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The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016, letter ("Letter") signed by you and several other members of the House Committee on Science, Space, and Technology ("Committee") seeking certain documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General's Office ("MA AGO") regarding potential violations of Massachusetts's consumer protection and securities laws by ExxonMobil Corporation ("Exxon").

At the outset, the Committee's characterization of MA AGO's investigative activities is inaccurate. The Committee's assertion that the MA AGO is engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution," is absolutely incorrect, and the Committee's intimation that the MA AGO's actions "may even amount to an abuse of prosecutorial discretion" is without basis.

The MA AGO is authorized under Massachusetts law to represent the interests of the Commonwealth and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. Based on MA AGO's review of a number of publicly available Exxon documents and public statements by Exxon, MA AGO determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's business.

Publicly available Exxon documents establish that at least by July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon



management, give rise to “the need for hard decisions regarding changes in energy strategies.”¹ Publicly available Exxon documents also confirm that Exxon’s scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and “redistribution of rainfall,” “accelerated growth of pests and weeds,” “detrimental health effects,” and “population migration.”² Exxon’s scientists counseled Exxon management that it would be possible to “avoid the problem by sharply curtailing the use of fossil fuels.”³ One Exxon scientist warned in no uncertain terms that it was “distinctly possible” that the effects of climate change over time will “indeed be catastrophic (at least for a substantial fraction of the earth’s population).”⁴ Despite Exxon’s early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.⁵

Exxon’s shareholders are taking very seriously concerns about the nature and extent of Exxon’s disclosures regarding the impacts of climate change on Exxon’s business; just last week, on May 25, Exxon shareholders came close to passing resolutions that would have required Exxon to implement “stress tests” to ascertain more specifically the climate-driven risks to Exxon’s business.⁶ As The Wall Street Journal reported, the proposals “drew more support than any contested climate-related votes” in Exxon’s history, and indicate that “more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously” the effects on Exxon of a “global weaning from fossil fuels.”⁷

¹ Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, available at <http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>

² Henry Shaw, *CO₂ Greenhouse and Climate Issues* (March 28, 1984), available at <http://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf>

³ *Id.*

⁴ Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug. 18, 1981), available at <http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf>

⁵ See, e.g., Draft Global Climate Science Communications Action Plan (est. 1998), available at <http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf> (noting “[v]ictory will be achieved when . . . those promoting the Kyoto treaty on the basis of extant science appear to be out of touch with reality,” and “[u]nless ‘climate change’ becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts.”).

⁶ Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016, available at <http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192>

⁷ *Id.*

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As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009). Because Exxon appears to have made many statements to investors and consumers about the impact of fossil fuels on climate change which appear to contradict its own internal documents, the MA AGO is entitled to investigate what Exxon knew and said to others about these issues.

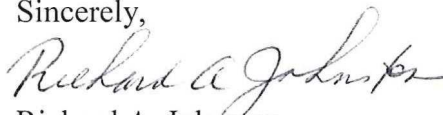
The Commonwealth has a sovereign interest in the protection of its investors and consumers. As the U.S. Supreme Court has explained, the “Constitution created a Federal Government of limited powers. ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system.” *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States, therefore, retain significant sovereign powers—“powers with which Congress does not readily interfere.” *Id.* at 2401.

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power is limited: Congress’s power may not be used to investigate matters “unrelated to a valid legislative purpose,” *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955), and must be narrowly tailored to avoid transgressing constitutional federal-state boundaries. *Tobin v. U.S.*, 306 F.2d 270, 275 (D.C. Cir. 1962), *cert denied*, 371 U.S. 902 (1962). An investigation by a state attorney general, and any related prosecution of a state law enforcement action, is not related to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not “confer upon Congress the ability to require the States to govern according to Congress’ instructions”). The Committee does not identify in its Letter any congressional authorization to undertake an investigation into the enforcement activities of this Office, and any such purported authorization would violate long-standing principles of federalism.

Moreover, most of the materials that the Committee has requested from the MA AGO, which include investigatory and deliberative process materials, attorney work product, and attorney-client and/or common interest privileged materials, would be protected from disclosure under established state and federal law.

For all of these reasons, the MA AGO respectfully declines to provide the requested materials.

Sincerely,



Richard A. Johnston
Chief Legal Counsel