

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

February 27, 2015

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hensarling:

I write today to express my alarm with respect to your new policy for the prospective issuance of subpoenas for documents to agencies under this Committee's jurisdiction.

Recently, I have been informed that your policy in the 114th Congress for the unilateral authorization and issuance of subpoenas for documents will be a standardized part of the agency document production process – one in which notice of intent to issue a subpoena will automatically be given a mere two weeks after an initial request for documents is made. An agency would then have only two additional weeks to achieve an arbitrarily-determined level of satisfactory compliance to avoid being mechanically served with a Congressional subpoena for the documents. This automated subpoena system would leave agencies with very limited time to review, produce and, if necessary, remedy deficiencies in – what are, very extensive – document productions before being subjected to the compulsory process.

As 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. Indeed, the Supreme Court has long held that a "legislative body cannot legislate wisely or effectively in the absence of information... [and] mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential".¹ But the coercive use of a Congressional subpoena cannot be justified in the absence of thoughtful deliberation. Because Congressional subpoenas are absolute, and non-justiciable, they must be used as a tool of last resort, not as a preliminary means of obtaining desired information.

This Committee has a 150 year history of conducting oversight over the banking agencies, and only in the past month has the authority to unilaterally authorize and issue subpoenas been vested in the Chairman. Because of the significance associated with the use of Congressional subpoenas, historical precedent in other Committees has established a process of escalation with respect to requesting and ultimately compelling such information. Only after initial briefings and voluntary, negotiated productions of both documents and testimony by agencies have failed to effectuate a reasonable resolution, has the full coercive force of a Congressional subpoena been brought to bear upon an agency. This new automated subpoena policy flies in the face of historical precedent and a common-sense understanding of the purpose and gravity of compulsory process.

¹ MCGRAIN V. DAUGHTERY, 273 U.S. 135, 175 (1924).

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Moreover, I also express my strenuous objection to the idea that an agency's production of documents necessary to avoid the issuance of a subpoena is to be determined by an arbitrary standard on a case-by-case basis, with no clear threshold as to what will preclude or warrant issuance. If you, or your staff, believe that substantial compliance is achieved, a subpoena may be avoided, but conversely, if a sense of substantial compliance is not achieved, then a subpoena may be issued without any further discussions or negotiation on your part. This is patently unreasonable to the agency attempting to comply with the request, as document productions are complex and necessarily require a good-faith effort by both parties to achieve satisfactory compliance – an effort this new process unequivocally lacks. And further, this process is also a clear violation of this Committee's rules regarding the use of subpoenas because, despite your willingness to share a letter weeks before the occurrence or nonoccurrence of a contingent event, this "may or may-not issue" standard fails to give "written notice to the ranking minority member at least 48 hours in advance of the authorization and issuance of a subpoena."²

On February 10, 2015, I joined with the Ranking Members of 15 other House Committees in a letter to our colleagues warning that the new rule allowing for unilateral authorization and issuance of subpoenas is an invitation for abuse that could diminish the ability for responsible oversight.³ In the letter, we reminded our colleagues that this unilateral subpoena authority is a model that has been embraced by only three Members to date, one of whom was Senator Joe McCarthy, who is considered to have led one of the most partisan, unfair and widely-discredited Congressional investigations in modern history. I am concerned that your decision to make subpoena issuance a standardized part of the document production process intimates that your unilateral subpoena authority may become corrupted in a similar manner.

A practice which fails to recognize the gravity of compulsory process is one which is destined to result in abuse and will ultimately corrode the significance of Congressional subpoenas. Mr. Chairman, I urge you to uphold the rules of this Committee regarding notice to the Ranking Member before authorizing and issuing subpoenas, and also to stand with historical precedent in the use of compulsory process as a tool of last resort, rather than a means of initial compulsion. I remain committed to working with you, and your staff, to develop reasonable practices for the use of the compulsory process which also sustain the importance of meaningful Congressional oversight.

Sincerely,



Maxine Waters
Ranking Member

² H. COMM. ON FINANCIAL SERVICES, 114TH CONG., RULES FOR THE COMMITTEE ON FINANCIAL SERVICES 6 (Comm. Print 2015).

³ LETTER FROM RANKING MEM. CUMMINGS, RANKING MEM. WATERS, ET AL. TO MEMBERS OF THE H.R., (Feb. 10, 2015), <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2015-02-10%20Waxman%20Op-Ed%20Dear%20Colleague.pdf>.