

February 20, 2018

Katherine D. McManus, Deputy Legal Adviser and Designated Agency Ethics Officer
Office of the Legal Adviser, U.S. Department of State
2201 C Street, NW, Room 6419
Washington, DC 20520-6310

CC: David P. Huitema, Assistant Legal Advisor for Ethics and Financial Disclosure
Office of the Legal Adviser, U.S. Department of State
2401 E Street NW, Room H-228
Washington, DC 20522

CC: Acting Director David J. Apol
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Re: Recusal of Secretary of State Tillerson from Security and Exchange Commission's rulemaking process regarding disclosure of payments by resource extraction issuers.

Dear Deputy Legal Adviser McManus:

Publish What You Pay – United States (PWYP-US), EarthRights International (ERI), Oxfam America, and Citizens for Responsibility and Ethics in Washington (CREW) write to draw your attention to the conflict of interest posed by the potential involvement of Secretary of State Rex Tillerson in the development of regulations implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1504”) – an anti-corruption provision requiring oil and gas companies to disclose payments made to foreign governments– which the State Department has participated in, and is likely to participate in again this year.

In his written ethics commitments, Secretary Tillerson stated that he would recuse himself from matters where “a reasonable person with knowledge of the relevant facts would question [his] impartiality in the matter.”¹ This is such a case.

ExxonMobil (“Exxon”), Secretary Tillerson’s recent employer, and the American Petroleum Institute (API), with which Secretary Tillerson recently held a leadership position, are two of the most visible and vocal opponents of Section 1504 and its implementation. In light of their clear interest in the issue, Secretary Tillerson’s own personal involvement in lobbying against Section 1504 while at Exxon, and his continuing financial relationship with Exxon, Secretary Tillerson must recuse himself from any deliberations on this matter, including any involvement in determining or influencing the State Department’s position on this matter. The State Department Ethics staff should make a determination to this effect, and should take the appropriate steps to assist Secretary Tillerson in formally recusing himself.

¹ Rex W. Tillerson, *Re: Ethics Undertakings*, Letter to Ms. Katherine D. McManus, at 4, Jan. 3, 2017, *available at* <https://assets.documentcloud.org/documents/3254118/Tillerson-Ethics-Undertakings-and-Financial.pdf> [hereinafter “Tillerson, *Ethics Undertakings*”]

The State Department has had a significant role in the development of implementing regulations

Section 1504 directs the Securities and Exchange Commission (SEC) to promulgate regulations requiring oil, gas and mining companies – including Exxon, as well as other members of API – to disclose the payments they make to foreign governments and the federal government as part of their annual financial reporting to the SEC.² While the SEC finalized a disclosure rule in 2016, Congress passed a “resolution of disapproval” in February 2017, which had the effect of voiding the 2016 rule and giving the SEC a year to issue a new implementing rule.³ The new rulemaking process is expected to begin this year,⁴ and Section 1504 specifically envisions consultation between the SEC and other agencies the SEC deems “relevant” as part of that process.⁵ During prior rounds of rulemaking, the SEC has relied heavily on the State Department’s view,⁶ which has been articulated in public submissions by the State Department during the comment period.⁷ Accordingly, the SEC is again expected to look to the views of the State Department in developing new implementing regulations this year.

The interests of Secretary Tillerson’s former employers in this matter give substantial reason to question his impartiality.

Secretary Tillerson was employed by Exxon for more than 40 years, including serving as Chairman and CEO up until his nomination to be Secretary of State in December 2016. Mr. Tillerson also served on the executive committee of the API, the industry lobbying group of which Exxon was and remains a prominent member, up until his nomination.⁸ Both entities have spent nearly a decade aggressively lobbying members of Congress to oppose any payment transparency legislation, including Section 1504 specifically, and have publicly spearheaded the opposition to the SEC’s efforts to finalize strong transparency regulations implementing Section 1504. These efforts are ongoing, and both entities would stand to benefit if the State Department were to change its position – which has previously been strongly supportive of full transparency – to align more closely with their own position in favor of far more limited transparency.

² 15 USCS § 78m(q).

³ H.R.J. Res. 41, 115th Cong. (2017).

⁴ Office of Information and Regulatory Affairs, Office of Management and Budget, Regulatory Agenda, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=3235-AM06>.

⁵ 15 USCS § 78m(q)(2)(B).

⁶ See Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,360, 49,362 (July 27, 2016) (“Notably, the U.S. Department of State expressed the view that, if adopted, the proposed rule would be a ‘strong tool to increase transparency and combat corruption’ and stated that it would advance ‘the United States’ strong foreign policy interests in promoting transparency and combatting corruption globally.”) (quoting State Department submission); *Id.* at 49380 (noting the State Department “strongly supported” the proposed rule, including the definition of “project,” and noting API disagreed with the definition State supported).

⁷ E.g. Comment letter submitted by Catherine A. Novelli, Under Secretary for Economic Growth, Energy, and the Environment, United States Department of State (Nov. 13 2015), available at <https://www.sec.gov/comments/s7-25-15/s72515-1.pdf>

⁸ Tillerson, *Ethics Undertakings* at 11.

Before it was enacted, API and Exxon spent substantial money lobbying against the legislation that ultimately became Section 1504.⁹ In fact, Mr. Tillerson – then Exxon CEO – personally lobbied against the provision. As Politico reported last year, Mr. Tillerson “was deeply worried about Section 1504,” so he and one of his lobbyists paid a visit to one of the provision’s co-authors, then-Senator Richard Lugar, “to try to get it killed.”¹⁰ A former staffer for Senator Lugar on the Senate Foreign Relations Committee confirmed Mr. Tillerson’s involvement to PolitiFact and recounted that Mr. Tillerson had “listed a number of his and the industry’s objections to [Section 1504,] including that it would harm Exxon’s relations with Russia.”¹¹ The staffer noted that Mr. Tillerson was the only CEO to come in to lobby personally on the issue.¹²

Section 1504 was passed and became law in 2010, but Exxon and the API continued to oppose strong implementing regulations and to undermine their finalization. During the SEC’s first rulemaking process, API and Exxon attended numerous meetings with the SEC and submitted comments arguing (among other things) for a limited rule requiring only anonymous disclosures at a high level of aggregation, and numerous exemptions.¹³ When the SEC issued a final rule in 2012 that required fully public, company-specific disclosures at the project level, without exemptions, API sued the SEC, arguing the regulations were burdensome and that disclosing factual financial information violated the First Amendment rights of companies like Exxon.¹⁴ Exxon publicly supported API’s lawsuit and opposed the implementing regulations.¹⁵ The court sent the rule back to the agency in 2013 on narrow grounds, and after another rulemaking period, in which Exxon and API were again the most active industry participants,¹⁶ the SEC issued a second final rule in June

⁹ See e.g. Exxon Mobil Corp., Lobbying Report, Second Quarter 2010, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=074A3C08-B2CF-4CE3-BE7B-CAA58F100FED&filingTypeID=60>; Exxon Mobil Corp., Lobbying Report, First Quarter 2010, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=8F6A6417-24FE-46DD-887C-CF0AFFC4B280&filingTypeID=51>; American Petroleum Institute, Lobbying Report, First Quarter 2010, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=A6D227E4-3CF9-4A65-820B-8CD366057F8D&filingTypeID=51>

¹⁰ Michael Grunwald, *Rex Tillerson Tried to Get This Rule Killed. Now Congress Is About to Do It for Him*, POLITICO (Feb. 1, 2017) <https://www.politico.com/magazine/story/2017/02/rex-tillerson-tried-to-get-this-rule-killed-now-congress-is-about-to-do-it-for-him-214725>

¹¹ Jon Greenberg, *Yes, ExxonMobil under Tillerson fought oil payment disclosure rule*, POLITIFACT (Feb. 8, 2017) <http://www.politifact.com/global-news/statements/2017/feb/08/sherrod-brown/yes-exxonmobil-under-tillerson-fought-oil-payment/> (quoting Jay Branegan)

¹² *Id.*

¹³ See SEC, Specialized Disclosures: Title XV Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, <https://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml> (showing API submissions and meetings with SEC staff); SEC, Comments on Proposed Rule: Disclosure of Payments by Resource Extraction Issuers, <https://www.sec.gov/comments/s7-42-10/s74210.shtml> (showing API and Exxon submissions and meeting with SEC staff).

¹⁴ *Am. Petroleum Inst. v. S.E.C.*, 953 F.Supp.2d 5 (D.D.C. 2013).

¹⁵ See, e.g. Ken Cohen, ExxonMobil, Why we support the court challenge to the SEC’s misguided transparency rules (May 21, 2013) <http://www.exxonmobilperspectives.com/2013/05/21/why-we-support-the-court-challenge-to-the-secs-misguided-transparency-rules/>

¹⁶ See SEC, Submitted Comments and Meetings with SEC officials <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml> (showing API and Exxon submissions and meeting with SEC staff).

2016. The 2016 rule required fully-public, project-level disclosures, but allowed companies to apply for exemptions on a case-by-case basis.¹⁷

Exxon and API then spent significant amounts of money lobbying Congress to repeal the 2016 regulations using the expedited Congressional Review Act (CRA) procedures.¹⁸ Lobbying disclosures confirm API and Exxon – directly, and through multiple lobbying firms – actively lobbied members of Congress to support a CRA resolution of disapproval to void the 2016 regulations.¹⁹ The House voted to pass H.J. Res. 41 disapproving the 2016 rule on February 1, 2017, the same day the Senate voted to confirm Mr. Tillerson as Secretary of State. The legislation was signed by President Trump on February 14, 2017.²⁰

More recent lobbying disclosures show API continues to spend money to lobby on implementation issues.²¹ New legislation, H.R. 4519, was introduced in December 2017, which would repeal Section 1504 entirely if passed, thus removing the SEC’s authority to issue transparency regulations altogether.²²

Following the CRA disapproval, the SEC is beginning a new rulemaking process to implement Section 1504 this year. The SEC may again seek input from the State Department in some form, and the State Department may choose to submit another public statement during the comment period. In the last two rulemakings, the State Department has taken the position that the best approach is fully-public, disaggregated disclosures, contrary to the position of Exxon and API. There is substantial reason to believe that Secretary Tillerson would seek to change the State Department’s long-held position on this issue to align with the position of Exxon and API if he is involved in the deliberations on this matter.

¹⁷SEC, Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg.49,360 (July 27, 2016).

¹⁸ See e.g. API, Support the Congressional Review Act Disapproval Resolution for the Dodd-Frank Section 1504 Rule, <http://www.api.org/news-policy-and-issues/section-1504/support-disapproval-resolution-1504-rule>; API, API Supports CRA disapproval resolution of Section 1504, <http://www.api.org/news-policy-and-issues/section-1504/api-supports-cra-disapproval-of-sec-1504>

¹⁹ See, e.g. Exxon Mobil Corp, Lobbying Report, First Quarter 2017, available at: <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=ED320F63-8BA3-4EF7-9888-FEF53B97A495&filingTypeID=51>; Avenue Solutions, Lobbying Report First Quarter 2017, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=0AD6A0EC-C3FE-4DC7-A471-6A1357E79628&filingTypeID=51> (lobbying on behalf of Exxon Mobil); The Nickles Group, LLC, Lobbying Report, First Quarter 2017, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=338326C3-EBAF-42DC-94E8-CABAE8A71551&filingTypeID=51> (lobbying on behalf of Exxon Mobil Corporation); The Simmons & Russell Group, LLC, Lobbying Report, First Quarter 2017, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=E1C2E1BC-979F-4C5D-A1C1-B87C4C778DEF&filingTypeID=51> (lobbying on behalf of ExxonMobil Corporation); API, Lobbying Report, First Quarter 2017, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=2AF2FA1A-6C41-4D7E-9D34-5867A59C9AD1&filingTypeID=51>

²⁰ H.J. Res. 41, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-joint-resolution/41/text>.

²¹ See e.g. API, Lobbying Report, Fourth Quarter 2017, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=77B584E5-13E1-45FA-B89F-7561D1A8637B&filingTypeID=78>

²² H.R.4519, 115th Cong. (1st Sess. 2017)

In his written ethics commitments, Secretary Tillerson pledged to recuse himself from any involvement in matters in which Exxon or API are a party for a period of one year after his resignation, and after that period, to recuse on a “case-by-case basis from participation in any particular matter involving specific parties in which I determine that a reasonable person with knowledge of the relevant facts would question my impartiality in the matter.”²³ While it has been just over a year since he resigned from API and Exxon, this is unquestionably a case that nonetheless warrants recusal. Given API and Exxon’s substantial interest in this matter, Secretary Tillerson’s personal past efforts on their behalf, the loyalty he undoubtedly still has to his former company and colleagues, and his continuing financial arrangement with Exxon, discussed more fully below, a reasonable person would have substantial reason to question Secretary Tillerson’s impartiality in this matter. Recusal from any involvement in any deliberations concerning the upcoming rulemaking is therefore the only appropriate course of action consistent with Secretary Tillerson’s stated ethics commitments.

Secretary Tillerson’s decision last year to withdraw from participation in the evaluation of the application for a Presidential Permit for the proposed Keystone XL pipeline, which he had publicly supported while at Exxon, provides an appropriate precedent for the proper steps to take in this case.²⁴ The similar circumstances around Section 1504 warrant a similar response.

Moreover, there is precedent for far broader recusals by Secretary Tillerson’s predecessors and other high ranking officials. Secretary James A. Baker III, for example, formally recused himself from “any particular matter that has a direct and predictable effect upon the price of domestic oil and gas” because of concerns regarding his ability to be perceived as impartial given his strong ties to the energy sector.²⁵ President George W. Bush’s Treasury Secretary, Hank Paulson, committed not to participate in any matter in which Goldman Sachs was a party for the duration of his tenure at the Department. And all of President Barack Obama’s appointees recused themselves from participating in any particular matter that was directly and substantially related to former employers or former clients, including regulations and contracts.²⁶

It is essential that the American people have confidence that the Secretary of State is serving their interests, and not the interests of his former employer. The Secretary’s own ethics commitments reflect this important consideration and require that he recuse himself from any involvement in the SEC rulemaking process, including any involvement in influencing the State Department’s views in this matter.

²³ Tillerson, *Ethics Undertakings* at 4.

²⁴ Katherine D. McManus, *Letter to Annie Leonard, Greenpeace Executive Director*, Mar. 9, 2017, available at <https://oge.app.box.com/v/TillersonRecusal>

²⁵ Letter to Mr. Rex W. Tillerson from Senators Edward J. Markey, Tom Udall, Richard Blumenthal, Jeffrey A. Merkley, Tammy Duckworth, Elizabeth Warren, Sheldon Whitehouse, Kirsten Gillibrand, Tammy Baldwin, and Robert Menendez, Jan. 30, 2017, available at https://www.eenews.net/assets/2017/01/31/document_daily_02.pdf.

²⁶ *Id.*

Secretary Tillerson’s financial arrangement with Exxon also warrants recusal from any involvement on this issue.

Secretary Tillerson’s accelerated payout and financial arrangement with ExxonMobil further warrant recusal. As a federal employee, the Secretary is subject to certain basic principles and *minimum* standards of ethical conduct that require him to “act impartially and not give preferential treatment to any private organization or individual.”²⁷ In carrying out his official responsibilities, he must “avoid any action creating the appearance that [he is] violating the law or the ethical standards.”²⁸

While Secretary Tillerson has divested from Exxon stock, the Secretary and Exxon have established an independent trust to house \$180 million in cash the Secretary is to receive in exchange for restricted stock over the next ten years. These payouts will be made under the same schedule that would have applied had he not become Secretary.²⁹ And, Secretary Tillerson has also elected to receive a total distribution of his interests in a variety of Exxon saving and pension plans in the coming years.³⁰

This relationship appears to implicate several regulations of the Office of Government Ethics (OGE). The lucrative contractual arrangements between Exxon and Secretary Tillerson are clearly not “routine consumer transaction[s],” and they appear to place the Secretary in a “covered relationship” with Exxon as the donor of the trust.³¹ Furthermore, the lucrative arrangement agreed to by Exxon and Secretary Tillerson after it was known he would become Secretary of State may also constitute an “extraordinary payment” and provide yet another basis for questioning his impartiality in the SEC rulemaking matter.³² Under these circumstances, a reasonable person would question Secretary Tillerson’s impartiality if he were to participate in this rulemaking matter in which his former employer (and trust donor) is an active participant.

Based on the process³³ and criteria set forth in 5 CFR § 2635.502,³⁴ Secretary Tillerson should consult with your office and be advised to withdraw from any involvement in this matter if a

²⁷ 5 CFR 2635.101(b)(8).

²⁸ 5 CFR 2635.101(b)(14).

²⁹ Tillerson, *Ethics Undertakings* at 2; Citizens for Responsibility and Ethics in Washington, *Rex Tillerson — Secretary of State*, <https://www.citizensforethics.org/rex-tillerson-secretary-state/>.

³⁰ Tillerson, *Ethics Undertakings* at 3.

³¹ Where an employee knows that a person with whom he has a “covered relationship,” including a “contractual or other financial relationship that involves other than a routine consumer transaction,” is a party to a particular matter and determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee.” 5 CFR § 2635.502.

³² Under 5 C.F.R. § 2635.503, an official who receives a payment from his former employer prior to entering government service must recuse himself for a period of two years from participating in matters in which the former employer is a party if the decision to pay the official was made after it was known the official was entering government service and not made pursuant to an established program.

³³ See 5 C.F.R. § 2635.502 (“an employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter”).

³⁴ Under 5 C.F.R. § 2635.502(d), these factors include: the nature of the relationship involved; the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship; the nature and importance of the employee’s role in the matter; the difficulty of reassigning the matter;; the sensitivity of the matter; and adjustments that can be made to the employee’s duties.

reasonable person with knowledge of the facts would question his impartiality – and as explained above, there is substantial reason to do so here.³⁵

Conclusion

The preceding discussion demonstrates that Secretary Tillerson’s written ethics commitments and OGE regulations both require that the Secretary recuse himself from any participation in the SEC’s rulemaking, including any involvement in any deliberations within the State Department about this matter. This result ensures that the American people know their Secretary of State is serving their interests rather than those of Exxon or API. The State Department ethics officers have important roles to play in preventing conflicts of interest like this one and in advising the Secretary on how to comply with his stated commitments and in determining when recusal is appropriate. Recusal is appropriate here and the State Department ethics staff should make a public determination to this effect and assist Secretary Tillerson in formally recusing himself from this matter. We request that this decision and the reasoning behind it be transparently communicated to the public.

We respect your thorough and thoughtful consideration of this issue and trust you will respond with the urgency required in this short timeline.

Sincerely,



Isabel Munilla
Policy Lead, Extractive Industries Transparency
Oxfam America
Steering Committee
Publish What You Pay – United States



Marco Simons
General Counsel
EarthRights International



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington

³⁵ See Citizens for Responsibility and Ethics in Washington, *Rex Tillerson —Secretary of State*, <https://www.citizensforethics.org/rex-tillerson-secretary-state/>.