JEB HENSARLING, TX, CHAIRMAN

MAXINE WATERS, CA, RANKING MEMBER

United States House of Representatives
Committee on Financial Services
Washington, D.C. 20515

May 8, 2015

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
2129 Rayburn House Office Building

Dear Chairman Hensarling:

I write in response to your letter dated May 6, 2015, in which you informed me of your intent to issue subpoenas *duces tecum* on May 11, 2015, to specific agencies of the executive branch.

I appreciate you notifying me before you authorized and issued the subpoenas, which is a welcome change from your previous letter, dated March 2, 2015, regarding your intended procedures for the use of unilateral subpoenas, in which you claimed that letters addressed to agencies, of which I receive carbon-copies, would serve as "ample notice" to satisfy this Committee's rules with respect to notifying me as the Ranking Member. I hope your most recent correspondence is evidence of your intention to adhere, going forward, to the unambiguous text of the Committee's rules which state, in relevant part, "[t]he Chair will provide written notice *to the ranking minority member* at least 48 hours in advance of the authorization and issuance of a subpoena."[1]

While I am grateful of your commitment to comply with the new Committee rules, I disagree with your assessment of the need for the issuance of unilateral subpoenas to the three agencies mentioned in your May 6th letter for several reasons.

Procedurally, this Committee has minimal history with respect to the issuance of subpoenas. Indeed, as you note in your letter, since you became Chairman, this Committee has only issued five subpoenas. However, even a cursory review of this Committee's record reflects the historical precedent of speech and debate regarding the authorization and issuance of subpoenas. That is to say, not one of those five subpoenas was issued unilaterally, but rather, all were put to a vote before the Subcommittee on Oversight and Investigations.[2] It is characteristically undemocratic to now use your newly-vested unilateral authority to authorize and issue subpoenas in order to eliminate the ability of Members of this Committee – both Democrat and Republican – to openly debate the merit and necessity of such subpoenas.

In both your May 6th and March 2nd letters, you reference the aggressive oversight of the Executive Branch conducted by former Energy and Commerce Chairman Dingell. I appreciate your comments with regard to Chairman Dingell's use of the subpoena in that Committee. I agree with you that both Republicans and Democrats have, in the past, participated in aggressive oversight of the Executive

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[1] H. COMM. ON FINANCIAL SERVICES, 114TH CONG., RULES FOR THE COMMITTEE ON FINANCIAL SERVICES 6 (Comm. Print 2015) (emphasis added).

[2] Meeting to Consider a Resolution Authorizing the Issuance of Subpoenas, May 8, 2014 (subpoenaing M. Stacey Bach, Liza Strong, and Benjamin Konop); Meeting to Consider a Resolution Authorizing the Issuance of Subpoenas, June 12, 2014 (subpoenaing Ali Naraghi and Kevin Williams).

Branch – and I am not opposed to conducting such oversight. I would however raise a very clear and important distinction between the subpoenas issued by Chairman Dingell, and the subpoenas you have proposed to issue here – that is, all of the subpoenas issued by Chairman Dingell were brought to a vote before the Committee or were authorized and issued with the concurrence of the Ranking Minority Member. That practice stands in stark contrast to your intent to issue subpoenas, unilaterally, and without any consideration by the other fifty-nine Members of this Committee. Indeed, I reiterate my historical understanding of Congressional practice detailed in my February 27th letter that the use of unilateral subpoena authority is a model that has been embraced by only three Members to date.

In 2006, former Oversight and Government Reform Committee Chairman Henry Waxman conducted an apt and interesting study on the use of Congressional subpoenas. In that Committee report, he found that going back "at least as far as the McCarthy era in the 1950s, until the Republican takeover in 1995, no Democratic Committee Chair issued a subpoena without either consent from the [M]inority or a [C]ommittee vote."[3] Pointing to a democratic process of issuing subpoenas as a means to support your autocratic use of them here is a red herring, and reeks of disingenuity.

Substantively, you claim that compulsory process is your only reasonable alternative "in light of the unprecedented secrecy and extraordinary stonewalling demonstrated by these agencies resulting in unfulfilled Committee requests." I find this determination unpersuasive at best. Although you are correct that some of the requests you have listed in your letter are indeed "months, and in some cases, years" old, I am aware of numerous efforts made by these agencies to meet your demands for documents and information.

Contrary to your assertions, this Committee has received information and access to documents from the identified agencies, directly responsive to your requests, as follows:

U.S. Department of Justice

With respect to the March 8, 2013, letter regarding the prosecution of large financial institutions, it is my understanding that the Department of Justice (DOJ) has attempted to be responsive to the Committee's inquiries in three separate letters.[4] In addition to those letters, DOJ has provided three briefings to Committee staff about these matters.[5] With respect to access to documents, DOJ has made available to the Committee, on multiple occasions, sensitive documents that appear to show DOJ's attempt to be responsive.[6] Finally, in related inquiries regarding prosecution of large financial institutions, the DOJ has transmitted multiple additional letters intended to shed light on its practices and inform the Committee's legislative activities.[7]

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[3] H. COMM. ON GOVERNMENT REFORM – DEMOCRATIC STAFF, 109TH CONG., "CONGRESSIONAL OVERSIGHT OF THE CLINTON ADMINISTRATION", (Jan. 17, 2006), *available at*: https://wayback.archive-it.org/4949/20141210030557/http:/oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf.

[4] Letter from Peter J. Kadzik, Prin. Dep. Att'y Gen., Dep't of Justice, to Jeb Hensarling, Chairman, Committee on Financial Services (May. 5, 2013); Letter from Peter J. Kadzik to Jeb Hensarling (Aug. 2, 2013); and Letter from Peter J. Kadzik to Jeb Hensarling (May 8, 2014).

[5] These briefings took place on May 13, 2013, June 2, 2014 and June 25, 2014.

[6] These documents were reviewed by Committee staff on June 3, 2014, June 4, 2014, and June 24, 2014, and also at the June 25, 2014 staff briefing.

[7] *See e.g.,* Letter from Peter J. Kadzik to Jeb Hensarling (May 16, 2013), discussing the contact with, in limited circumstances, domestic and foreign regulators in order to understand potential regulatory responses to possible law enforcement actions ; *see also*, Letter from Peter J. Kadzik to Jeb Hensarling (Jul. 26, 2013) discussing the use of deferred- or non-prosecution agreements.

With respect to the August 21, 2013, letter regarding the authorization and service of subpoenas on financial institutions, the DOJ responded on April 8, 2013, and explained that it has no guidance relating to service of subpoenas on financial institutions, and offered to continue working with staff to identify responses to other related inquiries.

With respect to the May 27, 2014, letter regarding the prosecution of McGraw-Hill Companies, the DOJ explained to Committee staff that the documents sought by the Committee remain subject to a protective court order, which precludes voluntary production of such information. Protective order aside, it has been made clear to this Committee that the universe of potentially responsive documents exceeds a total of 65 million documents. Such an expansive scope for production of documents effectively limits the ability of this Committee to seek, or review, materials for the purpose of conducting substantive oversight.

Notwithstanding the efforts described above, in response to this Committee's March 10, 2015, letter restating demands for productions of documents related to the above requests, DOJ reiterated, on March 23, 2015, that the Department stands prepared to "work with the Committee to accommodate its information needs".[8]

Federal Reserve Bank of New York

With respect to the November 6, 2013, letter to the Federal Reserve Bank of New York (New York Fed) regarding the ability to prioritize U.S. debt payments, the New York Fed has responded in writing, three times, to the inquiry.[9] In the first response, the New York Fed explained that it operates as fiscal agent for the U.S. Department of Treasury (Treasury) and that Treasury is the agency most appropriate and best positioned to produce documents responsive to the Committee's request. Indeed, as you note in your May 6th letter, the New York Fed has explained on multiple occasions that it has made Treasury aware of the request, and referred any further inquiries to that agency because of its lack of legal custody over the documents and, as of April 2014, the transfer of physical custody as well.[10]

U.S. Department of Treasury

The June 7, 2013, letter to Treasury inquires about a Freedom of Information Act request made by a private third-party to Treasury. This Committee has been given access to both redacted and unredacted documents that are responsive to the request. And, more importantly, since 2014, Treasury has offered to make available for further *in camera* review hundreds of additional pages of responsive documents[11]

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[8] Letter from Peter J. Kadzik to Jeb Hensarling (Mar. 23, 2015).

[9] Letter from Thomas C. Baxter, Jr., General Counsel and Executive Vice President, Fed. Res. Bank of N.Y., to J.W. Verret, Chief Economist, Committee on Financial Services (Dec. 5, 2013).

[10] *See* Letter from Thomas C. Baxter, Jr. to J.W. Verret (Apr. 8, 2014) explaining that "Treasury has informed the New York Fed, as its fiscal agent, that Treasury will respond today to the Committee on behalf of both Treasury and the New York Fed; *see also*, Letter from Thomas C. Baxter, Jr. to Jeb Hensarling (Mar. 27, 2015) explaining that "[w]e conducted a search, and in April 2014, we provided to Treasury documents that are potentially responsive to the November 2013 request.".

[11] *See* Letter from Alastair M. Fitzpayne, Assistant Secretary for Legislative Affairs, U.S. Dep't of Treas. to Jeb Hensarling (Apr. 8, 2014) affirming that "Treasury is now in a position to make available to the Committee several hundred pages of additional documents that we have identified as responsive to the Committee's June 7, 2013 request".

which appear to have never been reviewed. That offer has been pending for 395 days. It is difficult to comprehend the need for the use of compulsory process when voluntary access is available.

Finally, with respect to the December 6, 2013, letter regarding the ability to prioritize U.S. debt payments, Treasury, on behalf of itself and its fiscal agent the New York Fed, has responded to each of the Committee's requests for information and documents by making available for *in camera* review, more than 1,300 pages of sensitive materials.

In light of these significant efforts to comply with this Committee's requests for documents and information, I am not convinced that, as you say, "these agencies have resisted time and again complying with the Committee's legitimate oversight requests." But, even *arguendo*, were it in fact necessary to use compulsory process to gain access to records and information from the agencies, I would strenuously urge you not to use it unilaterally. Although, according to the new Committee rules you have the right to act on your own, I believe that this Committee's oversight activities would be more meaningful – and more effective – if they were conducted as a Committee, rather than by an individual.

In my previous letter of February 27, 2015, regarding this Committee's subpoena process, I stated unequivocally that "[a]s the Ranking Member of this Committee I am committed to ensuring broad and meaningful oversight over the agencies and entities within our Committee's jurisdiction. It is undeniable that substantive oversight is one of the most important functions of Congress." You responded by clarifying that you "expect all Committee Members – Democrats included – to support vigorous oversight".

Mr. Chairman, I urge you to allow this Committee to actually engage in substantive, vigorous, and bipartisan oversight by agreeing to not use your unilateral subpoena authority to authorize and issue subpoenas to the DOJ, the New York Fed, and Treasury on May 11th, and working together to ensure that our staffs have fully reviewed all relevant materials that have been offered voluntarily. And in the event that compulsory process is ultimately necessary, I request that you continue with the historical precedent of this Committee by bringing resolutions to authorize and issue subpoenas before the Committee for a vote, so that "all Committee Members" have an opportunity to exercise their constitutional prerogative of speech and debate.

Sincerely,

Maxine Waters
Ranking Member