which TIGTA summarized as follows:

“TIGTA recommended that the IRS finalize the interim actions taken, better document the reasons why applications potentially involving political campaign intervention are chosen for review, develop a process to track requests for assistance, finalize and publish guidance, develop and provide training to employees before each election cycle, expeditiously resolve remaining political campaign intervention cases (some of which have been in process for three years), and request that social welfare activity guidance be developed by the Department of the Treasury.”<sup>1015</sup>

After its release, the TIGTA audit report was the subject of thousands of media reports, most critical of the IRS. Many media reports indicated that the TIGTA audit report had found that the IRS had targeted conservative groups and subjected them to harsher treatment than other groups,

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<sup>1011</sup> Id. at 9-10.

<sup>1012</sup> Id. at 14.

<sup>1013</sup> TIGTA’s failure to provide an explicit finding on political bias stood in sharp contrast to the 2000 report on the same subject prepared by the Joint Committee on Taxation, which TIGTA’s auditors had consulted prior to conducting their work. See 3/16/2000 Joint Committee on Taxation Press Release No. 00-02, <http://www.jct.gov/pr00-02.pdf>; 3/6/2000 “Report of Investigation Of Allegations Relating To Internal Revenue Service Handling Of Tax-Exempt Organization Matters,” Report No. JCS-3-00, prepared by Joint Committee on Taxation, <https://www.jct.gov/publications.html?func=startdown&id=2545>; 3/19/2012 email from Troy Paterson to Cheryl Medina, Thomas Seidell, and Michael McGovern, “JCT Report on Allegations of Bias Surrounding Applications for Tax Exemption and Examinations of Tax-Exempt Organizations,” TIGTA Bates No. 003991.

<sup>1014</sup> 6/6/2014 letter from TIGTA Inspector General George to the Subcommittee, PSI-TIGTA-22-000001 – 004, at 001.

<sup>1015</sup> 5/14/2013 TIGTA Audit Report, at ii.

even though the TIGTA personnel interviewed by the Subcommittee uniformly stated that the report had found no evidence of political bias or politically motivated actions at the IRS.<sup>1016</sup>

## (9) Testifying on the Audit Results

After the audit report was released, TIGTA Inspector General George was asked to testify at six Congressional hearings about its findings. He testified on May 17, 2013, before the House Committee on Ways and Means;<sup>1017</sup> on May 21, 2013, before the Senate Committee on Finance;<sup>1018</sup> on May 22, 2013, before the House Committee on Oversight and Government Reform;<sup>1019</sup> and on June 3, 2013, before the House Appropriations Subcommittee on Financial Services and General Government.<sup>1020</sup> He testified a second time before the House Committee on Oversight and Government Reform on July 18, 2013,<sup>1021</sup> and a second time before the House Appropriations Subcommittee on Financial Services and General Government on February 26, 2014.<sup>1022</sup>

**No Political Bias.** One of the key issues raised in the hearings was whether IRS personnel had unfairly targeted Tea Party groups for special scrutiny and did so because of political bias against conservative groups. TIGTA Inspector General repeatedly testified that the audit had found no evidence of IRS political bias. As explained earlier, however, he made no mention of the strongest evidence of IRS impartiality, the finding made by the TIGTA Office of Investigations that thousands of IRS emails and other documents contained “no indication” that IRS actions had been “politically motivated,” because, according to Mr. George, no one on his staff had informed him of that finding.

At his first Congressional hearing about the audit report, which took place before the House Committee on Ways and Means on May 17, 2013, the Inspector General offered this unqualified testimony:

“Congressman Sander Levin: Did you find any evidence of political motivation in the selection of the tax exemption applications?”

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<sup>1016</sup> In their interviews with the Subcommittee, for example, both Mr. George and Mr. Kutz made unqualified statements that the TIGTA audit had found no evidence of political bias at the IRS. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Gregory Kutz, TIGTA (3/26/2014). Mr. George also expressed regret that the report had been misinterpreted. Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>1017</sup> See “IRS Tax-Exempt Investigation,” hearing before House Committee on Ways and Means, (5/17/2013), unofficial transcript available at <http://www.cq.com/doc/congressionaltranscripts-4278171>.

<sup>1018</sup> See “A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny,” hearing before Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013).

<sup>1019</sup> See “The IRS: Targeting Americans for Their Political Beliefs,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013).

<sup>1020</sup> See “Oversight Hearing – Internal Revenue Service,” hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, at 219-284, (6/3/2013).

<sup>1021</sup> See “The IRS’s Systematic Delay and Scrutiny of Tea Party Applications,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013).

<sup>1022</sup> See “Oversight Hearing – Internal Revenue Service,” hearing before House Appropriations Subcommittee on Financial Services and General Government, (2/26/2014), unofficial transcript available at <http://www.cq.com/doc/congressionaltranscripts-4433073>.

Mr. George: We did not, sir.”<sup>1023</sup>

Later in the hearing, Mr. George offered a more qualified statement:

“Congressman Reed: [Y]ou made some comments in your testimony about the partisanship determination. You kept referencing [w]hat I’ve seen many times in my legal career, ‘at this time.’ That implies to me that there are additional investigations coming down the – the pipeline that potentially could uncover such information. Isn’t that correct?”

Mr. George: That is an accurate statement, sir.”<sup>1024</sup>

Four days later, at a hearing before the Senate Committee on Finance on May 21, 2013, the Inspector General implied that the audit report’s finding was based solely on denials of political bias made by the IRS personnel involved with the 501(c)(4) application process:

“Senator Crapo: Mr. George – is it seems that there is an argument being made that there was no political motivation in these actions. Is that a conclusion that you have reached?

Mr. George: In the review that we conducted thus far, Senator, that is the conclusion that we have reached.

Senator Crapo: And how do you reach that kind of a conclusion?

Mr. George: In this instance, it was as a result of the interviews that were conducted ....

Senator Crapo: So, in other words, you have simply the statements of those who were engaging in the conduct saying they were not politically motivated?

Mr. George: That is correct, sir.

Senator Crapo: And based on that, and statements not under oath, you have reached the conclusion there was no political motivation.

Mr. George: Yes.

Senator Crapo: Now, have you reached the conclusion that there was none, or that you have not found it?

Mr. George: It is the latter, that we have not found any, sir.”<sup>1025</sup>

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<sup>1023</sup> Transcript of “IRS Tax-Exempt Investigation,” hearing before House Committee on Ways and Means, (5/17/2013), unofficial transcript available at <http://www.cq.com/doc/congressionaltranscripts-4278171>.

Mr. George had similar exchanges with Committee Members Becerra, Kind, and McDermott. Id.

<sup>1024</sup> Id.

In his testimony, Inspector General George began by saying TIGTA had reached the conclusion that there was no political motivation behind the IRS' actions, but then qualified that finding by stating it was based on the TIGTA review "conducted thus far," and relied "simply" on denials made by IRS personnel. In four Congressional appearances, the Inspector General made no mention of the documentary review that had been conducted by the TIGTA Office of Investigation of over 2,200 internal IRS emails and other documents, and its finding that the documents contained "no indication" that IRS actions in pulling 501(c)(4) applications for heightened review had been "politically motivated." Mr. George told the Subcommittee that he did not mention the documentary review, because no one on his staff had informed him of the TIGTA Office of Investigations finding, even though it addressed a central issue in the audit, whether the IRS had shown political bias in handling 501(c)(4) applications.

**BOLO Entries for Liberal Groups.** A related issue at the hearings involved the question of whether the IRS had used BOLOs to flag 501(c)(4) applications filed by liberal groups in addition to conservative groups. Evidence recited earlier shows that the IRS had repeatedly brought the BOLO entries for liberal groups to the attention of the TIGTA auditors to demonstrate that the agency had treated all groups in the same way.<sup>1026</sup> The Subcommittee was told by senior TIGTA officials, however, that the TIGTA auditors had failed to convey that information to TIGTA senior management until after the release of the report. In fact, as indicated earlier, TIGTA Chief Counsel Michael McCarthy told the Subcommittee that when he had explicitly asked about BOLO entries for liberal groups during his review of the draft audit report in February 2013, the TIGTA auditors had told him none existed.<sup>1027</sup>

The Subcommittee was told that the senior TIGTA officials first learned of the BOLO entries for liberal groups after the Congressional hearings were already underway. The key event took place on May 21, 2013, after the Inspector General had testified earlier in the day before a Congressional committee about the audit report, and before he was due to testify a third time before a different committee on the following day.<sup>1028</sup> Mr. McCarthy told the Subcommittee that, because there had been a Congressional request for copies of the BOLOs, he had decided to personally review the documents to ensure appropriate information had been redacted. He indicated that, about 7:00 p.m. on the evening of May 21, 2013, he opened the BOLO document on his computer screen at the office, and began to review the individual excel spreadsheets used for the various BOLO sections, including the spreadsheet for the Watch List section. He told the Subcommittee that when he reviewed the Watch List section and saw for the first time the BOLO entries for ACORN and Occupy groups, he was "surprised and confused."<sup>1029</sup>

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<sup>1025</sup> "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," hearing before Senate Committee on Finance, S.Hrg. 113-232, (5/21/2013) at 19-20, <http://www.finance.senate.gov/hearings/hearing/?id=9b0a1cc8-5056-a032-5219-3e11fc44d504>.

<sup>1026</sup> See the Report section on Conducting the Audit, in particular the subsections on Initiating the Audit and Collecting and Analyzing Information.

<sup>1027</sup> Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

<sup>1028</sup> *Id.*

<sup>1029</sup> *Id.* Mr. McCarthy told the Subcommittee that he did not see the BOLO entry for progressive groups at that time because of the confusing way in which the excel spreadsheets were arranged. *Id.*

Inspector General George told the Subcommittee that Mr. McCarthy informed him about the two liberal group BOLO entries that same night, which was the night before he was supposed to testify before the House Committee on Oversight and Government Reform.<sup>1030</sup> The Inspector General indicated that Mr. McCarthy had approached him, said “you’d better sit down for this,” and then relayed that the IRS had two BOLO listings naming liberal groups in addition to the one naming Tea Party groups.<sup>1031</sup> Mr. George told the Subcommittee that he asked Mr. McCarthy and Mr. Kutz, who was also present, how the IRS had used those entries to identify 501(c)(4) applications, and both responded that they didn’t know the answer.<sup>1032</sup> The Inspector General said that he immediately told Mr. Kutz to look into those BOLO entries and how they were used by the IRS.<sup>1033</sup>

Mr. Kutz told the Subcommittee that, like Mr. McCarthy and the Inspector General, he first learned of the two BOLO listings naming liberal groups on the evening of May 21, 2013.<sup>1034</sup> Mr. Kutz told the Subcommittee that after he was directed by the Inspector General to find out more, he immediately asked his audit team about the BOLO entries for the liberal groups and was told by his team that those entries had not come up during the audit.<sup>1035</sup> That assertion is at odds, however, with the evidence presented earlier showing that, from the beginning of the audit, TIGTA personnel were aware of issues related to IRS treatment of liberal groups and, throughout the audit, IRS personnel repeatedly drew the attention of the TIGTA auditors to the BOLO entries listing ACORN, Occupy, and progressive groups.<sup>1036</sup>

Mr. George told the Subcommittee that, at the Congressional hearing the next day, May 22, 2013, he did not disclose the existence of the BOLO entries naming the ACORN and Occupy groups, due to concerns that he didn’t know how those BOLO entries had been used by the IRS and might violate Section 6103, the tax code provision barring IRS disclosure of individual

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<sup>1030</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014). The Inspector General did not recall the exact date, but Gregory Kutz recalled that it was May 21, 2013. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Gregory Kutz, TIGTA (3/26/2014).

<sup>1031</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>1032</sup> Id.

<sup>1033</sup> Id. See also testimony by J. Russell George, “Oversight Hearing – Internal Revenue Service,” hearing before the House Appropriations Subcommittee on Financial Services and General Government, (2/26/2014), unofficial transcript available at <http://www.cq.com/doc/congressionaltranscripts-4433073?23> (Mr. George: “And it was literally 6:30 p.m. the night before my first testimony before the Senate Finance Committee in which my former chief counsel indicated that there was a hidden tab in one of the documents the IRS had supplied to us that indicated that there were other ‘Be On the Look Out’ list. This list – at that time we had no idea until then, at least I didn’t, that it existed but we certainly did not have any indication as to how they were being used.”).

<sup>1034</sup> Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

<sup>1035</sup> Id.

<sup>1036</sup> See Report section on Conducting the Audit. For example, as documented in that section, the BOLOs containing entries for liberal groups were provided to the TIGTA auditors in March 2012, and again in the summer of 2012. At the same time, the documentation does not demonstrate that the auditors conveyed the information about the BOLO entries for liberal groups to senior TIGTA officials. One TIGTA summary of a September 2012 meeting between Mr. Kutz and the TIGTA auditors indicated that they discussed the issue of 501(c)(4) applications filed by liberal groups, but did not indicate that they discussed, in particular, the BOLO entries for liberal groups. See 9/25/2012 “Memo of Contact,” prepared by TIGTA, “Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases,” TIGTA Bates No. 003084 (indicating Mr. Kutz and the auditors discussed “whether more liberal organizations were referred to the advocacy group” at IRS, and the difficulty of distinguishing between conservative and liberal groups).

taxpayer information.<sup>1037</sup> At the hearing, when asked about BOLO listings for liberal groups, Mr. George testified that TIGTA had “recently identified some other BOLOs that raised concerns about political factors,” but declined to provide specific information about them:

“Chairman Issa. Were there any BOLOs issued for progressive groups, liberal groups? Because I’m assuming that your investigation – we can’t see them – but your investigation showed liberal groups that flew right through during the same time and got their 501(c)(4)s. They were not stopped; isn’t that correct?”

Mr. George. Sir, this is a very important question. Please, I beg your indulgence.

Chairman Issa. Of course.

Mr. George. The only ‘be on the lookout,’ that is, BOLO, used to refer cases for political review were the ones that we described within our report. There were other BOLOs used for other purposes. For example, there were lookouts for indicators of known fraud schemes so that they could be referred to the group that handles those issues. For nationwide organizations, there were notes to refer State and local chapters to the same reviewers. As we continue our review of this matter, we have recently identified some other BOLOs that raised concerns about political factors. I can’t get into more detail at this time as to the information that is there because it’s still incomplete – that we’ve uncovered, rather, because it’s still incomplete. And there are 6103 issues –

Chairman Issa. Of course.

Mr. George. – involved here, too. I hope that provides context[.]”<sup>1038</sup>

Mr. George was then asked whether the IRS had a BOLO entry for “progressive” groups and if he was aware of any other group, other than the Tea Party, that had been “targeted politically” in a BOLO. After initially declining to answer and then being pressed for a response, Mr. George answered there were no such BOLO entries, which he should have known was inaccurate, given the BOLO entries he had learned about the night before:

“Chairman Issa. So, clearly, it’s fair to say, though, that there was a BOLO for Tea Party but not a BOLO for MoveOn or Progressive?”

Mr. George. I’m not in a position to give you a definitive response on that question at this time, Mr. Issa – Mr. Chairman.

<sup>1037</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014). Unlike the IRS, TIGTA has taken the position that disclosing IRS actions related to “ACORN successor” groups would violate Section 6103 of the tax code which requires the IRS to keep specific taxpayer information confidential, even though that phrase does not name any specific taxpayer.

<sup>1038</sup> Testimony of J. Russell George, “The IRS: Targeting Americans for Their Political Beliefs,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013) at 64, <http://oversight.house.gov/wp-content/uploads/2014/02/2013-05-22-Ser.-No.-113-33-FC-The-IRS-Targeting-Americans-for-Their-Pol-Beliefs.pdf>.



Chairman Issa. So are you saying today that there were other 501(c)(4)s, not specific, so much as one other 501(c)(4) not previously identified during your IG audit that were, in fact, targeted and held in a similar way?

Mr. George. I cannot give you a definitive answer, sir, at this time. But I certainly will when –

Chairman Issa. I only asked you if there's at least one. Are you aware of at least one that was targeted using a BOLO that was a 501(c)(4) in which they were targeted politically but did not fall into this current report we have before us? I'm not asking for privileged information. I'm asking –

Mr. George. No, no, no.

Chairman Issa. – for one.

Mr. George. Under the report, the review – the purposes of the audit that we conducted, which was to determine whether they were looked for in the context of political campaign intervention, there were no others.”<sup>1039</sup>

Mr. George testified that there were no other groups that had been “targeted politically” in a BOLO despite having learned the night before that the BOLO lists named ACORN and Occupy groups in the same manner as Tea Party groups. In addition, as indicated earlier, a BOLO entry for “progressive” groups had been included in the BOLO lists since 2010.<sup>1040</sup>

Mr. George told the Subcommittee at the time of his testimony on May 22, 2013, he had become aware of the BOLO entries for the two liberal-leaning groups, ACORN and Occupy, but remained unaware of the BOLO entry for “progressive” groups.<sup>1041</sup> TIGTA Chief Counsel Michael McCarthy told the Subcommittee that, at the time of the May 22, 2013 hearing, he was also unaware of the BOLO entry for progressive groups, since during his review of the BOLO lists the evening before, he had not seen the specific spreadsheet containing that entry.<sup>1042</sup> Mr. Kutz told the Subcommittee that he, too, was unaware of the progressive BOLO entry at the time of the May 22 hearing.<sup>1043</sup> That all three senior TIGTA officials professed to the Subcommittee to have no knowledge of the BOLO entry for progressive groups, despite its being listed in the BOLOs reviewed the night before, does not excuse the failure of Mr. George to disclose the existence of the BOLO listings for the two liberal-leaning groups, ACORN and Occupy, either at the hearing or to correct his testimony in the weeks that followed.

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<sup>1039</sup> Id.

<sup>1040</sup> See, e.g., August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 – 196 and at IRS00000002503 – 515 (including “TAG Historical” section containing an entry for “Progressive political activities” described as follows: “[C]ommon thread is the word ‘progressive.’ Activities appear to lean toward a new political party. Activities are partisan and appear as anti-Republican. You see references to blue.”).

<sup>1041</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

<sup>1042</sup> Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

<sup>1043</sup> Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

TIGTA's silence about the BOLO listings for liberal groups continued for weeks after its senior leadership learned about them, despite ongoing media and Congressional inquiries and public consternation about possible political bias at the IRS. According to TIGTA, on May 28, 2013, the TIGTA Office of Audit asked the TIGTA Office of Investigations to examine how the IRS used BOLO listings on the Watch List section, which includes the ACORN and Occupy listings, but still did not reveal the existence of those BOLO entries to the public.<sup>1044</sup>

**Disclosure of BOLO Entries for Liberal Groups.** Ultimately, the progressive, ACORN, and Occupy BOLO listings were publicly disclosed by Members of Congress and the media, rather than TIGTA. On June 24, 2013, six weeks after the TIGTA audit report was released and a month after the House hearing at which the TIGTA Inspector General denied the existence of BOLO listings for liberal groups, Congressman Sander Levin, Ranking Member of the House Committee on Ways and Means, released a letter disclosing publicly, for the first time, the existence of the progressive BOLO entry.<sup>1045</sup> TIGTA Chief Counsel Michael McCarthy told the Subcommittee that he learned about the progressive BOLO entry from the Levin letter for the first time; he said it had not been disclosed to him by TIGTA's audit team, and he had missed it during his personal review of the BOLO listings.<sup>1046</sup> That same day, the Associated Press reported on a number of other BOLO listings, including one for Occupy groups.<sup>1047</sup> A month after that, on August 20, 2013, Congressman Sander Levin released documents disclosing the existence of the BOLO entry for ACORN successor groups.<sup>1048</sup>

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<sup>1044</sup> See June 26, 2013 letter from TIGTA to Congressman Sander Levin, <http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf> ("TIGTA's Office of Audit made a referral to our Office of Investigations on May 28, 2013 stating that our recently issued audit report noted the use of other named organizations on the BOLO listings that were not related to potential political cases reviewed as part of our audit. TIGTA's Office of Audit requested the Office of Investigations investigate to determine: 1) whether cases meeting the criteria on the 'watch list' [a particular section of the BOLO listings] were routed for any additional or specialized review, or were simply referred to the same group for coordinated processing; 2) how many (if any) applications were affected by use of these criteria; 3) who was responsible for the inclusion of these criteria on the BOLO lists; and 4) whether these criteria were added to the BOLO for an improper purpose." Mr. Kutz told the Subcommittee that as part of this review, the Office of Investigations was asked to look at the "progressive" BOLO listing. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014). During the Subcommittee interviews, however, no one from TIGTA had any information about whether the referral had been accepted by the Office of Investigations or whether an investigation into IRS processing of applications filed by liberal groups was ongoing.

<sup>1045</sup> 6/24/2013 letter from Congressman Sander Levin to TIGTA, <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Letter%20FINAL.pdf>.

<sup>1046</sup> Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

<sup>1047</sup> See "Documents Show IRS Also Screened Liberal Groups," *Associated Press*, Alan Fram, (6/24/2013), <http://bigstory.ap.org/article/new-irs-chief-inappropriate-screening-was-broader>. In response to the BOLO disclosures, on June 24, 2013, the IRS "suspended the use of any 'be-on-the-lookout,' or BOLO lists in the application process for tax-exempt status." "Report Outlines Changes for IRS To Ensure Accountability, Chart a Path Forward; Immediate Actions, Next Steps Outlined," prepared by the IRS, <http://www.irs.gov/uac/Newsroom/Report-Outlines-Changes-for-IRS-To-Ensure-Accountability,-Chart-a-Path-Forward;-Immediate-Actions,-Next-Steps-Outlined>.

<sup>1048</sup> 8/20/2013 letter from Congressman Sander Levin to TIGTA, described in "New Documents Highlight IRS Scrutiny of Progressive Groups," Ways and Means Committee Democrats, (8/20/2013), <http://democrats.waysandmeans.house.gov/press-release/new-documents-highlight-irs-scrutiny-progressive-groups>. The IRS determined that information could be disclosed about "ACORN successor" groups without violating

Each of these BOLO entries could have been easily found by the TIGTA audit team or TIGTA senior managers had they carefully reviewed the BOLO lists already in their possession. Had the TIGTA Inspector General disclosed during his Congressional testimony the existence of the BOLO listings for two liberal-leaning groups – ACORN and Occupy – even without naming them, it would have addressed a central issue in the TIGTA audit, whether the IRS had shown political bias in the 501(c)(4) application process or was treating liberal groups the same way it treated conservative groups.

Instead, the TIGTA Inspector General continued to make statements implying that the IRS had unfairly singled out the Tea Party and other conservative groups in the 501(c)(4) application process. For example, at a June 3, 2013 hearing before the House Appropriations Subcommittee on Financial Services and General Government, in response to a question about whether TIGTA had “found any political motivation in reviewing tax-exempt applications,” Mr. George testified:

“[B]ut in the instance of the political activity matter, we did not uncover instances of groups that could readily be identified as being liberal, for lack of a better term, that were treated in the manner that these Tea Party cases were.”<sup>1049</sup>

The factual basis for his testimony is unclear, given that the TIGTA audit team deliberately chose not to audit how liberal groups were treated by the IRS in the 501(c)(4) application process; if that audit work had taken place, TIGTA would have discovered that liberal groups like ACORN, Occupy, and Emerge were subjected to the same types of inappropriate screening criteria, delays, and mismanagement as the conservative groups.

When asked about his testimony, the TIGTA Inspector General wrote the following in a letter to the Subcommittee:

“In the audit report, TIGTA did not characterize any organizations as liberal or conservative. Nor did we assess whether liberal groups were treated in a manner different than Tea Party groups. ... In my testimony before the House Appropriations Subcommittee on Financial Services and General Government, I was conveying that, in the audit report, we did not characterize the political views of any organizations. Many of the names of the organizations used terms not readily categorized on the political spectrum, and we did not identify any objective criteria that we could use to label these groups in a manner that meets government auditing standards.”<sup>1050</sup>

Later in the June 3, 2013 hearing, when asked if he had been surprised by what the audit found, Inspector General George responded “very much so,” and then compared the IRS’

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Section 6103 of the tax code which requires the IRS to keep specific taxpayer information confidential, since that phrase does not disclose the name of any specific taxpayer. In contrast, TIGTA has determined that disclosures related to ACORN successor groups would violate Section 6103 and has been unwilling to discuss those groups.

<sup>1049</sup> Testimony of J. Russell George, “Oversight Hearing – Internal Revenue Service,” hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 263.

<sup>1050</sup> 6/6/2014 letter from TIGTA Inspector General George to the Subcommittee, PSI-TIGTA-22-000001 – 004, at 003.

mishandling of 501(c)(4) applications filed by conservative groups to President Nixon's misuse of the IRS to harm political opponents:

"This is unprecedented, Congressman. And again, during the Nixon administration, there were attempts to use the Internal Revenue Service in manners that might be comparable in terms of misusing it. I am not saying that what the actions that were taken are comparable, but I'm just saying that the misuse of the — causing a distrust of the system occurred sometime ago, but this is unprecedented."<sup>1051</sup>

When asked about those comments, Mr. George told the Subcommittee that he was noting that the IRS had been abused in the past by the Nixon Administration, but did not equate that with the 501(c)(4) situation.<sup>1052</sup> He also stated: "There is no connection between the White House and this."<sup>1053</sup>

On June 25, 2013, TIGTA's "spokeswoman," presumably TIGTA Communications Director Karen Kraushaar, told National Public Radio that TIGTA was "not aware of any BOLOs listing progressive organizations when it conducted its review."<sup>1054</sup> That statement was, again, contrary to the documents cited earlier showing IRS personnel repeatedly brought information about the BOLO entries for liberal groups to the attention of TIGTA auditors.

On July 18, 2013, both Inspector General George and Assistant Inspector for Audit General Kutz testified before the House Committee on Oversight and Government Reform and denied that TIGTA had known about the BOLO entries for liberal groups during the audit period.<sup>1055</sup> In his opening statement, Inspector General George testified:

"I know you have questions and so do we on the other Be On the Look Out listings, but from the date of the May 17, 2012 document until we issued our report one year later, IRS staff at multiple levels concurred with our analysis citing Tea Party, Patriot, and 9/12 and certain policy positions as the criteria the IRS used to select potential political cases .... In fact, as previously noted, we provided IRS officials with several opportunities to

<sup>1051</sup> Testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 268, in an exchange with Congressman Womack.

<sup>1052</sup> Subcommittee interview of J. Russell George, TIGTA (4/22/2014).

<sup>1053</sup> Id. See also "No Evidence of White House Involvement or Political Motivation in IRS Screening of Tax-Exempt Applicants," Democratic Staff report, House Committee on Oversight and Government Reform, (5/6/2014), <http://democrats.oversight.house.gov/uploads/Cummings%20Report%20on%2039%20IRS%20Transcripts%20050614.pdf>, (showing that the White House had no role in the 501(c)(4) application process).

<sup>1054</sup> 6/25/2013 "Democrats Want Answers on 'Progressives' Targeted by IRS," National Public Radio, Tamara Keith, <http://www.npr.org/blogs/itsallpolitics/2013/06/25/195599362/Democrats-Want-Answers-On-Progressives-Targeted-By-IRS> (noting that "the BOLOs that Democrats have released contain the term 'progressives.' This raises some questions. For instance: Why wasn't this mentioned sooner? The IRS inspector general's report is clear: Tea Party groups were targeted by the IRS for extra scrutiny simply because they had 'Tea Party' or 'patriot' in their names. But the audit didn't mention progressive groups.").

<sup>1055</sup> See "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), <http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf>.

comment on our findings and they consistently agreed that, ‘Tea Party,’ and related criteria described in our report were the criteria that the IRS used to select cases for review of potential political campaign intervention during the 2010 to 2012 time frame that we reviewed.”<sup>1056</sup>

While the evidence shows that Mr. George was correct – the IRS did agree with TIGTA that it had used “Tea Party,” “Patriot,” and “9/12” as screening criteria – what he left out was that the IRS also repeatedly informed TIGTA auditors that it had used screening criteria for liberal groups as well, which demonstrated that the IRS had not singled out conservative groups or acted out of political bias. Since the July hearing took place nearly two months after Mr. George and Mr. Kutz were told by the TIGTA Chief Counsel about the BOLO listings for liberal groups, it difficult to understand why TIGTA’s senior management had not conducted by then an intensive review of what their auditors had known about the BOLO entries for liberal groups. That type of review would have uncovered, for example, the May 17, 2012 meeting summary prepared by the lead TIGTA auditor, cited earlier, indicating that IRS personnel had drawn the auditors’ attention to the BOLO listings for liberal groups in the earliest stage of the audit.<sup>1057</sup>

Nevertheless, during the July 18, 2013 hearing, Mr. Kutz insisted that the IRS had not told the TIGTA auditors about the BOLO entries for liberal groups, despite ample evidence to the contrary. Mr. Kutz testified:

“I just want to say, I mean, what Mr. George submitted at the beginning of the hearing is called the BOLO advocacy cases iterations. It was given to us May 17, 2012, and represented by the IRS to be the entire set of BOLOs that were used for political advocacy. We’re not making this up. We’ve submitted it for the record. If IRS was doing something beyond that, they never made it apparent to us in an entire year of doing an audit. So I just want to make that clear. If other people were misused, we’re very concerned about that, but IRS is the one that asserted to us in this email and a document Mr. George submitted for the record that the entire population of BOLOs used for political advocacy is on the document that says Tea Party until Lois Lerner changed it to advocacy in July of 2011.”<sup>1058</sup>

The head of the EO Rulings and Agreements Unit at the IRS, Holly Paz, told the Subcommittee that when she heard Mr. Kutz’s testimony, she was “surprised,” given her repeated actions in bringing the BOLO entries for liberal groups to the attention of the TIGTA audit team.<sup>1059</sup>

<sup>1056</sup> Id. at 62-63.

<sup>1057</sup> See 5/17/2012 “Memo of Contact,” prepared by Cheryl Medina, TIGTA, “Determinations Process Planning,” PSI-TIGTA-04-000016 – 018 (containing the lead auditor’s meeting notes: “Ms. Paz agreed that the initial criteria was not a good way to identify advocacy cases. However, it is common to refer to certain groups by name for identification purposes in Determinations. For example, the ‘Occupy’ and [REDACTED BY IRS] groups are listed specifically on the BOLO.”).

<sup>1058</sup> Testimony of Gregory Kutz, “The IRS’s Systematic Delay and Scrutiny of Tea Party Applications,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 115, <http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf>.

<sup>1059</sup> Subcommittee interview of Holly Paz, IRS (10/30/13).

At times during the hearing, the TIGTA officials seemed to suggest that IRS personnel had deliberately withheld documents from TIGTA auditors about the BOLOs for liberal groups, even though the IRS had been urging TIGTA to consider those same BOLO entries:

“Congressman Jordan: I'm looking at your testimony, Mr. George. You said, ‘New documents from July 2010 listing the term, “progressive” were provided to TIGTA last week on July 9th, 2013.’ You're disturbed that these weren't provided earlier. I get that. ‘We are currently reviewing the issue.’ What can you tell us? Without violating 6103, what can you tell us?

Mr. George: Great question, sir. I don't know whether they were withheld intentionally. I don't know—I don't know the circumstances. Again, I may defer to Mr. Kutz, if he has additional information on that. But I don't know because I just learned about this.

Mr. Kutz: We don't know. But, Congressman, throughout the entire audit, starting May 17, and the document Mr. George submitted to the record, we were given a listing of the BOLOs that were —

Congressman Jordan: ... So they had all kinds of opportunities to tell you this was there. They didn't tell you. Suddenly it appears, because the Democrats keep talking about it, appears out of nowhere. You're currently reviewing it. I mean, is there anything else you can tell us about the current review?

Mr. George: It tells me I'm concerned that there may be additional pieces of information that we don't have. I am very concerned about that, sir.”<sup>1060</sup>

The testimony provided by Mr. George and Mr. Kutz implied that the IRS had attempted to conceal information from TIGTA about the BOLO entries for liberal groups when, in fact, the IRS had been pleading with TIGTA auditors for nearly a year to consider, not only those BOLO entries, but also IRS treatment of 501(c)(4) applications filed by liberal groups, to show that conservative groups were not singled out for less favorable treatment. In response, the TIGTA auditors failed to investigate any information related to liberal groups.

**TIGTA Reconsideration.** Mr. George and Mr. Kutz indicated to the Subcommittee during their interviews that they had since reconsidered how the audit report treated 501(c)(4) applications filed by liberal groups. During his interview, TIGTA Inspector General George told the Subcommittee that, although the TIGTA audit report contained a footnote noting that TIGTA did not review “the use of other named organizations on the BOLO listing to determine if their use was appropriate,” in hindsight, TIGTA should have elaborated on that footnote.<sup>1061</sup> Mr. George told the Subcommittee that the failure to explain more about the decision to exclude other BOLO entries was a “judgment call” by the auditors, and that the report could have been

<sup>1060</sup> “The IRS’s Systematic Delay and Scrutiny of Tea Party Applications,” hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 84-85, <http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf>.

<sup>1061</sup> Subcommittee interview of Russell George, TIGTA (4/22/2014).

“better.”<sup>1062</sup> He indicated that the audit report should have acknowledged the existence of the other BOLO entries and the auditors should have looked into the other groups.<sup>1063</sup>

During his interview, Mr. Kutz acknowledged to the Subcommittee that “now that we know the interest in it,” TIGTA should have potentially looked into or included the progressive, ACORN, and Occupy BOLO listings in its analysis.<sup>1064</sup> He also noted, however, that to do so would have taken another year which would have delayed the report’s issuance.<sup>1065</sup> Mr. Kutz also told the Subcommittee that the evidence indicated that all 501(c)(4) applications within the 298 cases provided by the IRS for the two year period, May 2010 to May 2012, appeared to have been treated the same by IRS personnel, subjected to the same screening, delays, and problematic questions from the IRS, regardless of their politics.<sup>1066</sup>

#### **D. Analysis**

By excluding information about how the IRS handled 501(c)(4) applications filed by liberal groups, the TIGTA audit report presented a distorted analysis of how the IRS processed 501(c)(4) applications. The audit determined that no political bias was involved in the IRS decisionmaking process, but the audit report contained no explicit finding on that central issue. The report discussed the BOLO listing naming the Tea Party and other conservative groups, but made no mention of the BOLO listings naming progressive, ACORN, or Occupy groups. After receiving a pool of 298 501(c)(4) applications subjected to heightened scrutiny by the IRS over a two-year period, the report analyzed how many applications were filed by groups with the words “Tea Party,” “9/12,” or “Patriot” in their names, with no mention of cases filed by non-conservative or liberal groups. The audit report also made no mention of the Office of Investigations email review and its conclusion that IRS documents contained “no indication” that IRS decisions to select the 501(c)(4) applications for heightened review were politically motivated. Those omissions, as well as TIGTA’s overall decision to exclude any comparative data on how the IRS handled 501(c)(4) applications filed by liberal groups, resulted in a report that failed to present a full and fair picture of IRS actions.

After the audit report was issued, and senior TIGTA officials learned that it had omitted key information about BOLO entries for liberal groups, those TIGTA officials remained silent for weeks about the existence of those BOLO entries, until they were disclosed by Members of Congress or the media. Senior TIGTA officials also gave incomplete and inaccurate testimony at Congressional hearings about the BOLO entries for liberal groups, initially denying they existed despite having been informed of them prior to testifying, later denying TIGTA auditors had known about those BOLO entries, and at one point suggesting that the IRS may have deliberately withheld information about them when, in fact, the IRS had repeatedly supplied information about those BOLO entries to the TIGTA auditors.

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<sup>1062</sup> Id.

<sup>1063</sup> Id.

<sup>1064</sup> Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

<sup>1065</sup> Id.

<sup>1066</sup> Id.

TIGTA's failure to include an official finding in its audit report that the IRS showed no political bias and its failure to present information about how the IRS treated liberal as well as conservative groups filing 501(c)(4) applications damaged public confidence in a critical government agency, undermined public faith in IRS neutrality, and encouraged public suspicions about the IRS despite the absence of any evidence that the IRS or any of its employees engaged in politically motivated actions. Given public concerns about political bias and the potential damage to the reputation and standing of an important public agency, the TIGTA audit report should have provided a more balanced and comprehensive picture of how the IRS handled 501(c)(4) applications filed by both conservative and liberal groups.

One positive outcome from the TIGTA audit report is that it spurred a comprehensive review of the role of the IRS in processing 501(c)(4) applications for organizations involved with political advocacy and campaign activities. The audit report recommended and the IRS has responded by drafting proposed rules to revamp the agency's approach and provide the guidance needed to process applications in a more objective, transparent, consistent, and timely manner. The proposed rules should reduce IRS use of the facts and circumstances test, which is inherently time-consuming, intrusive, nontransparent, and subjective, and make greater use of objective standards and bright line rules to determine when an organization is engaged in campaign activities. The proposed rules should also reduce use of the facts and circumstances test to determine when an organization is engaged primarily in social welfare activities, moving closer toward the statutory requirement of exclusivity and using more objective standards that, among other measures, should establish a clearly defined percentage test. The IRS is now considering more than 150,000 public comments on how the proposed rules should be shaped and has indicated that it intends to continue to press forward to address the mismanagement and public distrust that now taint the 501(c)(4) applications process.



## **MINORITY STAFF DISSENTING VIEWS: IRS TARGETING TEA PARTY GROUPS**

### **I. EXECUTIVE SUMMARY**

The Majority staff on the Permanent Subcommittee on Investigations has issued the foregoing report titled *IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity*. The primary conclusion of the Majority staff report is that, contrary to common understanding and widespread reporting, the IRS actually exhibited no bias in its review of conservative groups. The Majority staff report claims that the IRS targeted liberal and conservative groups equally and that a Treasury Inspector General for Tax Administration (TIGTA) report on the targeting of conservative groups was fundamentally flawed.

The Subcommittee Minority staff sharply disagrees with the conclusions reached by the Majority staff report. While some liberal groups were examined by the IRS from May 2010 to May 2012, there were far fewer such groups, they were systematically separate from the review of conservative groups, their questioning was far less intrusive, and, in some cases, the liberal groups were affiliates of specific organizations like ACORN that had behaved illegally in the past and could reasonably expect additional scrutiny. The inclusion of a scant few liberal groups by the IRS does not bear comparison to the targeting of conservative groups.

Although the Majority and Minority have profound differences and were unable to come to an agreement in their analysis of this matter, the Subcommittee conducted its investigation through joint interviews and document requests, and continued its tradition of in-depth fact-finding and frequent consultations that are the hallmark of the Subcommittee's oversight work and lead to a deepened understanding of key issues.

### **A. Question of Political Bias and Disparate Impact**

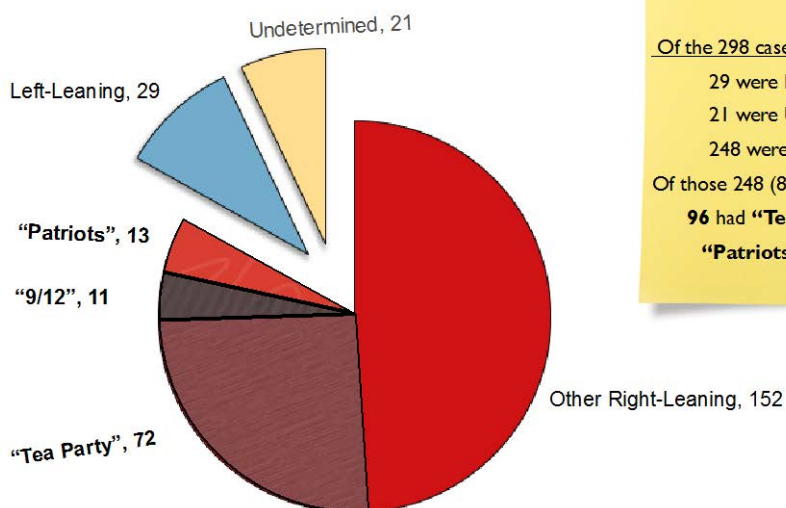
The Majority report asserts that there was no political bias in the way the IRS selected groups for additional scrutiny and that conservative and liberal groups were treated equally. This is simply untrue. The IRS screening resulted in a clearly disparate impact on conservative group applications. Of the groups applying for tax-exempt status that were pulled from normal processing and received additional scrutiny by the IRS, 83% (or 248 out of 298) of the groups were "right leaning" organizations.<sup>1067</sup>

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<sup>1067</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, (Sept. 18, 2013) <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

### Breakdown 298 of the Political Advocacy Cases

(May 2010 - May 2012)



Of the 298 cases the IRS held for review:

29 were Left-Leaning

21 were Undetermined

248 were Right-Leaning

Of those 248 (83%) Right-Leaning groups,

**96** had **"Tea Party"**, **"9/12"**, or

**"Patriots"** in their name

On July 30, 2014, the House Committee on Ways and Means published a study detailing the number of questions posed to conservative and progressive applicants for tax-exempt status.<sup>1068</sup> The IRS asked conservative groups 1552 questions, an average of 14.9 questions per group. Meanwhile, the 7 progressive groups were asked a mere 33 questions in total, or 4.7 per group.<sup>1069</sup> Conservative groups were asked on average more than triple the number of questions posed to progressive organizations.

#### IRS Targeting Statistics of Files Produced by IRS Through July 29, 2013

Organization Names	Total	Questions Asked	Average Questions Asked	Approved	Approved %	Outstanding or Withdrawn
Conservative	8	100	12.5	3	38%	5
Tea Party	72	1012	14.1	33	46%	39
Patriot, 9/12	24	440	18.3	12	50%	12
Subtotal of Conservative Organizations	104	1552	14.9	48	46%	56
Progressive	7	33	4.7	7	100%	0

\*1 file in the enumerated categories has not been provided by the IRS despite numerous requests.

<sup>1068</sup> <http://www.npr.org/blogs/itsallpolitics/2013/07/30/207080580/report-irs-scrutiny-worse-for-conservatives>

<sup>1069</sup> *Id.*

In addition, the chart above shows that the Progressive groups examined by the IRS were all approved, while less than half of the conservative groups were approved.

The Majority report further attempts to diminish the disparate impact of the IRS targeting on conservative groups by stating that “more conservative than liberal groups filed for 501(c)(4) tax exempt status from 2010 to 2013, underwent IRS scrutiny, and ultimately won tax exempt status.”<sup>1070</sup> The Majority report’s interpretation of the evidence fails, however, to accurately account for the impact of the targeting on conservative groups. The true impact on conservative groups becomes clear when comparing the percentage of liberal and conservative applicants ultimately approved for tax-exempt status. This analysis shows that 70% of liberal group applicants placed on a separate list and scrutinized by the IRS were approved, whereas only 45% of conservative group applicants were granted tax-exempt status.<sup>1071</sup> When the vast disparity in the number of questions asked of and the far lower tax-exempt approval rate for conservative groups are considered, it is clear that conservative and liberal groups were not treated equally. In fact, it plainly evidences that there was a sharp disparate impact on conservative groups as a result of the targeting.

## **B. Unresolved Factual Issues Meriting Further Investigation**

The Majority’s report claims to be able to draw definitive conclusions based on the available evidence. However, although the Subcommittee has spent over a year on this investigation, two major questions have yet to be resolved: whether there was political bias motivating the targeting and to what extent outside actors influenced the IRS’s actions. The Majority’s report purports to answer these questions, but does not take into account the recent release of Lois Lerner’s emails containing disparaging remarks about conservatives. Many relevant IRS emails are also still missing, key documents have not been produced, and Lois Lerner—the former director of the IRS Office of Exempt Organizations and a key witness—continues to refuse to testify. These factual gaps indicate that this Subcommittee’s investigation is necessarily incomplete.

At the same time, in the Minority’s view, substantial evidence shows political bias was involved in this matter and further investigation is necessary to ascertain the precise extent of it and to find out who besides Lerner was involved in the targeting. Drawing any definitive conclusion before fully resolving all of the factual issues, at this point, is unwise.

**Missing Sources of Information.** The IRS learned in February 2014, that the IRS had lost two years of emails belonging to Lois Lerner and six additional employees. These missing emails were from the time period when the IRS was targeting conservative group applications and would likely prove vital to the investigation. With critical information missing from the relevant time period the targeting occurred and from the head of the division responsible for the inappropriate targeting, the likelihood is more incriminating information will be found.

<sup>1070</sup> Majority Report at 31. This assertion is based on the U.S. House Committee on Ways and Means analysis of the 298 cases reviewed by TIGTA.

<sup>1071</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>. The 298 cases represent all cases pulled from the standard screening process and listed on a separate Advocacy List created by IRS employees.

Additionally, very recently produced emails demonstrate the presence of political bias by Lois Lerner. Lerner revealed her animus towards conservatives in one of these recently released email exchanges from November 2012 with an unnamed sender. In the exchange, the sender complained about the “whacko wing of the GOP” and “scary” “right wing radio shows.”<sup>1072</sup> The sender replied that conservative critics as being the reason that the “U.S. is through.”<sup>1073</sup> Lerner responded, “[G]reat. Maybe we are through if there are that many [redacted]holes.” Lerner called conservatives “our own crazies” and compared them to “teRrorists [sic].”<sup>1074</sup>

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**From:** Lerner Lois G  
**Sent:** Friday, November 09, 2012 12:04 PM  
**To:** [REDACTED]  
**Subject:** Re: Suspension of Retention

So we don't need to worry about alien teRrorists. It's our own crazies that will take us down.  
 Lois G. Lerner----- Sent from my BlackBerry Wireless Handheld

----- Original Message -----  
**From:** [REDACTED]  
**Sent:** Friday, November 09, 2012 12:19 PM  
**To:** Lerner Lois G  
**Subject:** RE: Suspension of Retention

And I'm talking about the hosts of the shows. The callers are rabid.

-----Original Message-----  
**From:** Lerner Lois G [mailto:Lois.G.Lerner@irs.gov]  
**Sent:** Friday, November 09, 2012 12:17 PM  
**To:** [REDACTED]  
**Subject:** Re: Suspension of Retention

Great. Maybe we are through if there are that many [REDACTED]holes.  
 Lois G. Lerner----- Sent from my BlackBerry Wireless Handheld

----- Original Message -----  
**From:** [REDACTED]  
**Sent:** Friday, November 09, 2012 12:02 PM  
**To:** Lerner Lois G  
**Subject:** RE: Suspension of Retention

Well, you should hear the whacko wing of the GOP. The US is through; too many foreigners sucking the teat; time to hunker down, buy ammo and food, and prepare for the end. The right wing radio shows are scary to listen to.

The IRS allowed four months to pass before revealing the loss of two years of Lois Lerner's emails to the House Ways and Means Committee. While the IRS revealed the loss of the Lerner emails on June 13, it took four more days until June 17 to inform the committee about the other missing emails.<sup>1075</sup>

The day before the June 17 Ways and Means announcement, IRS Commissioner John Koskinen met with Senate Finance Committee Chair Wyden and Ranking Member Hatch.<sup>1076</sup> During this meeting Commissioner Koskinen discussed Lerner's unrecoverable hard drive, but

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<sup>1072</sup> [http://waysandmeans.house.gov/uploadedfiles/lerner\\_email\\_a.pdf](http://waysandmeans.house.gov/uploadedfiles/lerner_email_a.pdf)

<sup>1073</sup> [http://waysandmeans.house.gov/uploadedfiles/lerner\\_email\\_a.pdf](http://waysandmeans.house.gov/uploadedfiles/lerner_email_a.pdf)

<sup>1074</sup> [http://waysandmeans.house.gov/uploadedfiles/lerner\\_email\\_a.pdf](http://waysandmeans.house.gov/uploadedfiles/lerner_email_a.pdf)

<sup>1075</sup> <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708>

<sup>1076</sup> <http://www.finance.senate.gov/newsroom/ranking/release/?id=479df47f-b3cd-4f58-9c64-118f92c254e8>

failed to inform them that additional employees' documents were also lost.<sup>1077</sup> Some of these unrecoverable emails belonged to three Washington, D.C.-based employees directly involved in the management and analysis of the Tea Party cases.<sup>1078</sup> These recent revelations and repeated failures to provide relevant information to congressional committees demonstrate an unacceptable culture of secrecy within the IRS. The investigation of these matters cannot be completed until all the facts about the supposed "lost" emails are uncovered.

The "lost" emails may still be recoverable, yielding important new facts. In mid-2011, Lois Lerner's computer reportedly crashed and the information stored on her computer's hard drive was deemed unrecoverable.<sup>1079</sup> The IRS stated that any "email that was only stored on that computer's hard drive would have been lost," but some emails may have been stored on the IRS's central servers.<sup>1080</sup> It might be possible, therefore, to retrieve Ms. Lerner's emails from the IRS's network. TIGTA is currently investigating whether Ms. Lerner's emails can be recovered and produced to the relevant congressional committees.

**Lack of Lerner's Testimony.** Lois Lerner's refusal to testify represents a second crucial gap in information. Lerner is the former Director of the IRS Exempt Organizations division and a key figure in the scandal. As Director, Lerner was likely in the best position to know precisely what led to the disparate treatment of conservative groups. Without her testimony, drawing a definitive conclusion is a mistake.

**Ongoing Litigation and Investigations.** Additional relevant information may be made available through ongoing litigation brought by the some of the targeted groups. One such group's case will soon begin the discovery process.<sup>1081</sup> This process may lead to the production of additional documents the IRS has thus far resisted disclosing and may shed further light on other unanswered questions. One such question may involve the frequent trips by former IRS Commissioner Douglas Shulman and then-acting Commissioner Steven Miller to the White House.<sup>1082</sup> Additionally, the Federal Bureau of Investigation and Department of Justice have

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<sup>1077</sup> <http://www.finance.senate.gov/newsroom/ranking/release/?id=479df47f-b3cd-4f58-9c64-118f92c254e8>; The IRS indicated that Mr. Koskinen's failure to inform the committee stemmed from the fact that he had not yet been briefed on the issue. This once again shows that the IRS is slow in communicating relevant information to the investigative committees.

<sup>1078</sup> The three D.C.-based employees in which the IRS determined email data was lost are Judy Kindell, Justin Lowe, and Ron Shoemaker. See also <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708>.

<sup>1079</sup> <http://www.irs.gov/PUP/newsroom/IRS%20Letter%20to%20Senate%20Finance%20Committee.pdf> at 7.

<sup>1080</sup> <http://www.irs.gov/PUP/newsroom/IRS%20Letter%20to%20Senate%20Finance%20Committee.pdf> at 7.

<sup>1081</sup> *Z Street v. Shulman*, Civil Action No. 2012-0401. US District Court for the District of Columbia, Memorandum Opinion, May 21, 2014 at 4 (located at: <http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/05/ZStreet.pdf>); see also IRS Judgment Day: The Untalkative Agency Comes Under Scrutiny from a Federal Judge, Wall Street Journal (May 28, 2014) <http://online.wsj.com/articles/irs-judgment-day-1401318881>.

<sup>1082</sup> See IRS Chief's 118 White House Visits Must Be Explained, Investor's Business Daily (May 28, 2013) <http://news.investors.com/ibd-editorials/052813-657927-irs-heads-118-white-house-visits-suspicious.htm?ref=HPLNews>.

been conducting investigations with alacrity into the IRS targeting scandal.<sup>1083</sup> Their findings will likely provide further relevant information.

### **C. IRS Scrutiny of Liberal Groups Differed in Justification and Extent From Its Scrutiny of Conservative Groups**

The Subcommittee Majority claims that the IRS targeted liberal groups and conservative groups equally.<sup>1084</sup> As shown in section A, that claim does not have statistical merit. In addition, liberal groups were targeted by the IRS for different reasons and in a different manner than conservative groups, which were placed on a separate listing for additional scrutiny.

The liberal groups mentioned on the “be-on-the-lookout” (BOLO) spreadsheet were selected for legitimate reasons. The BOLO spreadsheet was an IRS guidance document that alerted agents to potentially problematic types of cases. For example, the BOLO instructed IRS personnel to look out for groups associated with centrally-controlled organizations like ACORN.<sup>1085</sup> These organizations would also naturally be expected to undergo additional scrutiny because of previous controversies associated with their parent organizations.<sup>1086</sup> By contrast, the conservative groups in question were overwhelmingly independent and had no comparable history warranting heavy scrutiny.

The scrutiny endured by conservative groups also differed in kind from the scrutiny accorded to liberal groups. The IRS selected conservative groups out of normal processing, placed them on a separate list, stopped work on their applications completely, forced them to answer intrusive questions about their behavior and demeanor at meetings, and delayed their applications for multiple years. Our investigation has uncovered no evidence that liberal groups received the same expansive inappropriate treatment that conservative groups received.

Furthermore, had liberal groups been targeted in a similarly inappropriate manner, they would have likely voiced their concerns to the IRS and Congressional leaders. Instead, we have uncovered no evidence indicating that liberal groups were writing to their members of Congress to complain about targeting by the IRS during the relevant period. All of the known complaints regarding IRS targeting and burdensome treatment came from conservative groups. These

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<sup>1083</sup> See John D. McKinnon, FBI Launces Probe of IRS: Treatment of Tea-Party Groups Eyed; Internal Review Blames Higher-Ups, Wall Street Journal (May 14, 2013) <http://online.wsj.com/news/articles/SB10001424127887324216004578483203153773048> (“Attorney General Eric Holder said Tuesday the Justice Department has opened a criminal probe of the Internal Revenue Service's treatment of tea-party groups”).

<sup>1084</sup> Majority Report, Part I, Executive Summary, at 7 (“From 2010 through 2013, the IRS mismanaged the 501(c)(4) applications process for both conservative and liberal groups engaged in campaign activities, using inappropriate selection criteria to flag applications for heightened review, subjecting applicants to burdensome questions, and delaying disposition of their applications for years.”).

<sup>1085</sup> IRSR0000196739 – 758 (eight Emerge applicants related to national Emerge America organization and denied for private benefit); Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (Feb. 22, 2010) <http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223>; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (Feb. 23, 2010).

<sup>1086</sup> Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (Feb. 22, 2010) <http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223>; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (Feb. 23, 2010).

concerns spurred the TIGTA audit<sup>1087</sup> and ultimately led to congressional investigations by four committees and subcommittees.<sup>1088</sup>

The assertion that the IRS targeted liberal and conservative groups equally is further undermined by the IRS's response to the TIGTA audit. The TIGTA audit detailed the pervasive use of inappropriate criteria by the IRS that led to the targeting of conservative groups' applications. Prior to releasing its audit report, TIGTA provided multiple drafts to the IRS for comment. One would expect that, had the IRS been impartially targeting liberal and conservative groups equally, it would have raised that argument in its comments. In its official response, however, the IRS did not assert that it had impartially targeted both conservative and liberal groups. Instead, the IRS responded by accepting seven of the nine TIGTA recommendations.<sup>1089</sup> The IRS's tacit admission to targeting only conservative groups suggests that the liberal groups were not targeted in a similar manner.

To support its conjecture that the IRS targeted liberal groups, the Subcommittee Majority staff report offers the IRS's BOLO spreadsheet as evidence. Because the BOLO spreadsheet lists liberal groups such as ACORN, Progressive and Occupy as well as "Tea Party" cases, the Majority staff report concludes that liberal and conservative groups were targeted equally. However, the liberal organizations were grouped in different parts of the BOLO spreadsheet, meaning that the agents responsible for screening were supposed to treat them differently than they did the "Tea Party" cases.

The criteria flagging "Tea Party" groups were included on the spreadsheet tab labeled "Emerging Issues." The Emerging Issues Tab was the only spreadsheet on the BOLO associated with an actual, separate list of cases referred from the BOLO. IRS screeners pulled cases based on the criteria described and placed these applications on the Advocacy Case List. These applications were then referred to a specialist for additional scrutiny.

It was the "Emerging Issues" tab, and not any other BOLO tab, that IRS agents utilized to target tax-exempt applications for additional scrutiny; even though the BOLO spreadsheet had other criteria contained in different tabs.

Other BOLO entries, like those on the Watch List tab, included criteria for identifying ACORN successors. The BOLO Watch List tab contained recommendations for processing applications, not yet received, which might present concerns. ACORN successor cases were

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<sup>1087</sup> TIGTA Report, Memorandum from Michael E. McKenney, Acting Deputy Inspector General for Audit, at 1 (May 14, 2013) ("This audit was initiated based on concerns expressed by members of Congress and reported in the media regarding the IRS's treatment of organizations applying for tax-exempt status.").

<sup>1088</sup> The four committees investigating the IRS's targeting of conservative groups are: 1) The House Committee on Ways and Means, 2) the House Committee on Oversight and Government Reform, 3) the Senate Committee on Finance, and 4) the Senate Permanent Subcommittee on Investigations.

<sup>1089</sup> See generally, TIGTA Report. The IRS agreed that it should: implement the memorandum requiring the Direct of Rulings and Agreements to approve all BOLO entries and changes prior to formalization; Develop training on proper identification of political activity in applications; develop a process for Determinations to formally request assistance from the Technical and Guidance Units; Provide oversight to ensure expedient approval or denial of political cases; Have IRS Chief Counsel and Treasury develop guidance on how to measure "primary activity". Two additionally accepted recommendations involved the specifics of what the training on proper identification and handling of political cases should entail.



placed on the “Watch List” because of reports that ACORN successors (i.e., groups that had once been ACORN-affiliates and had spun off after the central organization closed in 2010) might file for 501(c)(3) or (c)(4) status following the breakup of the parent organization due to fraud and misconduct.<sup>1090</sup> That past conduct suggested a need to continue monitoring affiliates applying for tax-exempt status to prevent a fraudulent scheme. The reference to ACORN on the “Watch List” also considered that organizations would be applying for both 501(c)(3) and 501(c)(4) status. Thus, the IRS needed to monitor incoming ACORN applications to prevent potential tax fraud and abuse.

The “Watch List” also contained a 2012 listing for “Occupy” organizations affiliated with the Occupy Wall Street movement. However, the “Occupy” criteria were not added until almost two years after the initial targeting of “Tea Party” groups began. TIGTA determined that, during the timeframe that was the scope of its audit, no Occupy cases ever made it onto a list of political advocacy cases. TIGTA found no evidence to show that Occupy groups ever received the same treatment or delay that conservative groups received.<sup>1091</sup> Thus, it appears that the inclusion of Occupy organizations on the “Watch List” did not indicate similar targeting by the IRS.

Finally, the BOLO spreadsheet included a “Historical” tab representing types of cases that were no longer active and were thus “[h]istorical” for the purposes of IRS screening. “Progressive” was listed on the “Historical” tab, and the evidence shows that the listing was for 501(c)(3) cases only. While Progressive was still listed on the BOLO, the cases relating to this tab were inactive during the time period of the TIGTA audit.<sup>1092</sup> The greatest likelihood is that the Progressive 501(c)(4) cases were targeted for inclusion in the Advocacy Case List due to potential political activities, not based on the applicant’s name.

Although the IRS was fully aware of the other BOLO tabs, it **specifically directed** TIGTA only to the relevant “Emerging Issues” tab and the corresponding applications during the audit of political targeting. The other BOLO spreadsheet entries did not fit the scope of TIGTA’s audit.<sup>1093</sup>

How IRS employees used the BOLO spreadsheet shows the IRS’s targeting had a disparate impact on conservative groups, and that liberal groups were not targeted in the same

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<sup>1090</sup> IRSR0000410433 (“The officers of the organizations had prior affiliations with Acorn as members of boards on various chapters.”); *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 40-42 (April 7, 2014); ACORN dissolved as a National Structure, Politico (Feb. 22, 2010)

[http://www.politico.com/blogs/bensmith/0210/ACORN\\_dissolved\\_as\\_a\\_national\\_structure.html](http://www.politico.com/blogs/bensmith/0210/ACORN_dissolved_as_a_national_structure.html).

<sup>1091</sup> Interview with Tom Seidell (March 29, 2014); Interview with Troy Paterson (March 21, 2014).

<sup>1092</sup> IRS0000001354; Interview with Troy Paterson (March 21, 2014); Interview with Tom Seidell (March 19, 2014). According to the interviews with TIGTA, the Progressive listing on the Historical Tab of the BOLO Spreadsheet was a reference to 501(c)(3) Progressive organizations that had applied for tax-exempt status pre-2010 and were no longer being received. It was determined that all of the Progressive cases listed on the Advocacy Case List were 501(c)(4) organizations and it can be inferred that those cases were selected after the Emerging Issue criteria for political advocacy cases was expanded in June 2011.

<sup>1093</sup> Interview with Troy Paterson (March 21, 2014); Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin, at 2 (June 26, 2013) (“Our audit did not find evidence that the IRS used the “Progressives” identifier as selection criteria for potential political cases between May 2010 and May 2012.”).



manner as conservative groups. Unlike the liberal groups that were selected out for non-political reasons or merely noted as historical, “Tea Party” cases were actively targeted inappropriately using political criteria. As a result, all “Tea Party” cases had their applications flagged for additional scrutiny by the IRS. Based on the directions of the political advocacy entry on the Emerging Issues tab, a few progressive groups were caught up in the predominately conservative list of advocacy cases. However, these progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group’s name.

#### **D. The TIGTA Audit Accurately Represented the IRS’s Mistreatment of Conservative Groups**

The Subcommittee Majority staff report claims the TIGTA audit distorted the truth because it exclusively focused on conservative groups, not liberal groups. However, documentary evidence and Subcommittee interviews with TIGTA officials disprove this point. TIGTA officials did not consider the political leanings of the organization when they examined whether groups were inappropriately targeted.<sup>1094</sup> Instead, TIGTA audited the controls and procedures the IRS itself claimed it used when processing applications with political activity for 501(c)(4) tax-exempt status. The impartial audit validated the concerns raised by the media, members of Congress and others that the IRS was using inappropriate criteria and targeting groups by name or policy position. Thus, the Majority report’s claim that both liberal and conservative groups experienced the “same mistreatment” is clearly not supported by the evidence. It is incorrect to assert that the TIGTA audit was biased or factually flawed.

TIGTA auditors consulted the IRS to identify which, if any, cases received additional scrutiny through the IRS screening process. When asked by TIGTA if the IRS was tracking any cases separately, the IRS provided a list of applications identified as requiring “further scrutiny.” For the purposes of this report, this new Excel spreadsheet will be referred to as the “Advocacy Case List.” The Advocacy Case List consisted of applications singled-out according to criteria set out in the corresponding “Emerging Issues” BOLO tab. The scope of the TIGTA audit focused on those applications that the IRS identified as being set aside for further review based on perceived political intervention.<sup>1095</sup> The IRS directed TIGTA auditors only to the “Emerging Issues” tab and the corresponding Advocacy Case List. In doing so, the IRS deliberately declined to direct the auditors to the ACORN successors and “Progressive” references made on other BOLO tabs.<sup>1096</sup>

In their interviews, TIGTA officials Gregory Kutz and Troy Paterson made it clear that they looked at the Advocacy Case List because those were the cases the IRS indicated were relevant to the audit.<sup>1097</sup> Additionally, Mr. Kutz said he did not think adding references to Occupy or ACORN in the report would have changed the outcome of the audit.<sup>1098</sup> Furthermore,

<sup>1094</sup> Subcommittee Interview of J. Russell George (April 22, 2014).

<sup>1095</sup> TIGTA Report at 10 (“we reviewed all of the applications identified as potential political cases as of May 31, 2012”), *Id.* at 22 (“Detailed Objective, Scope and Methodology”).

<sup>1096</sup> Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1097</sup> Subcommittee Interview of Greg Kutz (March 26, 2014); Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1098</sup> Subcommittee Interview of Greg Kutz (March 26, 2014).

the Advocacy Case List included only those cases active during the May 2010-May 2012 time period that TIGTA examined in its audit. The BOLO spreadsheet entry mentioning “Progressive” only referenced cases that were not active during the time period of the TIGTA audit. Thus, the TIGTA audit team concluded that the other BOLO spreadsheets were not relevant to its audit.<sup>1099</sup>

The Subcommittee Majority places extra emphasis on the fact that the TIGTA audit was initiated at the request of the House Committee on Oversight and Government Reform (OGR). However, the Majority report’s assertion fails to present the whole story. While OGR did make a request, this alone did not spur TIGTA to audit the targeting. TIGTA began its audit in response to several media reports, an audit request letter sent by the Landmark Legal Foundation, and the OGR request.<sup>1100</sup> Moreover, the Subcommittee Majority staff report claims that TIGTA auditors only examined the treatment received by Tea Party and other conservative groups. In actuality, TIGTA audited the “actions taken by the EO function in response to the increase in applications” and “whether changes to procedures and controls” led to problems processing political advocacy cases.<sup>1101</sup>

The Subcommittee Majority staff report suggests that TIGTA failed to examine liberal groups’ treatment even after the IRS made TIGTA aware of the liberal groups in BOLO listings. The reality is that the IRS had three opportunities to edit the TIGTA report and never urged the inclusion of the liberal groups referenced on the other BOLO listings.<sup>1102</sup> Also, TIGTA reviewed every hard copy application file for the 298 cases on the IRS’s Advocacy Case List.<sup>1103</sup>

The Subcommittee Majority report places great weight on the email review conducted by TIGTA’s Deputy Inspector General for Investigations, Tim Camus. The review Mr. Camus conducted allegedly showed that IRS personnel were not politically motivated. The email review was a limited search of only five employees’ emails designed to find a smoking gun email; it was not a general search for evidence of political bias. Furthermore, the email review did not include a search of *any* emails from *any* DC based employees. Therefore, the email review cannot be cited for the proposition that this very limited investigation proves that there was no political bias on the part of IRS officials. Also, denial of political motivation is not determinative of there being no political motivation. Finally, TIGTA Inspector General J. Russell George and Mr. Kutz have indicated they are conducting a new audit into the entire BOLO spreadsheet to determine if the IRS acted improperly in other respects, too.

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<sup>1099</sup> Subcommittee Interview of Greg Kutz; Subcommittee Interview of Troy Paterson; TIGTA Report, at 6, footnote 16 (“We did not review the use of other named organizations on the BOLO listing to determine if their use was appropriate.”).

<sup>1100</sup> See TIGTA Report; *see also* Letter from Landmark Legal Foundation to TIGTA, (March 23, 2012) <http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf> (The Landmark letter also requested TIGTA look into whether IRS employees acted at the command of “politically motivated superiors.”).

<sup>1101</sup> TIGTA Report at 22.

<sup>1102</sup> Subcommittee Interview of Greg Kutz (March 26, 2014).

<sup>1103</sup> TIGTA Report at 24 (“Obtained and reviewed all 298 application cases identified for processing by the team of specialists”).

## II. CONSERVATIVE GROUPS TARGETED SIGNIFICANTLY MORE OFTEN AND PERVASIVELY THAN LIBERAL GROUPS

### A. Conservative Groups on the BOLO Spreadsheet

The IRS, using a Microsoft Excel spreadsheet referred to as the “Be-On-the-Lookout” Spreadsheet (“BOLO”), flagged conservative groups applying for tax-exempt status for additional scrutiny. One of the main mistaken contentions in the Majority’s report is that liberal groups, especially those listed on the BOLO Spreadsheet were treated equally poorly as Tea Party and conservative groups.<sup>1104</sup> In order to support this assertion, the Subcommittee Majority report attempts to draw tenuous comparisons between the different BOLO tabs. The evidence, however, strongly contradicts this finding. Instead, the evidence indicates that the systematic targeting of Tea Party and other conservative groups by the IRS was substantially different from the IRS’s treatment of liberal groups. The IRS’s treatment of Tea Party cases cannot be boiled down to an apples-to-apples comparison to liberal groups. Only one tab, labeled “Emerging Issues,” dealt with political advocacy groups under then-current review by the IRS for tax-exempt status. The other tabs with liberal groups listed were intended to alert IRS screeners only to watch out in the event they receive any tax-exempt status requests from groups like ACORN successors, Progressive or Occupy.

The Subcommittee Minority analyzed the way the IRS utilized the BOLO and found that groups in the “Emerging Issues” BOLO spreadsheet tab – most notably Tea Party groups – were treated differently than groups listed in other BOLO spreadsheet tabs.

In August 2010, IRS employees in Cincinnati created the BOLO spreadsheet to alert employees to certain cases.<sup>1105</sup> The BOLO spreadsheet had five sheets or tabs. The sheets or tabs of the spreadsheet varied over time. The original five tabs were: “TAG,” “TAG Historical,” “Emerging Issues,” “Coordinated Processing,” and “BOLO List.”<sup>1106</sup> TAG stands for “Touch-and-Go” and the cases referenced on the “TAG” tab indicated potential fraud, terrorism or other sensitive issues.<sup>1107</sup> “TAG Historical” referenced cases that were no longer active in the IRS’s system and had similar indications of fraud, terrorism or other sensitive issues.<sup>1108</sup> Later versions of the BOLO spreadsheet replaced “TAG” with “potential abusive” and “TAG Historical” with “potential abusive historical.”<sup>1109</sup> The “BOLO list” tab was a precursor to the “Watch List” tab. The “Watch List” tab was designed to draw attention to cases not yet received

<sup>1104</sup> See Majority Report, at 69 (“liberal groups encountered many of the same IRS processing problems as conservative groups”).

<sup>1105</sup> IRS0000002503-2515.

<sup>1106</sup> IRS0000002503-2515.

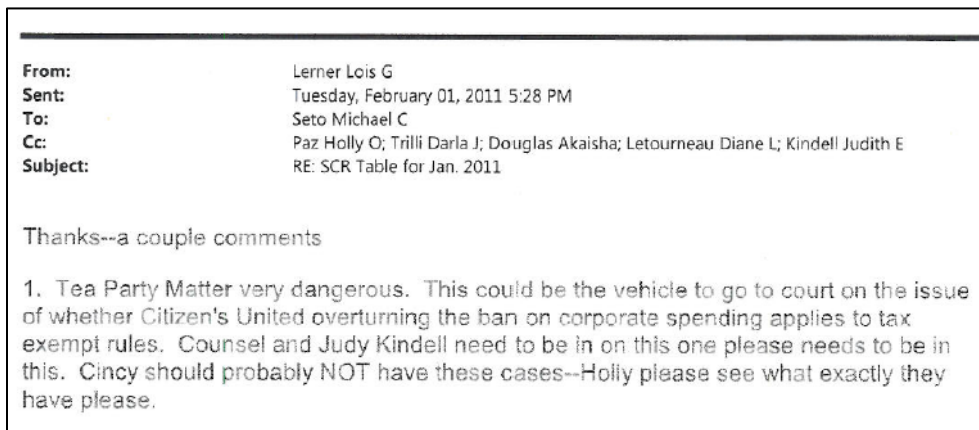
<sup>1107</sup> IRSR0000006659

<sup>1108</sup> Subcommittee Interview of Gary Muthert (1/15/2014); see also Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin, at 1 (June 26, 2013) (“The “Progressives” criteria appeared on a section. . . labeled ‘Historical,’ and, unlike other BOLO entries, did not include instruction on how to refer cases that met the criteria.” Also, TIGTA “found no indication in any of these materials that ‘Progressives’ was a term used to refer cases for scrutiny for political campaign intervention.”).

<sup>1109</sup> IRS0000001500-1511.

by the IRS that agents should be watching for.<sup>1110</sup> The “Emerging Issues” tab was used to flag newly received cases on which there was no precedent.<sup>1111</sup>

The “Emerging Issues” tab explicitly referred to the “Tea Party” movement. The tab contained no mention of any other political organization.<sup>1112</sup> In August 2010, the entry on the BOLO Spreadsheet for Tea Party read: “Tea Party: These case[s] involve various local organizations in the Tea Party movement are applying for exemption under 501(c)(3) or 501(c)(4).”<sup>1113</sup> The specific Tea Party reference was an umbrella term for conservative groups, designed to draw attention to a national movement that more often than not included organizations with Tea Party, Patriots, and 9/12 in the group name. On February 1, 2011, head of IRS Exempt Organizations, Lois Lerner emailed several of her employees and stated that the “Tea Party Matter [is] very dangerous.”<sup>1114</sup>



The Tea Party description contained in the “Emerging Issues” tab was used by the IRS to flag cases from August 2010 until July 2011. In July 2011, the description of cases to flag was altered to state the following: “Advocacy Orgs: Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4).”<sup>1115</sup> This change was requested by Lois Lerner, the Washington, D.C.-based Director of Exempt Organizations, in an attempt to broaden the criteria and prevent the inappropriate selection of cases based on their name only.<sup>1116</sup> Even after this effort, the IRS continued to target **all** Tea Party cases for heightened scrutiny.<sup>1117</sup> The “Emerging Issues” tab relating to political advocacy cases changed again in January 2012. The description was altered to read: “Current Political Issues: Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights,

<sup>1110</sup> IRSR0000006667 (“Typically Applications Not Yet Received”).

<sup>1111</sup> IRSR0000006660.

<sup>1112</sup> IRS0000002509.

<sup>1113</sup> IRS0000002509.

<sup>1114</sup> IRSR0000156541.

<sup>1115</sup> IRS0000001494 (it goes on to read: “Note: advocacy action type issues (e.g., lobbying) that are currently listed on the Case Assignment Guide (CAG) do not meet this criteria.”).

<sup>1116</sup> TIGTA Report at 35 (“During the briefing, the Director, EO, raised concerns over the language of the BOLO listing criteria. The Director, EO, instructed that the criteria be immediately revised.”).

<sup>1117</sup> PSI-IRS-37-000004-14 (In an assessment of all cases with Tea Party in the name received by June 5, 2012, every case was forwarded to the Advocacy Case List for additional scrutiny).

“Social [*sic*] economic reform/movement.”<sup>1118</sup> The January 2012 change was initiated because IRS employees in the Cincinnati office found that the July 2011 broad criteria caused too many cases unrelated to political activity to be sent to the advocacy group for processing. Finally, in May 2012, the Emerging Issues tab entry was changed for a fourth time, back to a broader, more-inclusive set of criteria by IRS management in Washington, D.C.<sup>1119</sup>

The active targeting of Tea Party applications began in February 2010.<sup>1120</sup> At that time, revenue agents screening applications began forwarding *every* Tea Party application to a specialist group handling the Emerging Issue cases. The informal criteria created and used by revenue agents in Cincinnati screening applications related to the Tea Party Emerging Issue entry included:

- 1) “Tea Party, Patriots or 9/12 Project is referenced in the case file
- 2) Issues include government spending, government debt or taxes
- 3) Education of the public by advocacy/lobbying to ‘make America a better place to life’
- 4) Statement in the case file criticize how the country is being run”<sup>1121</sup>

It is clear that all of these criteria were designed to scrutinize conservative applicants, especially considering the political climate of the time. Any application that fit these criteria was sent to the specialist group in Cincinnati handling Emerging Issues cases. Upon receipt of the first few Tea Party cases by the specialist group, a revenue agent created an entirely new Microsoft Excel spreadsheet to track progress on the applications. The spreadsheet, called the Advocacy Case List, recorded the organization’s name, the date the IRS received the application, the IRS assigned tracking number, whether it was a 501(c)(3) or (4) application and other information about the case.<sup>1122</sup> The Advocacy Case List was separate and distinct from the BOLO Spreadsheet. Whereas the BOLO contained criteria for flagging applications, the Advocacy Case List consisted of the actual cases being scrutinized by the IRS as a result of its political targeting. Between May 2010 and May 2012, the IRS accumulated 298 applications for tax-exemption, all of which were placed on the Advocacy Case List.<sup>1123</sup> This list of 298 cases was identified by the IRS as the cases the IRS itself had selected for further scrutiny and provided to TIGTA for its audit.<sup>1124</sup>

Although IRS employees in Cincinnati developed the Advocacy Case List, it was not the only IRS office ultimately involved. In March 2010, senior management in Washington, D.C. put the Tea Party cases on hold, while two Tea Party test cases were reviewed by the Washington, D.C. office. These cases were reviewed by the EO Technical department, which was overseen by

<sup>1118</sup> IRS0000001507 (it goes on to read: “Note: typical advocacy type issues that are currently listed on the Case Assignment Guide (CAG) do not meet these criteria unless they are also involved in activities described above”).

<sup>1119</sup> IRS0000001494 (“Current Political Issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit”).

<sup>1120</sup> Subcommittee Interview of Elizabeth Hofacre, IRS (10/25/2013); PSI-IRS-37-000013-14.

<sup>1121</sup> TIGTA Report, at 6, figure 3. *See also*, Lerner Briefing Document (June 2011).

<sup>1122</sup> IRSR0000006585.

<sup>1123</sup> TIGTA Report at 24.

<sup>1124</sup> TIGTA Report, at 10.

Holly Paz at the time.<sup>1125</sup> Both of these test cases were Tea Party groups.<sup>1126</sup> While a total of 6 cases from the 298 on the Advocacy Case List were approved between May 2010 and May 2012, not a single one of the approved cases had Tea Party in their name.<sup>1127</sup> The remaining 292 groups either withdrew their applications due to the lengthy delays or continued to await either an approval or denial.<sup>1128</sup> By being kept in limbo, these groups were severely hampered in their ability to raise funds. The IRS's failure to provide decisions on the 292 remaining applications also functionally denied these groups the right to appeal their treatment in federal court.

## **B. Liberal Groups on the BOLO Spreadsheet**

The Subcommittee's primary focus should be on the burdensome treatment of groups targeted via the Tea Party entry on the BOLO spreadsheet's "Emerging Issues" tab. The Majority report, however, attempts to draw attention away from the "Emerging Issues" tab by directing it toward unrelated tabs. It then attempts to draw tenuous similarities in the treatment of liberal organizations such as Progressive, ACORN, Occupy and Emerge to conservative groups by the IRS.<sup>1129</sup> Based on evidence discovered during this investigation the Majority's assertion is completely unsubstantiated. The treatment of these four liberal groups was dramatically and fundamentally different from that of Tea Party, Patriot and 9/12 groups applying for tax-exempt status. Furthermore, the disparate impact on conservative groups far outweighed any impact that the IRS treatment may have had on liberal groups. The comparison chart below shows that the Tea Party groups were systematically selected-out by name by utilizing the Tea Party entry on the BOLO spreadsheet. After being selected-out, the cases were assigned to the Tea Party Coordinator to manage processing and placed on a separate Advocacy Case List. Additionally, during the period of review, two Tea Party test cases were singled out and sent to Washington, D.C. for review. These two cases were also eventually reviewed by the IRS legal counsel's office. Based on these test cases, a sensitive case report was developed to inform senior IRS management of the cases. As is shown below, these actions all happened to Tea Party groups while only sporadically occurring to liberal groups.

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<sup>1125</sup> PSI-IRS-09-000040; Subcommittee Interview of Holly Paz October 30, 2013).

<sup>1126</sup> IRSR0000430436; *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 4 (April 7, 2014) ("The IRS's 'test' cases transferred from Cincinnati to Washington were exclusively filed by Tea Party applicants: the Prescott Tea Party, the American Juntio, and the Albuquerque Tea Party."). There were actually three cases used for the test cases, one of the original two cases was closed for failure to respond, so a third was selected.

<sup>1127</sup> TIGTA Report at 14 ("Prior to the hands-on training and independent review, the team of specialists only approved six (2 percent) of 298 applications."); Gregory Korte, IRS Approved Liberal Groups While Tea Party in Limbo, USA Today (May 15, 2013) ("There wouldn't be another Tea Party application approved for 27 months" starting in March 2010.).

<sup>1128</sup> TIGTA Report at 14 (Of the 298 applications, TIGTA determined that 28 groups withdrew the application and 160 continued to wait).

<sup>1129</sup> Majority Report, at 1, 2.

**Comparison Chart of Tea Party Group Treatment versus  
Occupy, Emerge, ACORN successors, and Progressive/Progress**

	Tea Party (incl. 9-12 and Patriot)	Occupy	Emerge	ACORN Successors	Progressive BOLO (c3s)	Progressive/ Progress c4s
Listed on the BOLO Spreadsheet	X	X		X	X	
Sensitive Case Report	X		X			
Test Cases sent to Washington	X		X	X		
IRS's office of Legal Counsel's review	X					
Listed on the Advocacy Case List	X			??		X
Assigned a specific Coordinator (i.e. Tea Party Coordinator)	X					
Development Letters	X		X			X

\* Due to 6103 restrictions on releasing individual taxpayer information, TIGTA officials were unable to confirm or deny the addition of a single ACORN group on the Advocacy Case List.

### (1) Progressive and Progress Groups

In the original BOLO Spreadsheet, on the TAG Historical tab, there was an entry that read:

“Progressive: Political Activities: Common thread is the word ‘progressive’. Activities appear to lean toward a new political party. Activities are partisan and appear as anti-republican. You see references to ‘blue’ as being ‘progressive.’”<sup>1130</sup>

According to our interviews with TIGTA employees, this entry refers to the IRS's previous handling only of 501(c)(3) applications for tax-exempt status from groups with Progressive in their name.<sup>1131</sup> As a result, it is highly unlikely that this entry was used to select progressive 501(c)(4) groups for review. Instead, 501(c)(4) cases that contained the name progressive or progress were included in the Advocacy Case List only because they fit the expanded criteria for scrutiny articulated by Lois Lerner in June 2011.

The fact that the Progressive cases referenced on the Historical tab of the BOLO Spreadsheet related only to 501(c)(3) cases is an important distinction to the Tea Party entry on the BOLO that referenced 501(c)(3) and (4) cases. Applicants applying for 501(c)(3) charity status are held to a stricter standard under the law than 501(c)(4) groups. That status requires 501(c)(3) charity organizations to *exclusively* conduct themselves for their stated charitable

<sup>1130</sup> IRS0000001354.

<sup>1131</sup> Subcommittee Interview of Tom Seidell (March 19, 2014). *See also* Subcommittee Interview of Elizabeth Hofacre (October 25, 2013) (Ms. Hofacre informed Subcommittee staff that EO technical had instructed her to send along 501(c)(3) applications and not (c)(4), as well as the fact that progressive cases were handled in a different manner than Tea party cases once flagged.)

purpose.<sup>1132</sup> On the other hand under IRS regulations, 501(c)(4) organizations must *primarily* operate for their social welfare purpose. The difference between *exclusively* and *primarily* allows 501(c)(4) organizations to participate in some political advocacy activities.<sup>1133</sup> As such, the IRS must carefully examine **all** groups, including explicitly partisan groups, applying for 501(c)(3) status to determine if its activities are at all related to improper political advocacy. However, based on the evidence available, taken together, these facts indicate, and the Subcommittee’s interviews confirm, there were no active cases relating to the Historical tab of the BOLO Spreadsheet Progressive entry at the time TIGTA completed its review.

According to the House Committee on Ways and Means, there were only seven applications with Progress or Progressive in the name included on the Advocacy Case List. This Subcommittee’s investigation determined that of the seven groups, four groups included “progress” in the name and three groups included Progressive in the name. All seven were groups applying for 501(c)(4) tax-exempt status and all seven were eventually approved.<sup>1134</sup> No Progressive 501(c)(3) cases ever made it onto the Advocacy Case List. There were also 14 organizations with Progressive or Progress in their name that were not sent to the Advocacy Case List.<sup>1135</sup> Unlike the Progress or Progressive groups, *all* Tea Party cases filed between February 2010 and March 2012 were scrutinized and delayed.<sup>1136</sup> Progressive cases were not identified specifically by name in the Emerging Issues tab of the BOLO Spreadsheets used by revenue agents. Further, it is unlikely that progressive cases appeared on the Advocacy Case List until after the Tea Party BOLO was expanded in July 2011. Fewer than 38 percent of applicants with Progress or Progressive in their name were sent to the Advocacy Case List.<sup>1137</sup>

The Subcommittee Majority report utilizes the existence of the seven total 501(c)(4) applications with either Progress or Progressive in the name to show that liberal groups were targeted and placed on the Advocacy Case List. The seven Progress or Progressive 501(c)(4) applications did not relate to the Progressive BOLO spreadsheet entry because they are not 501(c)(3) organizations. Also, all seven of these groups were likely not targeted for inclusion in the Advocacy Case List based on the applicant’s name, but rather due to their potential political

<sup>1132</sup> See 26 C.F.R. § 1.501(c)(3)-1(c)(1).

<sup>1133</sup> See 26 C.F.R. § 1.501(c)(4).

<sup>1134</sup> The House Committee on Ways and Means has statutory authority to view individual taxpayer information under 26 U.S.C. § 6103. With the ability to view and analyze this information, it was able to make statistical determinations by reviewing individual applications for tax-exempt status. See Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, (Sept. 18, 2013) <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126> (“One hundred percent of the groups with ‘Progressive’ in their name were approved”); PSI-IRS-37-000004-14 (Of the cases with the word Progress or Progressive in the applicant’s name, seven cases were on the Advocacy Case List by May 2012 when TIGTA completed its analysis); see also Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 34 (April 7, 2014).

<sup>1135</sup> PSI-IRS-37-000004-14.

<sup>1136</sup> PSI-IRS-37-000004-14 (In an assessment of all cases with Tea Party in the name received by June 5, 2012, every case was forwarded to the Advocacy Case List for additional scrutiny).

<sup>1137</sup> PSI-IRS-37-000004-14 (Of the cases with the word Progress or Progressive in the applicant’s name, seven cases were on the Advocacy Case List by May 2012 when TIGTA completed its analysis. Two additional Progress or Progressive cases were added to the December 2012 Advocacy Case List. Of the total 24 Progress or Progressive cases, 9 eventually ended up on the Advocacy Case List. Thus, 15 Progress or Progressive cases were not included on the Advocacy Case List.



activities. Only Tea Party, 9/12 and Patriot groups were specifically targeted based on the applicant's name. Publicly available information released in a *USA Today* article revealed that the earliest a Progress or Progressive application was listed on the Advocacy Case List was *after* March 2011. Therefore, it very likely the case was not actually added to the Advocacy Case List until after the criteria were broadened to include all advocacy groups in July 2011, not just the Tea Party. While at least 33 "Tea Party", six "9/12", and 13 "Patriot" cases languished on the Advocacy Case List, nearly 18 months passed before a single "Progress" or "Progressive" case was added to the list.

Notes taken during a July 28, 2010 screening workshop held in the IRS EO Determinations unit in Cincinnati further underscore the distinction between the Tea Party cases and Progressive cases.<sup>1138</sup> The workshop notes explicitly state Elizabeth Hofacre's role as the senior IRS revenue agent assigned the title Tea Party Coordinator/Reviewer, was only to process Tea Party groups. The notes even go so far as to explicitly exclude progressive groups from her jurisdiction.<sup>1139</sup>

**Current/Political Activities: Gary Muthert**

- Discussion focused on the political activities of Tea Parties and the like—regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - Emerge,
  - Progressive
  - We The People,
  - Rally Patriots, and
  - Pink-Slip Program.
- Elizabeth Hofacre **Tea Party Coordinator/Reviewer**
  - Re-emphasize that applications with Key Names and/or Subjects should be transferred to 7822 for Secondary Screening. Activities must be primary.
  - **"Progressive" applications are not considered "Tea Parties"**

1140

The Subcommittee has identified *no* evidence to suggest the treatment and handling of Progressive cases was the same as the Tea Party cases. Unlike Tea Party cases, Progressive cases were not identified by name in the "Emerging Issue" criteria used by revenue agents nor were they likely to have appeared on the Advocacy Case List until July 2011. Finally, every single one of the mere seven cases with Progress or Progressive in their name was approved.<sup>1141</sup>

<sup>1138</sup> IRSR0000168721-3.

<sup>1139</sup> IRSR0000168722 ("Progressive" applications are not considered "Tea Parties").

<sup>1140</sup> IRSR0000168722 (emphasis added by Subcommittee Minority).

<sup>1141</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, (Sept. 18, 2013) <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126> ("One hundred percent of the groups with 'Progressive' in their name were approved"); Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 34. (April 7, 2014).

## (2) ACORN Successors

The BOLO spreadsheet also contained an entry referencing “ACORN successors” that appeared on the “Watch List” tab.<sup>1142</sup> The listing has been partially redacted by the IRS for 26 U.S.C. § 6103 protection, but it states “ACORN Successors: Following the breakup of ACORN [Redacted Information].”<sup>1143</sup>

Unlike Tea Party groups, ACORN successor organizations were properly on the BOLO Spreadsheet because ACORN itself had been involved in a number of fraudulent transactions assisting tax evasion.<sup>1144</sup> After a series of scandals, which led to Congress revoking its funding of the organization, the national ACORN organization disbanded.<sup>1145</sup> The ACORN groups were thus not flagged simply for their political activities, but also because of a specific association to a group known to have legal problems.<sup>1146</sup> That rationale bears no relation to the Tea Party cases, which appear to have been singled out and targeted based solely on their name or political beliefs.

Based on the information available to the Subcommittee during its review, the IRS’s concern about potential ACORN successors never materialized.<sup>1147</sup> Documents show that of the initial four cases identified, the applications possibly came from only two groups applying for both 501(c)(3) and (c)(4) status.<sup>1148</sup> This further indicates the focus of IRS agents was on whether new entities would attempt to succeed ACORN after the national organization disbanded and not the organization’s name or policy positions.

## (3) “Occupy” Groups

A third group, “Occupy”, was only listed on the BOLO spreadsheet late in the processing of the Tea Party and Advocacy cases and related to the Occupy Wall Street movement.<sup>1149</sup> “Occupy” was listed on the “Watch List” tab of the BOLO spreadsheet beginning on February 8, 2012.<sup>1150</sup> IRS agents listed Occupy because media reports suggested this possible national

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<sup>1142</sup> IRS0000002513.

<sup>1143</sup> IRS0000002513.

<sup>1144</sup> Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (Feb. 22, 2010)

<http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223>; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (Feb. 23, 2010).

<sup>1145</sup> Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (Feb. 22, 2010)

<http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223>; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (Feb. 23, 2010); Sarah Wheaton, Acorn Sues Over Video as I.R.S. Severs Ties, New York Times (Sept. 23, 2009) [http://www.nytimes.com/2009/09/24/us/politics/24acorn.html?\\_r=0](http://www.nytimes.com/2009/09/24/us/politics/24acorn.html?_r=0) (ACORN “has faced a deluge of criticism after a series of videos from hidden cameras caught staff members giving advice about **tax evasion**, human smuggling and child prostitution”).

<sup>1146</sup> See Interview with Troy Paterson; Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 42.

<sup>1147</sup> The IRS revenue agents seemed more worried about the fact the applicants applying for 501(c)(3) status were the same as an applicant applying for 501(c)(4) status because they shared an address. See IRSR0000410433.

<sup>1148</sup> IRSR0000410433.

<sup>1149</sup> IRSR0000006710.

<sup>1150</sup> IRSR0000006710.

movement might lead to applications by groups from various cities.<sup>1151</sup> At no point between May 2010 and May 2012 did the “Occupy” cases make it onto the Advocacy Case List. There is also no evidence suggesting that these cases were subjected to the same level of severe scrutiny as the Tea Party cases.<sup>1152</sup>

The first Occupy case was received in 2012, two years after the targeting of Tea Party groups had begun. The Occupy listing on the Watch List tab read as follows:

“Occupy Organizations: Involve organizations occupying public space protesting in various cities, call people to assemble (people’s assemblies) claiming social injustices due to ‘big money’ influence, claim the democratic process is controlled by was street/banks/multinational corporations, could be linked globally. Claim to represent the 99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy.”<sup>1153</sup>

The Occupy listing is substantially different than the Tea Party listing for a number of reasons. First, Occupy was listed on the “Watch List” entry, which meant that it served as an advance notification in the event a possible application came in. The listing was not used by IRS employees to screen and select out applications from a known “emerging issue.”<sup>1154</sup> Also, unlike the then purely theoretical Occupy applications, the Tea Party cases were clearly already active. Although two Occupy groups eventually did apply for tax-exempt status, it was not until 2012; roughly two years after the Tea Party targeting began.<sup>1155</sup>

#### (4) Emerge

The final group cited by the Majority in support of the assertion that liberal groups were targeted by the IRS is “Emerge.”<sup>1156</sup> Emerge America is a national organization dedicated to the election of Democrat women with affiliate state-based organizations.<sup>1157</sup> The organization was explicitly a campaign organization for the private benefit of the Democratic Party.<sup>1158</sup> Emerge groups therefore clearly and blatantly did not qualify for tax-exempt status. As a result, all eight applications filed by Emerge affiliates were ultimately and properly denied tax-exempt status. Three of the eight Emerge cases were denied after review by EO Technical in Washington, D.C. because of their clear participation in political campaigns to benefit the Democratic Party.<sup>1159</sup>

<sup>1151</sup> Subcommittee Interview of Tom Seidell (March 19, 2014).

<sup>1152</sup> See Subcommittee Interviews with TIGTA employees.

<sup>1153</sup> IRSR0000006710.

<sup>1154</sup> IRSR000000669 (Watch List was for “World Events that Could Result in an Influx of Applications” (emphasis in original)).

<sup>1155</sup> See IRSR0000014173 – 174; IRSR0000014175 – 189.

<sup>1156</sup> Majority Report, at 82.

<sup>1157</sup> <http://www.emergeamerica.org/>.

<sup>1158</sup> IRSR0000012211-21, at 19 (“Based on the information you submitted with your application, you are not operated exclusively for the promotion of social welfare within the meaning of section 501(c)(4) of the Code because your activities primarily serve private interests.”); see also Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 32-33.

<sup>1159</sup> IRSR0000196739 – 758.

The other five cases were initially approved, but later had their tax-exempt status revoked by the IRS for the same reasons the other three groups were denied.<sup>1160</sup>

When the Emerge cases were received by the IRS, the cases were sent to the Washington office and IRS agents created a Sensitive Case Report (SCR) on the Emerge groups, similar to the SCR for Tea Party cases.<sup>1161</sup> That, however, is where the similarities end. Unlike the Tea Party groups, Emerge was never added to the BOLO Spreadsheet and it did not have a separate list in Cincinnati that held Emerge cases. On top of this, it was clear that all of the Emerge cases did not meet the requirement to primarily engage in the group's social welfare activity.

Any attempt to compare the severe scrutiny of conservative groups seeking tax-exempt status to these few liberal groups is untenable. Conservative groups were systematically targeted by the IRS, listed on a separate spreadsheet than the BOLO Spreadsheet, had their applications put on hold by IRS management, and asked obtrusive questions to a significantly greater degree.

### C. Disparate Impact on Conservative Groups

TIGTA's report on the IRS's processing of advocacy cases provides an illuminating look at the extent of the IRS's disparate impact on conservative groups. According to TIGTA's analysis, between May 2010 and May 2012, the IRS removed a total of 298 applications from normal processing and placed them on a special Advocacy Case List for additional scrutiny.<sup>1162</sup> Of the 298 groups, 72 had Tea Party in their name, 11 had 9/12 in their name and 13 had Patriots in their name.<sup>1163</sup> Thus, out of the 298 groups, 96 applications contained Tea Party, 9/12, or Patriot in their names and were placed on the Advocacy Case List as a result.<sup>1164</sup> Of the 298 cases, TIGTA auditors looked at the entire, hard-copy application file for 296 applications because 2 cases were incomplete and could not be reviewed.<sup>1165</sup>

Although Subcommittee does not have authority to view individual taxpayer data under 26 U.S.C. § 6103, the House Committee on Ways and Means does. It reviewed the 298 applications the IRS provided to TIGTA.<sup>1166</sup> According to the Committee's analysis, 83 percent – 248 of the 298 groups – were “right leaning.”<sup>1167</sup> In the same analysis, the Committee found that only 29 of the 298 groups, or 10 percent, were “left leaning.”<sup>1168</sup>

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<sup>1160</sup> IRSR0000468978 -980.

<sup>1161</sup> IRSR0000141809 – 811.

<sup>1162</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, [www.Waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126](http://www.Waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126)

<sup>1163</sup> TIGTA Report at 8.

<sup>1164</sup> TIGTA Report, at 8.

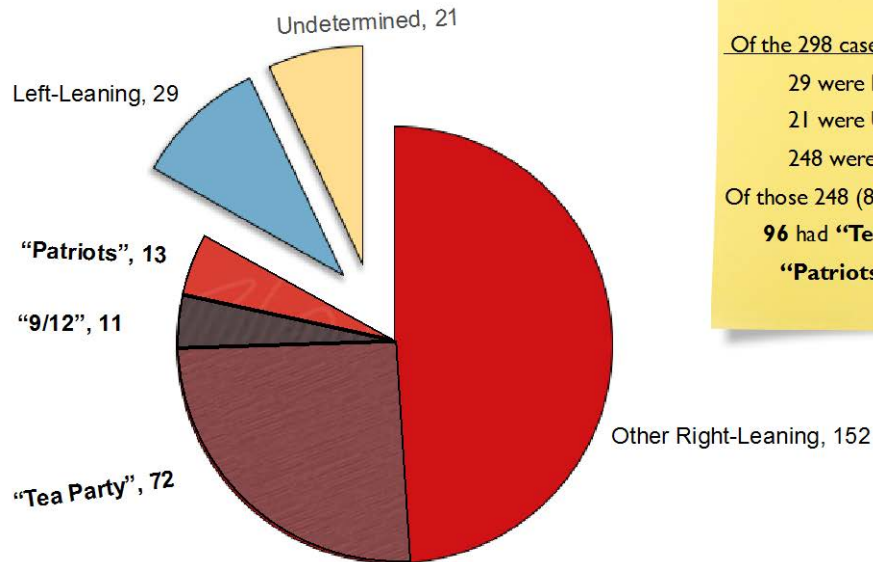
<sup>1165</sup> TIGTA Report, at 10.

<sup>1166</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

<sup>1167</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

<sup>1168</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

**Breakdown 298 of the Political Advocacy  
Cases**  
(May 2010 - May 2012)



Of the 298 cases the IRS held for review:

29 were Left-Leaning

21 were Undetermined

248 were Right-Leaning

Of those 248 (83%) Right-Leaning groups,

**96** had **"Tea Party"**, **"9/12"**, or  
**"Patriots"** in the their name

The full story becomes even clearer when the percentage of approvals is considered. The Committee on Ways and Means found that 45 percent, or 111 applications, of the 248 right-leaning groups were eventually approved.<sup>1169</sup> Liberal groups, on the other hand, enjoyed a 70 percent approval rate. Thus, of 29 left-leaning groups, 20 groups were approved while 9 groups withdrew their application or the application is still pending.<sup>1170</sup>

Additionally, according to TIGTA's audit, only six cases from the Advocacy Case List were approved in the span of two years.<sup>1171</sup> Amazingly, after TIGTA initiated its audit, 102 applications were approved from May to December 2012.<sup>1172</sup>

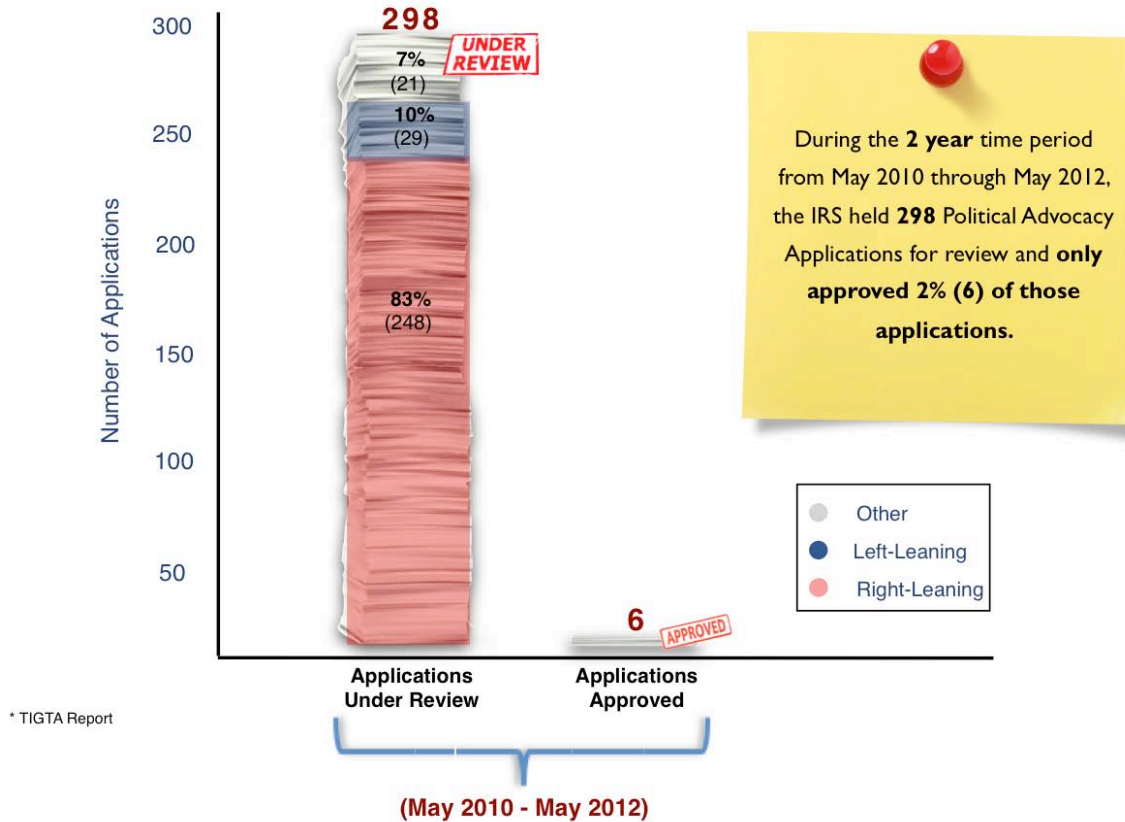
<sup>1169</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

<sup>1170</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

<sup>1171</sup> TIGTA Report at 14.

<sup>1172</sup> TIGTA Report at 14-15.

**# of Political Advocacy Applications  
Under Review/Approved by the IRS  
(from May 2010 - May 2012)**



Of these “hastily approved applications,” Ways and Means determined that many “were flagged for IRS surveillance by Washington, D.C.”<sup>1173</sup> As is consistent with the IRS’s treatment of conservative groups, “[o]f those flagged, more than eighty percent of the groups were right leaning.”<sup>1174</sup> Moreover, Ways and Means determined that of the organizations sent to the IRS Exempt Organizations Examinations unit, 94 percent were right-leaning. That 94 percent of flagged groups being found to be right-leaning is certainly telling, but Ways and Means’ other discovery demonstrates the disparate impact on conservative groups even further. The Committee found that “of the organizations referred for audit from this process, 100 percent were right leaning.”<sup>1175</sup>

<sup>1173</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>.

<sup>1174</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126> (“The IRS surveillance program, called the “Review of Operations,” is conducted by the EO Examinations unit in Dallas and involves the monitoring of a group’s activity. The consequence of being in the program is that surveillance can lead to an audit.”).

<sup>1175</sup> Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>.



As it reviewed each of the applications, TIGTA attempted to discern whether an application had “indications of significant political campaign intervention,” the qualifier the IRS identified as the reason a case would need additional scrutiny.<sup>1176</sup> TIGTA auditors determined that 91 applications, or 31%, of the 296 applications reviewed did not have “indications of significant political campaign intervention.”<sup>1177</sup> This means that the auditors could not find any activities in the case file that suggested the group would participate in campaign-related events that may have disqualified them from 501(c)(4) status.<sup>1178</sup>

During the course of the audit, TIGTA determined that a number of groups received intrusive questions by the IRS in the form of development letters.<sup>1179</sup> A development letter is drafted by the revenue agent processing the application to obtain additional information from the group prior to its approval or denial of tax-exempt status. According to the TIGTA report, 170 organizations in the Advocacy Case List received a development letter.<sup>1180</sup> Of those 170, TIGTA found that 98 organizations, or 58 percent, received burdensome and unnecessary questions.<sup>1181</sup>

One inappropriate question the IRS asked related to requesting an applicant’s list of donors. In all, 27 applicants received that request,<sup>1182</sup> of which TIGTA determined that “13 had Tea Party, Patriots, or 9/12 in their names.”<sup>1183</sup> Thus, 48% of organizations receiving inappropriate donor questions had been selected solely on the basis of having Tea Party, Patriot, or 9/12 in their name. The donor list questions are particularly disturbing because after a 501(c)(4) group is approved, it does not need to publicly disclose its donor list. The approved tax-exempt organization only needs to privately provide the IRS with this information in its tax returns and the IRS is obligated not to make this public. However, the IRS is required to make information that is part of an approved tax-exempt application publicly available.<sup>1184</sup> As result, if a group submits its donor list and the IRS relies on this information to grant 501(c) status, then that otherwise nonpublic donor list is required to be publicly released.<sup>1185</sup> Thus, the request for donor lists from these conservative groups could be used as an indirect means to force the release of the donor lists of these organizations to the public.

The IRS provided to the Subcommittee a document showing that all Tea Party applications submitted from February 2010 to June 2012, experienced delays in processing, were

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<sup>1176</sup> TIGTA Report, at 10.

<sup>1177</sup> TIGTA Report, at 10.

<sup>1178</sup> See Subcommittee Interview of Tom Seidell (March 19, 2014).

<sup>1179</sup> TIGTA Report, at 18.

<sup>1180</sup> TIGTA Report, at 18.

<sup>1181</sup> TIGTA Report, at 18.

<sup>1182</sup> TIGTA Report, at 18.

<sup>1183</sup> TIGTA Report, at 18, fn. 43.

<sup>1184</sup> <http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations>Returns-and-Applications:-Public-Disclosure-Requirements-in-General>. See also, <http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations>Returns-and-Applications:-Documents-Subject-to-Public-Disclosure> (describing the tax exempt application as including all supporting documents and any letter issued by the IRS.).

<sup>1185</sup> TIGTA Report, at 18. According to the IRS, the requirement to disclose all information used to approve a tax-exempt organization’s application has changed. The new, current position is that the IRS has discretion to withhold sensitive information such as donor lists or social security numbers.

placed on the special Advocacy Case List for further scrutiny, and forced to linger in limbo.<sup>1186</sup> By contrast, 24 applications with the word “Progressive” or “Progress” were filed with the IRS during the same time period, but only seven of those were added to the advocacy listing.<sup>1187</sup>

In September 2013, *USA Today* published the 2011 list of applications that IRS employees sent to advocacy specialists for additional scrutiny.<sup>1188</sup> The *USA Today* analysis determined that beginning in March 2010, the IRS failed to approve any organizations with “Tea Party” in their name for 27 months.<sup>1189</sup> Left-leaning groups, however, continued to gain tax-exempt status approvals during that time.<sup>1190</sup>

According to the Majority staff report’s analysis of the *USA Today* list, 11 of the 162 organizations listed are likely liberal groups.<sup>1191</sup> This fact is cited to suggest that liberal groups were also treated poorly by the IRS and thus no political bias could have occurred. However, even if 11 liberal groups were included on the list published by *USA Today*, it would still fail to show equal treatment by the IRS of conservative groups and liberal organizations. This is clearly shown by comparing the *USA Today* document to the tax news website, *Tax Analysts*, report of the 170 cases approved by the IRS between 2010 and 2013.<sup>1192</sup> This analysis showed that all of the liberal groups listed by the Majority were ultimately approved by the IRS for tax-exempt status. Further, that the number of “likely” liberal groups on the list represents just slightly more than 6% of the listed organizations only serves to further underline the disparate impact of the targeting on conservative groups.

In addition to using inappropriate criteria to identify Tea Party cases for increased review, the IRS also subjected these groups to invasive, unnecessary, and irrelevant questions. In fact, some groups preferred to remove their applications from consideration rather than comply with the burdensome requests for additional facts.<sup>1193</sup> As has been detailed in the *Ways and Means* analysis, 89 percent of the groups that were asked donor questions were “right leaning.”<sup>1194</sup> One particularly inappropriate and invasive set of questions was directed to a pro-life group.<sup>1195</sup> That group was asked to “please explain [if]...activities, including the prayer meetings held outside of Planned Parenthood, are considered educational,” as well as to explain the “activities at these prayer meetings” and to estimate the “percentage of time spent on prayer meetings as compared with other activities of the organization.”<sup>1196</sup>

<sup>1186</sup> PSI-IRS-37-000004-14.

<sup>1187</sup> PSI-IRS-37-000004-14. Based on interviews with TIGTA staff, the Subcommittee has determined that of the seven applications with Progressive or Progress in their name, four cases had the word “Progress” in the name and 3 cases had the word “Progressive in the name.”

<sup>1188</sup> <http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-document/2827925/>.

<sup>1189</sup> <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/>.

<sup>1190</sup> <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/>.

<sup>1191</sup> Majority Report, at 68.

<sup>1192</sup> See Martin A. Sullivan, News Analysis: Substantial Minority of Scrutinized Eos were Not Conservative, *Tax Analysts* (May 30, 2013).

<sup>1193</sup> <http://www.newsmax.com/Newsfront/irs-targeting-tea-party/2014/02/06/id/551274/>

<sup>1194</sup> <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126>

<sup>1195</sup> <https://news.yahoo.com/blogs/the-ticket/irs-conservative-group-2009-members-pray-193833144.html>

<sup>1196</sup> <https://news.yahoo.com/blogs/the-ticket/irs-conservative-group-2009-members-pray-193833144.html>



The treatment of Catherine Englebrecht, by multiple agencies in response to her founding a tax-exempt organization, represents a specific example of an individual being subjected to excess enforcement and targeting. According to a *Forbes* article, Ms. Engelbrecht has seen:

“[t]he organization [she founded] has been questioned by the FBI on numerous occasions; she has had her personal tax returns audited by the IRS; and has also had her small manufacturing business tax returns audited by the IRS. In addition, her business has been subjected to two unscheduled audits by the U.S. Bureau of Alcohol, and Tobacco and Firearms (BATF) and has undergone another unscheduled business audit by the Occupational Safety and Health Administration (OSHA).”<sup>1197</sup>

In another example of IRS overreach, Ms. Lerner, head of the Exempt Organizations division, took it upon herself to review referrals sent to the IRS by non-profit watchdog group, Democracy 21.<sup>1198</sup> These referrals urged the IRS to examine a conservative group’s 501(c)(4) status.<sup>1199</sup> After reviewing the Democracy 21 referral, she found that “the allegations in the documents [against the conservative group] were really damning, so [she] wondered why [the IRS] hadn’t done something with the org.”<sup>1200</sup>

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<sup>1197</sup> <http://www.forbes.com/sites/larrybell/2013/05/30/why-you-should-care-that-the-u-s-government-has-targeted-catherine-engelbrecht-and-her-organizations/>.

<sup>1198</sup> Democracy 21 is a nonprofit organization and its stated mission seeks to “eliminate the undue influence of big money in American politics, prevent government corruption, empower citizens in the political process and ensure the integrity and fairness of government decisions and elections.” See <http://www.democracy21.org/our-mission/>.

<sup>1199</sup> IRSR0000122549-51; see also Letter from Chairman Dave Camp to Attorney General Eric Holder, at 2-6 (April 9, 2014).

<sup>1200</sup> IRSR0000122549-51 (The IRS has the ability to take referrals from outside groups and process them through its Referral Committee to determine if an IRS examination of a 501(c)(4) group is necessary. In the instance described, an organization was looked at by the referral committee twice, but the committee twice voted unanimously to not recommend the group for examination.).

**From:** Lerner Lois G  
**Sent:** Friday, January 04, 2013 4:50 PM  
**To:** Downing Nanette M  
**Subject:** FW: Referral organization

I had a meeting today with an organization that was asking us to consider guidance on the c4 issue. To get ready for the meeting, I asked for every document that had sent in over the last

several years because I knew they had sent in several referrals. I reviewed the information last night and thought the allegations in the documents were really damning, so wondered why we hadn't done something with the org. The first complaint came in 2010 and there were additional ones in 2011 and 2012.

I asked Tom Miller whether he recalled seeing referral committee notes on the referrals when he and Judy went down to look at the referrals. He looked them up, and as you can see below, the referral committee unanimously non-selected the case twice. I don't know where we go with this--as I've told you before--I don't think your guys get it and the way they look at these cases is going to bite us some day.

[REDACTED] 6103  
 [REDACTED] 6103  
 [REDACTED] 6103  
 [REDACTED] 6103 Yet--twice we rejected the referrals for somewhat dubious reasons and never followed up once the 990s were filed.

1201

As the email shows, Lerner agreed with the Democracy 21 complaint and was agitated that the conservative group had not been denied or revoked 501(c)(4) status. An IRS referral committee specifically set up to decide on the need for referrals to the Examinations Unit of Exempt Organizations *unanimously* found, in two separate reviews, the allegations from Democracy 21 were not sufficient for referral.<sup>1202</sup> Nevertheless, despite acknowledging the committee's reviews, Lerner called for reexamination of the group in question. Lerner directly stepped in to seek additional scrutiny when the system designed to refer tax-exempt organizations for examination failed to reach the result she wanted. Ms. Lerner even went so far as to inform her senior advisor that "you should know that we are working on a denial of the application, which may solve the problem because we probably will say it isn't exempt."<sup>1203</sup> Ms. Lerner knew full well that a system was in place to handle referrals to the Examinations Unit. Instead of allowing the system to work, she made the decision to actively target a single group and push for additional scrutiny.<sup>1204</sup>

<sup>1201</sup> IRSR0000122549-51.

<sup>1202</sup> IRSR0000122550 ("...the referral committee unanimously non-selected the cases twice").

<sup>1203</sup> IRSR0000122550.

<sup>1204</sup> See Staff Report, Lois Lerner's Involvement in the IRS Targeting of Tax-Exempt Organizations, Committee on Oversight and Government Reform, page 10 (March 11, 2014) (Lerner's testimony was necessary to understand the rationale for and extent of the IRS's practice of targeting certain tax-exempt groups for heightened scrutiny. By then, it was well known that Lerner had extensive knowledge of the scheme to target conservative groups.).

National Public Radio (NPR), on July 30, 2014, published a House Committee on Ways and Means study detailing the disparity in the number of questions posed to conservative applicants for tax exempt status versus the number posed to progressive organizations.<sup>1205</sup> What the House Committee found perfectly highlights the disparate impact that the IRS targeting had on conservative organizations. The analysis determined conservative groups were asked 1552 questions, an average of 14.9 questions per group. Meanwhile, the 7 progressive groups were asked a mere 33 questions in total or 4.7 per group.<sup>1206</sup> This means that conservative groups were asked on average more than 3 times the number of questions posed to progressive organizations. This tremendous discrepancy in the number of question posed to conservative and progressive groups emphasizes the difference in treatment that liberal and conservative groups' received at the hands of the IRS.

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<sup>1205</sup> <http://www.npr.org/blogs/itsallpolitics/2013/07/30/207080580/report-irs-scrutiny-worse-for-conservatives>; *see also* <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=344485>.

<sup>1206</sup> *Id.*

### III. TIGTA AUDIT

#### A. Scope of the Audit

The Subcommittee Majority staff report raises concern that the scope of the TIGTA audit was inadequate. The Majority report asserts that the audit should have been broadened to include additional information, especially information related to the purported targeting of liberal groups.<sup>1207</sup> Based on its review, the Subcommittee Minority finds that the scope of the audit adequately covered the relevant material and the TIGTA findings are valid. The IRS raised no objection to the underlying scope of the audit,<sup>1208</sup> including accepting seven of the nine recommendations TIGTA made.<sup>1209</sup> Additionally, the audit followed standard auditing principles<sup>1210</sup> and all members of the TIGTA audit team have stood by the accuracy of its findings.<sup>1211</sup>

TIGTA initiated the IRS targeting audit for three reasons: (1) concerns articulated by members of Congress and the House Committee on Oversight and Government Reform (OGR);<sup>1212</sup> (2) media reports alleging unfair treatment of certain organizations applying for tax-exempt status;<sup>1213</sup> and (3) receipt of a letter from the Landmark Legal Foundation requesting an investigation to determine whether IRS employees acted inappropriately in their assessment of applications applying for tax-exempt status.<sup>1214</sup>

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<sup>1207</sup>Majority Report, at 185 (“By excluding information about how the IRS handled 501(c)(4) applications filed by liberal groups, the TIGTA audit report presented a distorted analysis of how the IRS processed 501(c)(4) applications.”).

<sup>1208</sup>The IRS reviewed three drafts of the TIGTA report and never once raised the issue of scope. Additionally, the Subcommittee interviewed multiple witnesses from both the IRS and TIGTA and they all stated they did not have a problem with the audit’s scope. *See Subcommittee interview of Troy Paterson (March 21, 2014), Subcommittee interview of Gregory Kutz (March 26, 2014).*

<sup>1209</sup>TIGTA Report, Highlights page; Note: In May 2013, President Obama directed Treasury Secretary Lew to make sure the IRS carried out all of TIGTA’s recommendations. *See* <http://www.whitehouse.gov/the-press-office/2013/05/14/statement-president>.

<sup>1210</sup>Government auditing standards “require that [TIGTA] plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on [their] audit objective.” *See* TIGTA Report, at 4.

<sup>1211</sup>Subcommittee Interview of Troy Paterson (March 21, 2014); Subcommittee Interview of Thomas Seidell (March 19, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1212</sup>PSI-TIGTA-03-001404: Letter from House Committee on Oversight and Government Reform to J. Russell George, Treasury Inspector General for Tax Administration (June 28, 2012) (“On March 8, 2012, Committee staff and [TIGTA] staff discussed potential problems with IRS’s recent effort to increase scrutiny of organizations operating under 501(c)(4) status. We understand that...TIGTA is conducting ongoing work to better understand this IRS initiative. We would greatly appreciate if you provided Committee staff periodic updates and a copy of TIGTA’s final report on this matter.”).

<sup>1213</sup>Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (May 22, 2013), and The House Appropriations Subcommittee on Financial Services and General Government (June 3, 2013), at 3; TIGTA Report, at 3; *See e.g.* Pat Holmes, *Agency Questions Tea Party group calls IRS intrusive*, THE COLUMBUS DISPATCH (Feb. 16, 2012) <http://www.dispatch.com/content/stories/local/2012/02/16/tea-party-group-calls-irs-intrusive.html>.

<sup>1214</sup>Letter from Landmark Legal Foundation to TIGTA, (March 23, 2012) <http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf> (The Landmark letter

The scope of the audit focused on the internal controls the IRS used to review applications from organizations “potentially involved in political campaign intervention.”<sup>1215</sup> With this focus in mind, the auditors requested all information from the IRS relating to the matter.<sup>1216</sup> J. Russell George, Inspector General for TIGTA, stated in his testimony to multiple Congressional Committees, “[w]e focused our efforts on reviewing the processing of applications for tax exempt status and determining whether allegations made against the IRS were founded.”<sup>1217</sup> TIGTA did not, as it has been suggested, look only at how “Tea Party” cases were treated.<sup>1218</sup> In actuality, TIGTA looked at the entire group of cases the IRS selected for special review from the Emerging Issues tab and put on the Advocacy Case List.

The audit specifically focused on the IRS’s own criteria, which it directed TIGTA to use, that singled out “Tea Party,” “9/12,” and “Patriot” groups for special scrutiny.<sup>1219</sup> TIGTA reviewed both open<sup>1220</sup> and closed<sup>1221</sup> cases from the period of May 2010 through May 2012. TIGTA did so because this was the time period in which the IRS developed and implemented the “inappropriate criteria,” which “focused narrowly on the names and policy position of organizations.”<sup>1222</sup> The criteria were modified from July 2011 to January 2012 and again in May 2012 to look at an organization’s political activities and not their names or policy positions.<sup>1223</sup>

While the Subcommittee Majority staff report criticized TIGTA for only evaluating the “Emerging Issues” tab on the BOLO spreadsheet and not the other tabs such as “Watch List” or “TAG Historical,”<sup>1224</sup> the Subcommittee Minority has found that TIGTA’s actions were appropriate. Auditors reviewed the “Emerging Issues” tab on the BOLO spreadsheet because the IRS stated this was the only tab used to identify potential political cases for additional scrutiny.<sup>1225</sup> The Subcommittee Majority staff report points to an email from Lois Lerner to

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also requested TIGTA look into whether IRS employees acted at the command of “politically motivated superiors.”).

<sup>1215</sup> TIGTA Report, at 22.

<sup>1216</sup> Subcommittee Interview of Thomas Seidell (March 19, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1217</sup> Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (May 22, 2013), and The House Committee on Appropriations Subcommittee on Financial Services and General Government (June 3, 2013), at 3.

<sup>1218</sup> Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin (June 26, 2013).

<sup>1219</sup> Subcommittee Interview of J. Russell George (April 22, 2014); Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1220</sup> “Open cases” refer to cases in which their tax exempt status had not yet been determined.

<sup>1221</sup> “Closed cases” refer to cases in which their tax exempt status had been determined.

<sup>1222</sup> TIGTA Report, at 6-7 & 22; Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (May 22, 2013), and The House Committee on Appropriations Subcommittee on Financial Services and General Government (June 3, 2013), at 4-5.

<sup>1223</sup> TIGTA Report, at 6-7 & 22; Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (May 22, 2013), and The House Committee on Appropriations Subcommittee on Financial Services and General Government (June 3, 2013), at 4-5. In January 2012, the criteria was altered to again focus on organizations policy positions and remained in place until May 2012. *See* TIGTA Report, at 7.

<sup>1224</sup> Majority Report, at 185.

<sup>1225</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of Mike McCarthy (April 30, 2014).

TIGTA officials, asserting that “the IRS again brought its treatment of liberal groups to the attention of senior TIGTA personnel.”<sup>1226</sup> The email, however, shows that Ms. Lerner did not feel that there is any political motivation and shows her misunderstanding of the purpose of the audit. In addition, the Majority conflates being on the BOLO list with being selected for additional scrutiny.<sup>1227</sup> The BOLO list itself does not signal any additional attention paid to a particular group.

The Lerner email referenced also shows that Lois Lerner *believed* TIGTA’s audit related to the question whether the IRS was politically motivated, and that was her focus. TIGTA auditors attempted to persuade her that the audit was about whether certain groups were *targeted* by the IRS. Ms. Lerner ignored this and instilled her own view of the audit’s purpose into the conversation when the auditors explicitly stated they were not attempting to determine if groups were liberal or conservative.

The Subcommittee Majority staff report indicates that the TIGTA audit was done solely at the behest of the House Oversight and Government Reform Committee to look into whether the IRS was specifically targeting “Tea Party” groups.<sup>1228</sup> That allegation is unfounded. Staffers from OGR met in early 2012 with TIGTA to discuss concerns raised by constituent “Tea Party” groups.<sup>1229</sup> Around the same time, the media aired multiple reports regarding the same issue.<sup>1230</sup> TIGTA then completed its standard preliminary review to determine the need for an audit and concluded it would begin a full audit into the IRS’s handling of political cases.<sup>1231</sup> During

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<sup>1226</sup> Majority Report, at 162 (quoting Lerner’s email “I told them my understanding is that the audit was to determine whether the IRS was acting in a politically motivated manner – not whether the earlier articulation of the criteria looked bad. However, that doesn’t seem to be the focus. They have said they aren’t looking at whether the organizations are conservative or liberal because that is too difficult to figure out. They have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases. So, I’m not sure how they are looking at whether we were politically motivated, or what they are looking for with regard to targeting. They didn’t seem to understand the difference between IRS acting in a politically motivated manner and front line staff people using less than stellar judgment.”).

<sup>1227</sup> Majority Report, at 185-186.

<sup>1228</sup> Majority Report, at 5 (“TIGTA’s Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform.”).

<sup>1229</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of J. Russell George (April 22, 2014).

<sup>1230</sup> Republican Senators expressed concern that the IRS targeted conservative groups. *See* Christopher Santarelli, *GOP Senators Call on IRS to Explain Tea Party Bullying*, THE BLAZE (March 14, 2012) <http://www.theblaze.com/stories/2012/03/14/gop-senators-call-on-irs-to-explain-tea-party-treatment/>; Mike Zapler, *GOP senators to IRS: Don’t pick on Tea Party groups*, POLITICO (March 14, 2012) <http://www.politico.com/blogs/on-congress/2012/03/gop-senators-to-irs-dont-pick-on-tea-party-groups-117460.html>. Tea party and other conservative groups claim the IRS is preventing them from gaining tax-exempt status. *See* Alan Fram, *IRS Battling Tea Party Groups Over Tax-Exempt Status*, THE HUFFINGTON POST (March 1, 2012) [http://www.huffingtonpost.com/2012/03/01/irs-tea-party-tax-exempt\\_n\\_1314488.html](http://www.huffingtonpost.com/2012/03/01/irs-tea-party-tax-exempt_n_1314488.html); Perry Chiaramonte, *Numerous Tea Party chapters claim IRS attempts to sabotage nonprofit status*, FOX NEWS (Feb. 28, 2012) <http://www.foxnews.com/politics/2012/02/28/numerous-tea-party-chapters-claim-irs-attempting-to-sabotage-non-profit-status/>. IRS sends Tea Party groups extensive questionnaires. *See* Janie Lorber, *IRS Oversight Reignites Tea Party Ire*, ROLL CALL (March 8, 2012) [http://www.rollcall.com/issues/57\\_106/IRS-Oversight-Reignites-Tea-Party-Ire-212969-1.html](http://www.rollcall.com/issues/57_106/IRS-Oversight-Reignites-Tea-Party-Ire-212969-1.html); David Martosko, *Congressional investigations sought over IRS ‘assault’ on Tea Party groups*, THE DAILY CALLER (Feb. 22, 2012) <http://dailycaller.com/2012/02/22/congressional-investigations-sought-over-irs-assault-on-tea-party-groups/>.

<sup>1231</sup> Subcommittee Interview of Timothy Camus (April 7, 2014).

interviews with Subcommittee staff, every TIGTA employee stated that at no time was the audit done for, or at the directive of, OGR Chairman Issa, nor did he or his staff influence the audit process. During his interview, the Audit Director, Troy Paterson consistently rejected the idea that TIGTA's audit narrowly focused on processing of Tea Party groups.<sup>1232</sup> Instead, Mr. Paterson stated that TIGTA's audit looked at the full history of the Tea Party/Advocacy Organization case listing.<sup>1233</sup> At no point during the audit process did TIGTA brief any congressional members or staffers as to the progress of the audit, including those staffers with the Oversight Committee.<sup>1234</sup>

Multiple TIGTA officials confirmed the audit was completed and only released earlier than planned due to Lois Lerner's statement and apology at an American Bar Association conference on May 10, 2013.<sup>1235</sup> It was *not* due to pressure from OGR and Congressional Representatives.<sup>1236</sup> TIGTA has verified that the audit was complete and the report in the final editing stages for release in the next week or two.<sup>1237</sup> Moreover, prior to the report's release, TIGTA gave the IRS three opportunities to comment on the draft report to ensure its accuracy.<sup>1238</sup>

Careful analysis of the TIGTA report proves that it properly found that the IRS's internal controls for processing political applications caused systematic delays and burdensome questioning of groups. The TIGTA audit was pursued based on standard procedures and completed at the time of its release.

## **B. Office of Investigations Email Review**

One primary contention in the Subcommittee Majority report is that TIGTA's Deputy Inspector General for Investigations Timothy Camus's findings and analysis from a limited email review should have been included in the audit report.<sup>1239</sup> The Majority report erroneously believes that including this information would have definitively shown no explicit directive existed and no political bias was present. TIGTA's Assistant Inspector General for Audit

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<sup>1232</sup> Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1233</sup> Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1234</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1235</sup> Subcommittee Interview of Troy Paterson (March 21, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1236</sup> Subcommittee Interview of Troy Paterson (March 21, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1237</sup> Subcommittee Interview of Thomas Seidell (March 19, 2014); Subcommittee Interview of Troy Paterson (March 21, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1238</sup> Subcommittee Interview of Thomas Seidell (March 19, 2014); Subcommittee Interview of Troy Paterson (March 21, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1239</sup> See Majority Report at 158 ("it is difficult to understand why [the Office of Investigations review] was excluded from the report."). It has been suggested that Mr. Camus's statements are definitively conclusive that there was no political motivation in the selection of applications. The Subcommittee Minority cannot conclude the same as this was a very narrow review of a very few email accounts. Moreover, the Subcommittee Minority believes that if there were a political directive, it is unlikely that it would have been put in an email.



Gregory Kutz and Mr. Camus, however, both agreed that the email search only confirmed the findings in the report and did not add anything new.<sup>1240</sup>

During the audit of the IRS's controls and procedures for processing 501(c)(4) applications, TIGTA's Office of Investigations (OI) played a very minor role. In spite of this, the Subcommittee Majority relies heavily on the Office of Investigation's supposed email search findings. Mr. Kutz stated in an interview with the Subcommittee that at some point during the audit process, an IRS employee told the auditors about an email that could be a "smoking gun" directive to target specific political organizations.<sup>1241</sup> Since the TIGTA auditors had previously requested all relevant emails from IRS employees and could not locate this particular email in the produced documents, Mr. Kutz was concerned his team was not receiving all relevant emails.<sup>1242</sup>

In an attempt to locate the possible "smoking gun" email, Mr. Kutz requested that Mr. Camus use OI's technical capabilities to perform a keyword search of relevant employee emails in order to locate this email.<sup>1243</sup> The request for assistance from the investigative division was necessary because auditors do not have the ability to retrieve emails not voluntarily provided to them by the IRS.<sup>1244</sup> After discussions between Inspector General George, Mr. Camus, and Mr. Kutz, OI pulled the emails from the actual IRS servers for five IRS employees and ran a keyword search to narrow the total number of documents and emails. The review pulled 2,277 emails or documents that had a keyword "hit". These pulled emails were then reviewed by a member of Mr. Camus's team.<sup>1245</sup> No email containing an explicit directive was found.<sup>1246</sup> After the review was completed, Mr. Camus detailed his findings and provided an analysis on the content of the emails.<sup>1247</sup> As mentioned above, Mr. Camus believed the email search results did not add anything new to the TIGTA report and did not require inclusion in the report.

One additional point of concern was the removal of a footnote in the draft report that referenced the referral to OI by the audit team.<sup>1248</sup> According to witness testimony, the footnote was removed at the request of Mr. Camus.<sup>1249</sup> He sought removal because this was not an official investigation request and, typically, it is inappropriate to disclose law enforcement practices.<sup>1250</sup> Overall, the email search that was conducted was a limited search of only four

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<sup>1240</sup> Subcommittee Interview of Timothy Camus (April 7, 2014); Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1241</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014).

<sup>1242</sup> PSI-IRS-37-000002-3.

<sup>1243</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of Timothy Camus (April 7, 2014); Subcommittee Interview of J. Russell George (April 22, 2014).

<sup>1244</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of Timothy Camus (April 7, 2014); Subcommittee Interview of J. Russell George (April 22, 2014).

<sup>1245</sup> PSI-TIGTA-04-000015 (TIGTA Office of Investigations Email Review results).

<sup>1246</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of Timothy Camus (April 7, 2014); Subcommittee Interview of J. Russell George (April 22, 2014).

<sup>1247</sup> PSI-IRS-37-000001.

<sup>1248</sup> IRSR0000014719-69 (Draft TIGTA Report, at 6 n. 15).

<sup>1249</sup> Subcommittee Interview of Timothy Camus (April 7, 2014).

<sup>1250</sup> Subcommittee Interview of Gregory Kutz (March 26, 2014); Subcommittee Interview of Timothy Camus (April 7, 2014); Subcommittee Interview of J. Russell George (April 22, 2014); Subcommittee Interview of Mike McCarthy (April 30, 2014).



keywords and five IRS employee email accounts, none of which were employees in Washington, D.C.<sup>1251</sup> According to former TIGTA chief counsel, Michael McCarthy, the OI email search was not a “definitive statement,” but instead was a very limited review to locate a purported document.<sup>1252</sup> This limited search, combined with recent news of the loss of Lois Lerner emails from 2009 to 2011 and the loss of six other IRS employee hard drives, further underscores the inability to conclude no political bias was involved in the IRS’s targeting of conservative groups.<sup>1253</sup>

### C. Advocacy Case List

According to the Majority Report, “TIGTA failed to analyze IRS treatment of any non-conservative cases.”<sup>1254</sup> This assertion is misleading for a number of reasons. During the audit, TIGTA requested the IRS provide all applications for 501(c)(4) tax-exempt status that the IRS sent off for additional scrutiny for the period in which the improper criteria were in place. In response, the IRS provided TIGTA the list of all “potential political cases” selected for heightened scrutiny from the period of May 2010 to May 2012.<sup>1255</sup> The 298 cases contained in the list, although referred to as “Advocacy Cases” by the time of the audit, had been referred to as “Tea Party Cases” until July 2011.<sup>1256</sup> Of these 298 cases, 72 included “Tea Party” in their name, 11 included “9/12” in their name, and 13 included “Patriots” in their name. The remaining 202 applications were listed as “other” and two applications were incomplete.<sup>1257</sup> The criteria that caused an application to be routed to an IRS specialists group for processing these applications related only to the “Emerging Issues” tab on the BOLO spreadsheet.<sup>1258</sup> Cases identified as using these criteria then went on to receive a heightened review by a team of specialists to determine whether or not the organization was engaged in “significant political campaign intervention.”<sup>1259</sup>

TIGTA first reviewed the hard copy application for every case listed in the Advocacy Case List, a total of 298 applications. TIGTA categorized the 298 applications based on the exact same criteria used by the IRS.<sup>1260</sup> The IRS specifically stated that it looked for the names

<sup>1251</sup> The OI email review searched the email account of five IRS employees located in the Exempt Organizations Determinations Unit in Cincinnati. The search looked for the keywords: “Tea,” “Patriots,” “9/12,” and “(c)(4).” The email review searched a total 16,691 emails, resulting in 5,617 total “hits” found in 2,277 emails/documents. Jim Jackson reviewed the 2,277 emails to look for a directive to target conservative groups. *See* OI Email Review results PSI-TIGTA-04-000015.

<sup>1252</sup> Subcommittee Interview of Mike McCarthy (April 30, 2014).

<sup>1253</sup> The OI email review searched the email account of five IRS employees located in the Exempt Organizations Determinations Unit in Cincinnati. The search looked for the keywords: “Tea,” “Patriots,” “9/12,” and “(c)(4).” The email review searched a total 16,691 emails, resulting in 5,617 total “hits” found in 2,277 emails/documents. Jim Jackson reviewed the 2,277 emails to look for a directive to target conservative groups. *See* OI Email Review results PSI-TIGTA-04-000015; *See e.g.* Stephanie Condon, IRS Official Says Lois Lerner’s Missing Emails May not be Lost, CBS NEWS (July 22, 2014) <http://www.cbsnews.com/news/irs-official-says-lois-lerners-missing-emails-may-not-be-lost/>

<sup>1254</sup> Majority Report, at 146.

<sup>1255</sup> TIGTA Report, at 10.

<sup>1256</sup> TIGTA Report, at 5 n.13.

<sup>1257</sup> TIGTA Report, at 8.

<sup>1258</sup> TIGTA Report, at 6; Subcommittee Interview of Thomas Seidell (March 19, 2014).

<sup>1259</sup> TIGTA Report, at 5.

<sup>1260</sup> Subcommittee Interviews of TIGTA employees.

“Tea Party,” “9/12,” and “Patriots” to determine whether or not a case was “potentially political.”<sup>1261</sup> The IRS did not explicitly use any other names to select applications for additional scrutiny.<sup>1262</sup> The IRS also used criteria related to an applicant’s policy positions, including: “issues include government spending, government debt or taxes” and “statement in the case file criticize how the country is being run.”<sup>1263</sup> After categorizing the cases using the specific names, TIGTA placed the remaining cases in the “other” category.<sup>1264</sup>

TIGTA did not identify, by name, the 202 “other” cases in the report for good reason.<sup>1265</sup> First, given the IRS criteria, TIGTA would have had to subjectively decide how to potentially list the 202 different names. It opted instead to objectively use only the IRS’s own criteria. Second, 26 U.S.C. § 6103 prevents TIGTA from releasing individual taxpayer information. Thus any group with a name that, if released would violate 6103 protections, TIGTA would have had to redact or withhold.<sup>1266</sup> Third, it was too difficult to break the groups out by policy positions. During interviews with the Subcommittee, TIGTA auditors explained that the IRS revenue agents often failed to indicate why an application was forwarded to the Advocacy Case List.<sup>1267</sup> This made it difficult for TIGTA to objectively provide a further breakdown of the remaining 202 other applications.

The Subcommittee Majority staff report argues that TIGTA did not have the resources to complete a review of all 298 cases.<sup>1268</sup> That conclusion is inconsistent with the available facts. TIGTA was able to and did in fact review all 298 applications that were found on the Advocacy Case List. On top of reviewing the 298 cases, TIGTA reviewed an additional 331 cases to determine if the IRS failed to identify cases for additional review.<sup>1269</sup> Again, TIGTA reviewed the entire application for each of the 298 cases and discussed these cases with the IRS.

#### **D. Conclusion of TIGTA Section: Audit Was Accurate and Proper**

TIGTA’s audit was a focused review of whether “the IRS targeted specific groups applying for tax-exempt status, delayed the processing of targeted groups’ applications, and requested unnecessary information from targeted groups.”<sup>1270</sup> TIGTA’s auditors looked at the IRS’s processing of potential political cases to determine if IRS personnel improperly forwarded cases for review. The auditors found that the IRS used inappropriate criteria to select certain

<sup>1261</sup> Subcommittee Interviews of TIGTA employees.

<sup>1262</sup> Subcommittee Interviews of TIGTA employees.

<sup>1263</sup> TIGTA Report, at 6, figure 3. *See also*, IRSR0000002737 (Lerner Briefing Document (June 2011)).

<sup>1264</sup> Subcommittee Interviews of TIGTA employees.

<sup>1265</sup> *See* TIGTA Report, at 8.

<sup>1266</sup> *A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny: Hearing before the S. Comm. on Finance*, 113<sup>th</sup> Cong. 26-27 (2013) (statement of J. Russell George, Treasury Inspector General for Tax Administration and statement of Steven Miller, Acting Commissioner, Internal Revenue Service); Subcommittee Interview of Troy Paterson (March 21, 2014).

<sup>1267</sup> Subcommittee Interviews of TIGTA employees.

<sup>1268</sup> Majority Report, at 143 (The Subcommittee Majority staff report states that “Mr. Paterson told the Subcommittee that TIGTA concentrated on the cases that were flagged using what looked to be inappropriate selection criteria, and didn’t have the resources to analyze the other 200 cases.”).

<sup>1269</sup> *See* TIGTA Report at 9, 22-23 (The auditors created two statistical samples to review open or closed 501(c)(4) applications from the general inventory of cases the IRS received).

<sup>1270</sup> TIGTA Report, Highlights page.

groups by using a group's name or policy position. In doing so, the IRS improperly forwarded their applications for review. Simply stated, the IRS treated these conservative and Tea Party groups differently from other non-conservative groups.

The Subcommittee Majority draws a false equivalency. The Majority report alleges that had TIGTA looked into the IRS's treatment of liberal groups, TIGTA would have found that liberal groups were treated the same or similarly as conservative groups. The evidence, however, points to the contrary.<sup>1271</sup> Only conservative groups were inappropriately selected for additional scrutiny solely by their name or policy positions. A selection that often occurred irrespective of the activities listed in the group's application. Finally, the ratio of conservative groups to liberal groups selected for scrutiny, plus the absence of complaints by liberal groups to TIGTA and elected officials, demonstrates that these groups were not targeted *en masse* or treated unfairly.<sup>1272</sup>

Overall, Subcommittee staff interviewed eight people from TIGTA regarding the audit and reviewed 20,000 pages of documents produced by TIGTA. It is clear that the TIGTA audit was unbiased, proper and, most importantly, accurate. The audit in this case has withstood all of the criticisms to remain an accurate depiction of the faulty processes used by the IRS.

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<sup>1271</sup> See e.g., Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin (June 26, 2013) at 2-3 ("Progressive" was found in TAG Historical section of BOLO and no evidence was found that this section was used as selection criteria between May 2010 and May 2012).

<sup>1272</sup> Subcommittee Interview of J. Russell George (April 22, 2014); Subcommittee Interview of Troy Paterson (March 21, 2014).

## **V. CONCLUSION OF SUBCOMMITTEE MINORITY STAFF REPORT**

Based on the facts identified in the Subcommittee's investigation, the IRS used inappropriate criteria to target specific conservative groups for increased scrutiny and delay. While the Majority report attempts to draw similarities between the IRS's treatment of liberal and conservative groups, the vast distinctions in treatment prove that conservative groups received the bulk of unfair and burdensome treatment. The IRS failed to use its own "facts and circumstances" test, leading IRS employees to focus on a group's name or policy positions instead of the group's potential political activities. This significant bias created a disparate impact on conservative groups. As shown above, the numbers and analysis by TIGTA and others clearly demonstrate that TIGTA's conclusions were proper and the objections raised by numerous conservative groups valid. TIGTA's audit provided a prudent statistical analysis of the inappropriate treatment of conservative groups by the IRS.

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