United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510–6200

February 16, 2017

The Honorable Steven Mnuchin
Secretary of Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Secretary Mnuchin and Commissioner Koskinen:

We write to you regarding concerns about recent reports of a compensation arrangement that would allow Rex W. Tillerson, the Secretary of State, to defer paying millions of dollars in federal taxes. It appears that the tax position taken by ExxonMobil and Mr. Tillerson is aggressive at best and may evade current law. We ask that you closely scrutinize this arrangement to ensure compliance with current law. Furthermore, some aspects of the rules governing executive compensation arrangements are too loose and encourage aggressive tax planning. Therefore, we also ask that you review and tighten these rules in order to eliminate future abuse.

According to press reports, ExxonMobil plans to cancel a restricted grant of ExxonMobil stock to Mr. Tillerson. Such shares are presently valued at over $170 million. Mr. Tillerson has not yet vested in these shares. As a substitute for such stock, the company then plans to put a similar amount of cash into a trust with Mr. Tillerson as the beneficiary. The trust will make payments to Mr. Tillerson gradually over the next ten years. The arrangement includes a noncompete clause.

Although we commend Mr. Tillerson for his attempt to comply with government ethics rules, there are a number of problems with this arrangement.

First, to avoid current federal tax liability, the trust includes a noncompete clause. Should Mr. Tillerson leave government employment and become employed or otherwise engaged in the oil and/or gas industry, any assets remaining in the trust will be forfeited. However, it does not appear that this clause constitutes a substantial risk of forfeiture.

According to Treasury regulations, "an enforceable requirement that the property be returned to the employer if the employee accepts a job with a competing firm will not ordinarily be considered to result in a substantial risk of forfeiture unless the particular facts and circumstances indicate to the contrary." Mr. Tillerson is 64 years old and will be the Secretary of State for the foreseeable future. Furthermore, pursuant to Article I(H) of the trust agreement, in determining whether Mr. Tillerson violated the trust's noncompete clause, the trustee is, entitled "to rely conclusively, without investigation" on a certification by Mr. Tillerson. In other words, it is unclear whether and when Mr. Tillerson will exit government service and he is permitted under the terms of the trust to self-certify whether he has engaged in the activity that would trigger a forfeiture. Therefore, it appears that the noncompete clause does not truly create a substantial risk of forfeiture and Mr. Tillerson should pay taxes currently on the full amount in the trust.

It also should be noted that, although this arrangement might technically fall outside the rules for nonqualified deferred compensation under Code Section 409A, cancelling one form of deferred compensation and essentially replacing it with another that is subject to more lenient conditions does not fit with the spirit of these rules. If Mr. Tillerson's restricted stock arrangement had been governed by Code Section 409A, such a substitution could result in immediate taxation and a 20 percent penalty. As such, the Treasury Department and the Internal Revenue Service (IRS) should consider a similar application in instances such as this.

In closing, according to press reports, Mr. Tillerson is potentially avoiding "an immediate federal income tax bill of as much as $72 million" through this deferred compensation arrangement. It appears that the taxpayers are taking an aggressive tax position and therefore, we ask the Treasury Department and Internal Revenue Service to closely scrutinize this transaction and ensure compliance with current law. Furthermore, as clearly demonstrated by this arrangement, some aspects of the rules governing executive compensation are too loose and encourage aggressive tax planning. Therefore, we also ask that you review and tighten these rules in order to eliminate future abuse.

Thank you for your attention to this matter. We look forward to working with you to ensure fairness in our tax system and shut down executive compensation loopholes.

Sincerely,

Ron Wyden
Ranking Member

Tom Carper
United States Senator

Sherrod Brown
United States Senator