

# Congress of the United States

Washington, DC 20515

November 6, 2014

The Honorable Fred Hochberg  
Chairman and President  
Export-Import Bank of the United States  
811 Vermont Avenue, NW  
Washington, D.C. 20571

Dear Mr. Hochberg:

We write in response to your letters of August 29, 2014, and July 24, 2014, to the Committee on Financial Services, in which you refused to make certain employees available for transcribed interviews and declined to provide unredacted transcripts of meetings of the Export-Import Bank's ("Bank") Board of Directors.<sup>1</sup> Contemporaneous with this letter, the Committee on Oversight and Government Reform is issuing a subpoena to compel production of the unredacted transcripts, and the Oversight Committee will consider the use of compulsory process to compel the Bank's Chief Risk Officer, Chief Financial Officer, and General Counsel to appear for depositions, unless the Bank agrees by no later than noon on November 13, 2014, to make them available for voluntary transcribed interviews.

The Bank's unjustified refusal to make those employees available voluntarily, and the Bank's decision to withhold unredacted transcripts, obstructs Congress's ability to meet its Constitutional obligation to conduct oversight, and at a critical time. Having submitted a proposal to reauthorize the Bank and increase its lending authority, you should expect to provide Congress with unfettered access to the information it needs to evaluate that request, including information relating to Bank operations. However, redacted transcripts made available by the Bank reveal very little about those matters; the Bank redacted virtually every discussion among directors and staff exploring why the Bank could lawfully participate in specific financing transactions. As a result, Financial Services Committee staff has been unable to assess, for example, the reasonableness of determinations made by the Bank that it could participate in a transaction because adequate financing was unavailable in the private market<sup>2</sup>—even though such analyses

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<sup>1</sup> The Committee requested the individuals' and records production by letters dated July 17, 2014 and August 18, 2014.

<sup>2</sup> *Cf.* 12 U.S.C. § 635(b)(1)(B) (mandating that "the Bank in the exercise of its functions should supplement and encourage, and not compete with, private capital").

speak directly to the question of the Bank's utility and therefore whether Congress should reauthorize it.

The redacted transcripts produced by the Bank instead shroud the deliberations of its Board of Directors in secrecy. For example, at a February 2, 2012, board meeting, a Bank employee recommended approval of a transaction involving aircraft exports, but the specific reasons for the recommendation are redacted.<sup>3</sup> The Bank also redacted the reasons given by a director for refusing to support the same transaction.<sup>4</sup> Similarly, at an April 25, 2012, meeting, in connection with another transaction involving aircraft, an employee noted that "[t]he principle [sic] issue . . . is the justification for Ex-Im Bank support," but the Bank redacted the ensuing analysis.<sup>5</sup> The Bank liberally redacted the same information contained within transcripts for other meetings of the Board of Directors reviewed by Financial Services Committee staff.<sup>6</sup>

The Bank's decision to redact the transcripts and refuse to make the requested employees available for interviews—apparently made to keep Bank deliberations and sensitive commercial information secret—is deeply troubling given the Financial Services Committee's clear authority to conduct the present inquiry. Under Rule X of the House of Representatives, the Financial Services Committee may oversee the Bank's operations because it has jurisdiction over banks and banking, financial aid to commerce and industry, and international finance. Moreover, the Financial Services Committee may receive and review materials that describe sensitive commercial information and

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<sup>3</sup> February 2, 2014 Meeting Minutes at 10 (comments of Robert Roy, Transportation Division).

<sup>4</sup> *Id.* at 11 (comments of Sean Mulvaney, Director).

<sup>5</sup> Apr. 25, 2012, at 27-31 (comments of David Fiore, Transportation Division).

<sup>6</sup> *See, e.g.*, Feb. 29, 2012, at 5 ("Ex-Im Bank support is needed [redacted]") (comments of David Fiore, Transportation Division); *Id.* at 7 ("Thank you, Mr. Chairman. I support the transaction. It's a difficult one, however. [Redacted]") (comments of Wanda Felton, Vice Chair and First Vice President); *Id.* at 15 ("Ex-Im Bank support for the transaction is needed. [Redacted]") (comments of Beth Touomou, Structured Finance Division); *Id.* at 21 ("Ex-Im Bank support is needed because [redacted]") (comments of Lou Pham, Working Capital Division); Mar. 8, 2012, at 5 ("Our support for this transaction is needed to [redacted]") (comments of David Fiore, Transportation Division); *Id.* at 10 ("David, thank you for your presentation today and the briefing you gave me earlier this week. It's obvious that this transaction is necessary because of [redacted]") (comments of Larry Walther, Director); *Id.* at 11 ("I support the transaction for [redacted]") (comments of Sean Mulvaney, Director); *Id.* at 28 ("Our support is needed because [redacted]") (comments of Lou Pham, Working Capital Division); Mar. 15, 2012, at 5 ("Ex-Im Bank financing support is needed for this transaction due to [redacted]. Ex-Im Bank financing support is needed in this transaction also [redacted]") (comments of Edward Ciampa, Transportation Division); Mar. 29, 2012, at 10 ("I also want to commend the transaction team, you had a very thorough memo, particularly the justification section for Ex-Im support. [Redacted]") (comments of Sean Mulvaney, Director); and *Id.* at 16 ("The need for Ex-Im support has been demonstrated by [redacted]") (comments of Hala El-Mohandes, Structured Finance Division).

internal Bank deliberations because the Committee is acting pursuant to Congress's exercise of the legislative power. The information sought by the Committee is pertinent to whether the laws establishing the Bank are being implemented as Congress intended, whether the laws should be altered, and whether conditions require that the Bank should cease operations.

Congress's right to obtain information in connection with the act of legislating is well-recognized. Harvard University Law Professor James M. Landis writes: "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."<sup>7</sup> Congress may ascertain the facts by reviewing pertinent evidence from any source, including written records and oral testimony.

When investigating government-chartered financial institutions similar to the Bank, Congress has obtained information equivalent to that which the Committees are now seeking—rendering the Bank's failure to cooperate particularly troubling. In 1818, members of a House committee traveled to Philadelphia to "personally inspect[]" the books of the Second Bank of the United States and "interrogate[] on oath, the president, the cashier, all the directors of the bank whose attendance could be obtained, and several of its clerks and officers."<sup>8</sup> In 1832 and 1833, in connection with investigations of the Second Bank's financial condition and potential violations of its charter, a House select committee and the Ways and Means Committee questioned the Second Bank's directors

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<sup>7</sup> James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 209 (1926). The Bank's decision to withhold information relating to its operations is contrary to settled conceptions of the rights and responsibilities of legislative bodies, and to this country's constitutional tradition. The Baron de Montesquieu writes that one of the principal functions of representative bodies is "to see whether the laws already enacted be duly executed" and that "the legislative power . . . has a right and ought to have the means of examining in what manner its laws have been executed[.]" *Spirit of Laws* Book XI, ch. 6 (1750). Walter Bagehot, the English political analyst and economist, describes the "informing function" of the House of Commons, the origins of which are medieval, as consisting of laying "grievances and complaints" before the nation. *The English Constitution* 96 (Cambridge Univ. Press 2001). Such oversight, Bagehot continues, is one of the most important parliamentary functions "because it makes us hear what otherwise we [might] not." *Id.* at 97. The Constitution vests Congress with similar rights to conduct oversight. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

<sup>8</sup> The committee was studying matters relating to the Second Bank's overall management and operations as well as "the question of a violation of its charter." Report of committee appointed to inspect the books and examine the proceedings of the Bank of the United States, H. Doc. 92 at 1 (Jan. 16, 1819).

and senior officials, in some cases under oath, reviewed the bank's financial statements, and examined records relating to internal bank deliberations, including attorney-client communications.<sup>9</sup> In 1950, when investigating whether the Reconstruction Finance Corporation authorized loans for improper political purposes, a Senate Banking subcommittee examined accounting records, correspondence, and other document files relating to specific loans and, where wrongdoing was suspected to have occurred, "the complete detail of the loan negotiations[.]"<sup>10</sup>

In light of these precedents and Congress's clear constitutional authority to examine the Bank's operations, including matters relating to sensitive commercial information and internal Bank deliberations, the Committees will not countenance the Bank's efforts to impede our ongoing oversight efforts. The Committees therefore expect

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<sup>9</sup> See, e.g., Select Committee on the Bank of the United States, Report, H. Rep. No. 450 at 51 (Apr. 30, 1832) (legal opinion of bank counsel Daniel Webster evaluating legality of issuing bank drafts); *id.* at 112 (examination of former bank cashier); *id.* at 128 (examination of bank director); *id.* at 132 (examination of bank teller); *id.* at 150-51 (letter from bank president relating to internal bank deliberations); *id.* at 152 (examination of bank assistant cashier); *id.* at 154 (examination of bank director); *id.* at 155 (examination of bank cashier); *id.* at 282 (letter from bank president to U.S. Treasury Secretary discussing internal bank deliberations); *id.* at 440-46 (letters marked as confidential from bank president to Treasury Secretary discussing allegations of improper political influence in bank affairs); *id.* at 478-79 (correspondence between high-ranking officials discussing internal bank deliberations); *id.* at 480 (board of directors meeting minutes reflecting internal bank deliberations); *id.* at 494 (same); *id.* at 496-97 (legal opinion of bank counsel Daniel Webster interpreting charter provisions governing bank's authority to enter into certain transactions); Committee on Way and Means, Report on the Bank of the United States, H. Rep. No. 121 at 47 (Mar. 1, 1833) (letter from bank official to bank president discussing internal deliberations); *id.* at 50 (sworn testimony of bank director); *id.* at 54 (same); *id.* at 58 (same); *id.* at 67 (same); *id.* at 69 (same); *id.* at 71 (same); *id.* at 84 (same); *id.* at 89 (sworn testimony of Acting Treasury Secretary relating to internal bank/Executive Branch deliberations); *id.* at 91 (sworn testimony of bank director); and *id.* at 93 (letter from bank president producing correspondence depicting internal bank deliberations pursuant to request of Ways and Means Committee).

<sup>10</sup> The subcommittee also scheduled hearings to examine specific loans. In such cases, the subcommittee probed "every aspect of policy reflected in the loans, and inquired extensively into the public interest served by the grant of government financial assistance to the borrowers." It also "examined in some detail the salient characteristics of the loan application, the negotiations, the conditions agreed upon and the experiences encountered in working out the particular borrower's problem." J.W. Fulbright, "Congressional Investigations: Significance for the Legislative Process," 18 *University of Chicago Law Review* 440, 446-47 (1951). In earlier hearings—when the subcommittee did not have access to specific loan files—representatives of the Reconstruction Finance Corporation "gave policy explanations in broad and sweeping terms, and engaged in discussions of general principles designed to 'justify' what the agency had done" and "the Subcommittee was not equipped to probe behind these general explanations." *Id.* at 445. As a result, the earlier hearings "yielded no great results." *Id.*

that the Bank will voluntarily cooperate with any future request for documents or information. Otherwise, we may compel the Bank to produce additional records by means of one or more subpoenas. If you have questions regarding this matter, please contact Joseph Clark of the Financial Services Committee staff at (202) 225-7502 and Christopher Hixon of the Oversight and Government Reform Committee staff at 202-225-5074.

Sincerely,

  
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Jeb Hensarling  
Chairman  
Committee on Financial Services

  
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Darrell Issa  
Chairman  
Committee on Oversight  
and Government Reform

  
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Patrick McHenry  
Chairman  
Subcommittee on Oversight and Investigations

  
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Jim Jordan  
Chairman  
Subcommittee on Economic Growth,  
Job Creation, and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

The Honorable Maxine Waters, Ranking Minority Member  
Committee on Financial Services

The Honorable Al Green, Ranking Minority Member  
Subcommittee on Oversight and Investigations  
Committee on Financial Services

The Honorable Matthew A. Cartwright, Ranking Minority Member  
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs  
Committee on Oversight and Government Reform