Questions from Senator Grassley:

Question 1:

As I mentioned at your hearing, I appreciate kind words you have given concerning the IRS whistleblower program and look forward to hearing back from you related to the issues I lay out below.

First, the payments to whistleblowers have slowed to a trickle at best. This is whistleblowers waiting for payment where dollars have been collected and the holdup is with the IRS processing and checking the boxes for a payment. Often it is the whistleblower office waiting for someone in the field, or in senior management to move paper. I ask that that your office review all whistleblower cases pending payment and bring the Drano to unclog the holdup.

Second, I again find myself frustrated with an IRS Chief Counsel office that seems to wake up every day seeking ways to undermine the whistleblower program both in the courts and the awards. I am especially concerned that chief counsel is throwing every argument it can think of against whistleblowers in tax court. It appears at times that the Chief Counsel's office thinks its job is to come up with hyper technical arguments and seek to deny awards to whistleblowers who have risked their lives to uncover big time tax cheats. I ask that your office and the director of the whistleblower office review the chief counsel's wasteful and

harmful litigation positions that undermine the whistleblower program and go directly against your support for the whistleblower program.
Third, with tight budgets at the IRS it is all the more imperative that the IRS works with whistleblowers and their counsels on cases. The IRS criminal investigators have had great success using whistleblowers to go after banks and terrorist organizations, but the IRS civil division still hasn't gotten the message of working with whistleblowers. I note that the IRS hasn't been shy about paying outside law firms big money to help it in big examinations, yet ignores the possibility of harnessing whistleblowers and their lawyers who won't cost the IRS a dime from its budget.
Commissioner, I appreciate your willingness to provide detailed written response addressing these three points.
I have discussed with the Director of the Whistleblower Office the pace of award payments under section 7623, and have verified that he has made timely processing of claims for which an award is payable a top priority. Awards cannot be paid until the relevant taxpayer audit or investigation is completed (including any appeals), proceeds are collected, and the statute of limitations for filing a refund claim has expired. When those preconditions are met, the Whistleblower Office moves as quickly as possible to notify the whistleblower of a proposed award, obtain comments on the proposal, and make an award decision. To date, the Whistleblower Office has paid 12 awards under section 7623(b). The Director estimates that six to twelve additional 7623(b) awards will be paid in FY 15.
With respect to your second point, the IRS Office of Chief Counsel is responsible for defending the determinations of the IRS in the U.S. Tax Court, including those of the Whistleblower Office. The Office of Chief Counsel coordinates with the Whistleblower Office in defending its determinations before the Tax Court to ensure that Chief Counsel's litigating positions are consistent with the program's goals as well as the statutory and regulatory framework. In most cases before the Tax Court, the record of the case is sealed to protect both whistleblower and taxpayer interests. As a result, I cannot comment on specific arguments made in defending particular Whistleblower Office determinations that are subject to an order of the Tax Court sealing the record. The positions taken by the Office of Chief Counsel support the IRS's administration of the law.
The suggestion that the IRS can do more to work with whistleblowers and their counsel is one that the IRS takes seriously. In a memorandum dated August 20, 2014, the IRS's Deputy Commissioner of Services and Enforcement reinforced previous guidance on the importance of thorough debriefing of whistleblowers during the evaluation of their submissions. After the IRS begins an investigation based on whistleblower information, section 6103 provides limited authority to interact with a whistleblower since disclosure of taxpayer information would be necessary to gather additional information while pursuing the audit or investigation. 17

Question 2:

During the hearing, I asked you about the ability of individuals receiving deferred action to amend tax returns and claim the earned income tax credit (EITC) as a result of the President's executive action. Your answer essentially confirmed that this is the case, but in doing so you also suggested that those receiving deferred action would have had to of already filed tax return for the year in question. However, a page on IRS' website titled "Claiming EITC for Prior Tax

Years" would appear to suggest even if one failed to file a tax return in a previous year, they may now file a return for that year and claim the EITC.[4] Could you please clarify your remarks and address whether someone receiving deferred actually must have previously filed a tax return during the year in question to claim the EITC retroactively? Also, please verify, whether or if,

4 Internal Revenue Service, "Claiming EITC for Previous Tax Years." Available at: http://www.irs.gov/Individuals/Claiming-EITC-Prior-Years

the IRS intends to revisit the March 2000 IRS Chief Counsel Advice concerning the ability of individuals to amend their tax returns to claim the EITC once obtaining a Social Security Number.

To clarify my earlier comments on EITC, not only can an individual amend a prior year return to claim EITC, but an individual who did not file a prior year return may file a return and claim EITC (subject to refund limitations under section 6511 of the Internal Revenue Code). I would note that filing new returns for prior years would likely be difficult, since filers would have to reconstruct earnings and other records for years when they were not able to work on the books.
Section 32 of the Internal Revenue Code requires an SSN on the return, but a taxpayer claiming the EITC is not required to have an SSN before the close of the year for which the EITC is claimed. At your request, the IRS has reviewed the relevant statutes and legislative history, and we believe that the 2000 Chief Counsel Advice (CCA) on this issue is correct.

Question 3:

The Affordable Care Act created tax credits that can go directly to your insurance company to pay for coverage. If the credits were more than a person was supposed to get, they were supposed to pay that back to the IRS at the end of the year. Last month the IRS decided that it would waive some of these overpayments.

- **How much money do you estimate this decision will cost?**

Notice 2015-9 provides limited penalty relief for certain taxpayers who received excess advance payments of the premium tax credit through Affordable Insurance Exchanges (also known as Marketplaces). It provides relief only for the

failure to pay penalty and the estimated tax payment penalty. Notice 2015-9 does not provide relief from the underlying tax liability or the associated interest related to excess advance payments. Because the Notice likely only affects a small number of taxpayers, and because it provides relief for modest penalty amounts, it is not estimated that the Notice will have significant fiscal impact.

• Will you report back to me after tax season has ended, to give me the exact amount of money the IRS waived?

As noted above, Notice 2015-9 does not provide relief from the underlying tax liability or the associated interest related to excess advance payments received through the Marketplaces. Rather, it provides relief only for the failure to pay penalty and the estimated tax payment penalty. Moreover the notice applies only for the 2014 tax year and is only available for taxpayers who are otherwise compliant with their filing and payment obligations.

Because the penalties to be abated under Notice 2015-9 are expected to affect a small number of taxpayers, in small amounts per taxpayer, it was decided to provide taxpayers seeking relief under the notice with a simple method of seeking relief. Taxpayers seeking relief from the penalty under section 6651(a)(2) for failure to pay were instructed to send a letter stating they are eligible for relief because they received excess advance payment of the premium tax credit; taxpayers seeking relief from the penalty under section 6654(a) for failure to pay estimated tax were instructed to file Form 2210, *Underpayment of Estimated Tax by Individuals, Estates and Trusts,* with a statement that they are eligible for relief because they received excess advance payment of the premium tax credit. Because of the simplified method provided to obtain relief, it is not administratively feasible to obtain precise data on the penalty amounts waived.

• How will the IRS determine whether people actually need a waiver, or just don't want to pay what they owe?

As noted above, Notice 2015-9 does not provide relief from the underlying tax liability or the associated interest related to excess advance payments received through the Marketplaces. Rather, it provides relief only for the failure to pay penalty and the estimated tax payment penalty. The eligibility requirements and the specific procedures by which a taxpayer can request penalty relief are outlined in Notice 2015-9. Generally, eligible taxpayers must complete existing IRS Form 2210 to seek relief from the estimated tax payment penalty and must assert, in response to IRS correspondence, that they are eligible for relief from the failure to pay penalty.

<u>Question 4</u>:

I asked you about nonprofit hospitals and whether the IRS is doing enough to ensure they are complying with requirements, particularly financial assistance 19

policy requirements in the ACA. Please describe the IRS's efforts to audit hospitals for financial assistance policy requirements in FY 2014 and FY 2015, and any planned activity the IRS intends to conduct in this area going forward.

The IRS reviews, at least once every three years, the Community Benefit Activities (CBA) of tax-exempt hospital organizations (estimated at more than 3,100 hospital organizations, many with multiple facilities) to which Internal Revenue Code (IRC) section 501(r) applies. Under IRC section 501(r), the IRS began conducting CBA reviews in March 2011 and has completed the first cycle of reviews of hospital organizations. In FY 2014, the IRS started the second cycle of reviews of hospital organizations and conducted 1,033 reviews during FY 2014. By February 20, 2015, the IRS had conducted 406 reviews. A total of 32,201 IRS labor hours have been spent conducting these reviews since they began.

The general requirements of the Financial Assistance Policy (FAP) have been effective for tax years beginning after March 23, 2010. On December 29, 2014, the IRS issued final regulations under section 501(r) that are effective for taxable years beginning after December 29, 2015. A comparative analysis of hospitals that have been reviewed twice since reviews began in 2011 shows the hospitals with an FAP have increased by 6.8% (1,362 to 1,466). In addition, the following observations have been noted from the hospital reviews:

1. 97.13% (1,390) of tax-exempt hospitals are using the Federal Poverty Guidelines (FPG) to determine the eligibility for ***free care.***

2. 95.0% (1,312) are using the FPG to determine the eligibility for ***discounted care.***

3. A comparison between first and second review responses to facility level questions (regarding eligibility criterion, FPG, and the basis of calculating amounts charged to patients, etc.) shows a significant increase, on average 25.4%, in positive responses. This may imply hospitals are providing more details in the FAP or a more complete FAP since the first reviews were conducted.

4. To date, 17 hospital organizations (for 49 tax years) have been referred for audit of non-ACA issues, including unrelated business income (UBI) tax, lack of profit motive, net operating losses (NOL), etc. None was referred for noncompliance with FAP requirements. Twenty-four of these examinations have been closed, with six resulting in change due to various issues including compensation adjustment, UBI, NOL adjustment, and FICA adjustment.

As the regulatory requirements become effective, the Exempt Organizations Examination office will expand the audits of organizations that have failed to meet the statutory provisions outlined in section 501(r)(1) including the assertion of the section 4959 excise tax associated with a failure under section 501(r)(3), Community Health Needs Assessment (CHNA). Training materials are being

prepared for employees to enforce the final provisions of the section 501(r) regulations.

Question 5:

Commissioner, in an email you sent to IRS employees you referenced the need to make tough choices given budget constraints and suggested employee furloughs may have to be implemented. Before you take such actions, I hope that you consider cutting back on the number of hours dedicated by IRS employees to union work while on the taxpayer dime, which reportedly topped 500,000 for fiscal year (FY) 2013. If the budget constraints are as dire as you contend, existing resources must be used efficiently and effectively as they can. IRS agents performing union work, when they could instead be assisting taxpayers, is certainly not the most efficient use of resources. What, if any, changes have you taken or do you plan to take to reduce hours spent on union time or "official time" given current budget constraints? Additionally, please provide me with the number of hours IRS employees dedicated to union work in FY 2014 and, as well the number of hours so far spent on union work in FY2015. Additionally, please include the number of IRS agents who have dedicated 50% or more of their working hours to union activities.

Congress found collective bargaining to be in the public interest and through 5 U.S.C. Chapter 71 required a grant of official time in many circumstances and binding collective bargaining in others. Because official time is mandated by statute and by collective bargaining agreements, IRS management does not have unilateral authority to control the amount of official time used. In addition, employees performing representational duties on official time are often able to resolve issues at early stages. Therefore, official time is an efficient use of resources particularly given the strain of overwork under which the current workforce is operating. Even so, the IRS and National Treasury Employees Union (NTEU) recently completed a round of negotiations through which IRS secured a new collective bargaining unit agreement designed to further reduce official time use over the next three years. The new agreement is expected to go into effect on October 1, 2015. These changes are expected to include:

• Establishing benchmarks for reducing per capita official time;
• Reducing the number of face-to-face formal meetings by combining multiple meetings into one and disseminating more information electronically;
• Reducing travel time and the number of full time stewards; and
• Creating an IRS-NTEU committee to implement official time mitigation strategies.

These newly agreed upon strategies supplement previously agreed measures, including: placing limits on the amount of official time that non-full time stewards

may use in a year; incentivizing NTEU to better manage official time usage; and establishing official time coordinators, who can address any potential underreporting of official time with NTEU.

There were 491,948 official time hours during Fiscal Year (FY) 2014 and 113,294 hours in the first quarter of FY 2015. Since 2011, the amount of official time hours has been cut by 16.7 percent. In FY 2014, there were 36 revenue agents that dedicated 50% or more of their working hours to union activities; in the first quarter of FY 2015, there were 37.