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May 26, 2016

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 (the “Letter”) signed by you and several other Republican members of the House Committee on Science, Space, and Technology (the “Committee”) requesting that my office provide various documents and communications referring or relating to law enforcement and investigative activities of the Office of the Attorney General of New York (“NYOAG”) concerning climate change.

NYOAG has a long, very proud history of aggressively protecting investors and consumers from corporate fraud. The matter that appears to be the focus of your attention is our ongoing investigation into whether ExxonMobil Corporation violated New York’s securities, business and consumer fraud laws by making false or misleading statements to investors and consumers relating to climate change driven risks and their impact on Exxon’s business. This investigation comes on the heels of an investigation NYOAG concluded last year into Peabody Energy Corporation, then the largest publicly traded coal company in the world, which found that Peabody made false and misleading statements to the public and investors regarding financial risks associated with climate change and the effects of potential regulatory responses on the market for coal.¹

For the reasons set forth below, the NYOAG respectfully declines to provide the materials requested by the Letter. The Letter is premised on a series of incorrect statements and assumptions regarding the actions of the NYOAG and raises serious constitutional concerns,

¹ Under the agreement concluding the NYOAG investigation, Peabody committed to revising its disclosures to investors regarding the company’s financial risks related to climate change. Assurance of Discontinuance at pp. 9-10, *In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Peabody Energy Corporation*, Assurance No. 15-242 (Nov. 8, 2015), <http://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf>.

including the lack of congressional jurisdiction over state law enforcement activities and the Committee's intrusion into sovereign state actions protected by the 10th Amendment to the U.S. Constitution.

First, the Letter makes unfounded claims about the NYOAG's motives. Our investigation seeks to ensure that investors and consumers were and are provided with complete and accurate information that is indispensable to the just and effective functioning of our free market. There is no basis for your suggestion that the NYOAG has been 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." As I am sure you are aware, "the First Amendment does not shield fraud." *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) (allowing fraud claim and rejecting argument that fraudulent charitable solicitations are protected by the First Amendment); *People v. Coalition Against Breast Cancer, Inc.*, 22 N.Y.S.3d 562, 565 (2d Dep't 2015) (same); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (holding that false and misleading statements about the health effects and addictiveness of smoking cigarettes were not protected by the First Amendment); *SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (2009) ("Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment.").

Second, Congress does not have jurisdiction to demand documents and communications from a state law enforcement official regarding the exercise of a State's sovereign police powers, such as the NYOAG's investigation of ExxonMobil. Congress' powers are limited by the 10th Amendment to those granted by the U.S. Constitution, and its investigative jurisdiction is derived from and limited by its power to legislate concerning federal matters. *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959); *Kilbourn v. Thompson*, 103 U.S. 168, 195-96 (1880). Thus, Congress' oversight authority does not extend to investigations by a state Attorney General. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations . . . comprehends probes into departments of the Federal Government . . .").

Investigations and other law enforcement actions by a state Attorney General for potential violations of state law, as here, involve the exercise of police powers reserved to the States under the 10th Amendment, and are not the appropriate subject of federal legislation, oversight or interference. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.") Our federal system contemplates a crucial role for state law enforcement. *See The Federalist No. 45 at 357* (James Madison) (Robert Scigliano ed., 2010) (the powers delegated "to the federal government are few and defined. . . . The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state").

The Honorable Lamar Smith

May 26, 2016

Page 3 of 3

Third, we are not aware of any precedent supporting a Congressional investigation or oversight of a state Attorney General, as contemplated by the Letter. Indeed, absent an explicit authorization, a committee's investigative power is narrowly construed to avoid serious constitutional concerns, such as the state sovereignty issues that are implicated here. *See Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir.), *cert denied*, 371 U.S. 902 (1962) (overturning contempt conviction involving House Judiciary Subcommittee subpoena of Port of New York Authority records pursuant to "expansive investigation of an interstate compact agency" by Congress that had "never before [been] attempted"). The Letter does not identify any congressional authorization to engage in this inquiry; nor could it, given the constitutional principles discussed above. Under House Rule X, cited in the Letter, Congress has authorized the Committee on Science, Space, and Technology, to "review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development." Rule X(3)(k). Congress has not delegated this committee with any oversight authority concerning the investigations of state attorneys general regarding violations of state securities, consumer or business laws, nor could it. Moreover, throughout the Rules of the House of Representatives, context demands that "Government" with a capital "G" be understood as a proper noun to describe a specific government—the Federal Government—and not *all* governments. *See, e.g.*, Rule X(4)(c)(1)(B) (Committee on Oversight and Government Reform shall "evaluate the effects of laws enacted to reorganize the legislative and executive branches of the Government"). *See also* Gov't Printing Office Style Manual, Rule 3.19. The governments of the several states are distinct entities from the entity that is the Government of the United States. *United States v. Cruikshank*, 92 U.S. 542, 549 (1876) ("We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others . . .").

We trust that you and the other signatory Committee members appreciate the importance of our federal system, state law enforcement activities, and the critical need to maintain their integrity and independence from federal interference.

Sincerely,



Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

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