CONTINUING DEVELOPMENTS REGARDING THE SOLYNDRA LOAN GUARANTEE

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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C O N T E N T S

[1] Mr. Burner did not offer a statement for the record.

CONTINUING DEVELOPMENTS REGARDING THE SOLYNDRA LOAN GUARANTEE

FRIDAY, OCTOBER 14, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:35 a.m., in room 2123, Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Members present: Representatives Stearns, Terry, Sullivan, Murphy, Burgess, Blackburn, Bilbray, Gingrey, Scalise, Gardner, Griffith, Barton, Upton (ex officio), DeGette, Schakowsky, Markey, Green, Dingell, and Waxman (ex officio).

Also present: Representatives Pompeo and Kinzinger.

Staff present: Jim Barnette, General Counsel; Karen Christian, Counsel, Oversight; Todd Harrison, Chief Counsel, Oversight and Investigations; Alan Slobodin, Deputy Chief Counsel, Oversight; Carl Anderson, Counsel, Oversight; Krista Rosenthall, Counsel to Chairman Emeritus; John Stone, Associate Counsel; James Thomas, Coordinator, Oversight and Investigations; Andrew Powaleny, Press Assistant; Sean Bonyun, Deputy Communications Director; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Katie Novaria, Legislative Clerk; Carly McWilliams, Legislative Clerk; Phil Barnett, Minority Staff Director; Stacia Cardille, Minority Counsel; Matt Siegler, Minority Counsel; Kristin Amerling, Minority Chief Counsel and Oversight Staff Director; Karen Lightfoot, Minority Communications Director, and Senior Policy Advisor; Elizabeth Letter, Minority Assistant Press Secretary; and Alvin Banks, Minority Assistant Clerk.

Mr. STEARNS. Good morning everybody. And we convene the Subcommittee on Oversight and Investigations. And I will open with my opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

We convene this hearing of the Subcommittee on Oversight and Investigations to simply gain a better understanding about the Department of Treasury's role in reviewing the Solyndra loan guarantee, particularly with regard to the Department of Energy's decision to restructure the loan guarantee and subordinate taxpayers to private investors. While President Obama may claim that hindsight is 20/20, but the facts tell a much different story. Recent emails produced by the White House and OMB, as well as a long

chain of others, clearly show that numerous members of the Obama administration from the most senior levels in the West Wing down to the career professionals at OMB and DOE knew that Solyndra was a bad bet that was destined to fail. And while the Obama administration may not have had a crystal ball, they did have financial models in August 2009 for telling that Solyndra would run out of money in September 2011, which they choose to ignore.

In late 2010 Solyndra informed DOE that the situation was dire. DOE began negotiations to restructure the terms of the loan to keep Solyndra above water. Under the new arrangement, two primary investors, Argonaut, Madrone and Madrone Capital, were given priority over the government with respect to the first $75 million recovered in the event of liquidation. I and other members of the subcommittee have continuously questioned the legal basis for this unprecedented decision. Section 1702–3 of the Energy Policy Act of 2005 clearly states in plain language that when DOE makes a loan, "the obligation shall be subject to the condition that the obligation is not subordinated to other financing."

Previous communications produced to the committee reveal that there were numerous concerns within the administration regarding the financial and political impact of the restructuring. What the latest round of emails show is that senior officials within the Obama administration had significant concerns about its legal basis and those concerns were simply ignored. In August 2011, as discussions about a second restructuring were underway, Assistant Secretary of Treasury, Mary Miller emailed the director of OMB Jeffrey Zients stating that, "Since July of 2010, Treasury has asked DOE for briefings on Solyndra's financial condition and any restructuring of terms.

The only information we have received about this has been through OMB as DOE has not responded to any request for information about Solyndra."

She goes on to note that Treasury's legal counsel believes that the statute and the DOE regulations both require that the guaranteed loan should not, should not be subordinated to any loan or other debt obligations, and that in February, Treasury requested in writing that DOE seek the Department of Justice's approval of any proposed restructuring, and that to her knowledge, that has never happened.

In a closing, Assistant Secretary Miller seemed almost resigned to DOE's course of action in stating that while she expects that DOE has a view about why loan subordination can occur without DOJ approval or Treasury's consultation, I wanted to correct any impressions that we have acquiesced in the steps to date, that is her quote.

Unfortunately, Assistant Secretary Miller is unable to join us today to discuss her correspondence with DOE or her Department's role in the Solyndra review. Hopefully, my colleagues or witnesses here today can shed some light on the decision-making process that occurred around the time of this restructuring. In fact, one of our witnesses, Gary Burner, Chief Financial Officer at the Treasury Department's Federal Financing Bank also emailed key DOE officials involved in the Solyndra restructuring after hearing about the proposed terms of the new agreement from OMB. He noted on Feb-

ruary 10th that he understood, "these adjustments may include subordination of Solyndra's 535 million reimbursement obligations to DOE, and possibly the forgiveness of interest." Accordingly, he raised a prospect of seeking the Department of Justice's approval which never ultimately occurred. Judging from these emails it is clear that senior officials at the Department of Treasury were not sufficiently consulted about the restructuring, and when they offered their opinions and warning signs, they were ignored like so many of the others along the way.

It should be noted, however, that the final rule issued by DOE implementing Title 17 of the Energy Policy Act specifically requires DOE to consult with the Secretary of Treasury before "DOE grants a deviation that would constitute a substantial change in the financial terms of the loan guarantee agreement." There is no exception allowing DOE to ignore those who disagree with its course of action.

I look forward to better understanding why the Department of Treasury felt so strongly about being consulted prior to the restructuring of a loan guarantee and whether they believe DOE violated the Energy Policy Act of 2005.

[The prepared statement of Mr. Stearns follows:]

Opening Statement of the Honorable Cliff Stearns

Chairman, Subcommittee on Oversight and Investigations

"Continuing Developments Regarding the Solyndra Loan Guarantee"

October 14, 2011

774 words

We convene this hearing of the Subcommittee on Oversight and Investigations to gain a better understanding about the Department of Treasury's role in reviewing the Solyndra loan guarantee, particularly with regard to the Department of Energy's decision to restructure the loan guarantee and subordinate taxpayers to private investors.

While President Obama may claim that hindsight is 20/20 but the facts tell a much different story. Recent emails produced by the White House and OMB, as well as a long chain of others, clearly show that numerous members of the Obama Administration—from the most senior levels in the West Wing down to career professionals at OMB and DOE—knew that Solyndra was a bad bet destined to fail. And while the Obama Administration may not have had a crystal ball, they did have

financial models in August 2009 foretelling that Solyndra would run out of money in September 2011, which they chose to ignore.

In late 2010, Solyndra informed DOE that their situation was dire. DOE began negotiations to restructure the terms of the loan to keep Solyndra above water. Under the new arrangement, two primary investors in Solyndra, Argonaut and Madrone Capital, were given priority over the government with respect to the first $75 million recovered in the event of liquidation. I and other members of this Subcommittee have continuously questioned the legal basis for this unprecedented decision. Section 1702(3) of the Energy Policy Act of 2005 clearly states in plain language that when DOE makes a loan, "the obligation shall be subject to the condition that the obligation is not subordinate to other financing."

Previous communications produced to the Committee revealed that there were numerous concerns within the Administration regarding the financial and political impact of the restructuring. What the latest round of emails show is that senior officials within the Obama Administration

had significant concerns about its legal basis, and that those concerns were simply ignored.

In August 2011, as discussions about a **second** restructuring were underway, Assistant Secretary of Treasury, Mary Miller, emailed the Deputy Director of OMB, Jeffrey Zeints, stating that:

> "since July of 2010, Treasury has asked DOE for briefings on Solyndra's financial condition and any restructuring of terms. The only information we have received about this has been through OMB, as DOE has not responded to any requests for information about Solyndra."

She goes on to note that "[Treasury's] legal counsel believes that the statute and the DOE regulations both require that the guaranteed loan should not be subordinate to any loan or other debt obligation" and that "in February, [Treasury] requested in writing that DOE seek the Department of Justice's approval of any proposed restructuring" and that to her knowledge "that has never happened." In her closing, Assistant Secretary Miller seems almost resigned to DOE's course of action in

stating that while she "expect[s] that DOE has a view about why loan subordination can occur without DOJ approval or Treasury consultation, I wanted to correct any impression that we have acquiesced in the steps to date."

Unfortunately, Assistant Secretary Miller is unable to join us today to discuss her correspondence with DOE or her Department's role in the Solyndra review. Hopefully, however, our witnesses can shed some light on the decision-making process that occurred around the time of the restructuring. In fact, one of our witnesses, Gary Burner, Chief Financial Officer at the Treasury Department's Federal Financing Bank, also emailed key DOE officials involved in the Solyndra restructuring after hearing about the proposed terms of the new agreement from OMB. He noted on February 10th that he understood "these adjustments may include subordination of Solyndra's $535 million reimbursement obligation to DOE and possibly the forgiveness of interest." Accordingly, he raised the prospect of seeking DOJ approval, which never ultimately occurred.

Judging from these emails, it is clear that senior officials at the Department of Treasury were not sufficiently consulted about the restructuring and when they offered their opinions and warning signs, they were ignored like so many of the others along the way. It should be noted, however, that the final rule issued by DOE implementing Title 17 of the Energy Policy Act specifically requires DOE to consult with the Secretary of Treasury before "DOE grants a deviation that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement." There is no exception allowing DOE to ignore those who disagree with its course of action.

I look forward to better understanding why the Department of Treasury felt so strongly about being consulted prior to the restructuring of the loan guarantee and whether they believe DOE violated the Energy Policy Act of 2005.

With that, I recognize my distinguished colleague Ms. DeGette.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you, Mr. Chairman. So if we want to know the legal basis for the subordination of this loan by DOE wouldn't it be nice to have DOE here? The majority has focused on an email from August 2011 in which a Treasury official raises questions about whether subordination of the guaranteed loan to Solyndra was appropriate. And the Treasury official expresses a view that DOE's restructuring of the loan may require Department of Justice approval.

Now, I think it's appropriate for this subcommittee to conduct fact-gathering relating to these documents to advance the committee's understanding of decisions relating to the Solyndra loan guarantee. But if we really wanted to have a fact-finding hearing wouldn't we also bring DOE in to see what they thought when Treasury told them that they thought that the Department of Justice needed to approve this loan?

The Treasury comments regarding subordination raised definite questions about the application of the Energy Policy Act provisions to the Department of Energy loan guarantee program, and it's the Department of Energy that implements these provisions. And so the Treasury email thus makes DOE's legal rationale for restructuring decisions a central issue of this hearing. I don't really see how you can have this hearing just bringing in one side in without the other side to respond. And as I have said repeatedly, Mr. Chairman, I think we need to have a full and fair gathering of the facts of what happened with the Solyndra loan and the restructuring so we can decide how we proceed further with solar energy and other types of alternative energy, loan guarantees and other types of supports. But despite this, the majority has refused the minority's request to invite the Department of Energywitnesses to this hearing. And astonishingly the majority has even objected to the minority's request to release the February 15, 2011 memorandum by counsel for the DOE loan program that was produced to the committee.

In that memo, the DOE counsel provides a detailed analysis of their view of the subordination issue, the statutory authorities in question, and DOE's position. And by the way, since February of this year, the Department of Energy has also given this committee an additional 65,000 pages of documents to go through.

Now, look, it should go without saying that the DOE's legal analysis of restructuring should be a component of today's discussion. But without the DOE legal memo, with sort of having our hands tied behind our back, let me just talk for a minute about this memo. In an August 17, 2011, email to the OMB deputy director, an assistant secretary at Treasury expressed a view that, "The statute and the DOE regulations both require that the guaranteed loan should not be subordinate to any loan or any other debt obligation."

She further notes that "DOE regulations state that DOE shall consult with OMB and Treasury before any deviation is granted

from the financial terms of the loan agreement." The statute and regulation she appears to be referring to contain the Title 17 Loan Guarantee Program which the Department of Energy interprets through implementing regulation. The Department has indeed interpreted the subordination language of the statute and regulations in the February 2011 memo I referenced. And the Department also interprets what constitutes a deviation from the title 17 rules.

I'm looking forward to hearing more from the Treasury today regarding what the Treasury official meant by her August 17th email. But if we really want a full understanding of the legal arguments for subordination and whether the restructuring constituted a deviation as defined under Department of Energy regulations, we also need to review the Department of Energy memo, and have the opportunity to ask DOE officials questions about their rationale.

The August email further notes that Treasury had suggested in February that the DOE consult with the Department of Justice regarding the restructuring based on a statutory provision that requires DOJ approval where there is a compromise of a claim. Communications provided to the committee show that a conversation between Treasury and DOE officials occurred on this issue in February 2011. To more fully understand what happened on both sides of this issue, the committee needs to hear from DOE as well as Treasury. Now, look, the majority may argue that the subcommittee will provide an opportunity to question DOE about its views on a later date. Mr. Chairman, I'm sure you intend to do that. But that approach only serves to ensure that half the story is told today. It makes this hearing appear to me to be more about generating headlines than engaging us in thorough fact-finding. And I hate to say that, and I say it with all due respect. But let's not do this investigation piecemeal, let's do a whole investigation, let's get all the facts out there and then let's figure out what to do.

Mr. STEARNS. I thank the ranking member. And I think it's self-evident that we're going to have the DOE folks up here. We agree with you completely, so we intend to have them up here, as well as the people who signed the document, so we can assure that we will have this happen. With that, I recognize the chairman of the full committee, my distinguished colleague from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, Mr. Chairman. Eight months ago, we asked Secretary Chu to turn over all documents containing communications between the Department of Energy and the Department of Treasury related to Solyndra. We had to ask again in September and DOE is only now beginning to respond to our request. The administration claimed our request was too burdensome for a timely response, but it is now apparent that that was not the case. We recently asked the Treasury Department to turn over similar documents and they responded immediately, thank you, beginning to turn over the requested documents in less than a week.

What we've seen so far suggested DOE essentially ignored Treasury after signing off on a $535 million loan guarantee. The documents also reveal the Department of Energy fervently steering

more taxpayer cash to Solyndra with complete disregard to the alarm bells that were coming from Treasury and others within the Obama administration.

DOE apparently stonewalled Treasury failing or refusing to turn over information related to Solyndra's restructuring. In one exchange with OMB in August of 2011 Assistant Secretary Mary Miller noted that, "Since July of 2010, Treasury has asked DOE for briefings on Solyndra's financial condition and any restructuring of terms. The only information we have received about this has been through OMB as DOE has not responded to any request for information about Solyndra." This seems to be a clear violation of the Energy Policy Act of 2005 which says DOE shall consult with OMB and the Secretary of Treasury before granting any deviation in that loan. Putting the taxpayers at the back of the line behind private investors in the event of liquidation for bankruptcy is not only a deviation, it's apparently unprecedented.

So what happened? Why did DOE keep Treasury in the dark? Solyndra was burning through cash and the alarm bells were certainly ringing. In February of 2011, DOE restructured the terms of the agreement and gave two private investment firms priority over the Federal Government in the likely event that Solyndra declared bankruptcy. DOE postponed Solyndra's initial interest payments and pushed back the repayment of the loan. DOE waived several requirements that Solyndra was obligated to meet before receiving further funding, including Solyndra's consistent failure to comply with the Davis-Bacon Act and their inability to contribute to an agreed upon reserve fund. While all that was happening DOE continued to push millions of additional dollars out the door in a futile attempt to save it, save Solyndra. Six months later, as predicted by DOE's only financial model back in 2009, Solyndra went belly up.

Today's witnesses hopefully are going to help us understand Treasury's involvement at various points of life of the Solyndra loan guarantee. Does Treasury believe DOE should have consulted with DOJ about restructuring? You have to wonder, given Treasury's expertise in commercial lending and project finance, if DOE had responded to Treasury's request for information would something have been different, could some of the taxpayers' money been saved? The Department of Energy has a lot of explaining to do and we will hear from them again soon, I assure you. Unfortunately, we also have to ask how many more Solyndras are there? Were there other warning flags that were ignored, risky gambles made with the taxpayers' hard-earned money? Today we focus on the startling development of one cabinet level agency concerned that another's actions were in violation of the law.

This investigation will continue until taxpayers get the answers that they deserve regardless of how high in this administration the facts take us. And I would just like to say that in regard to the minority's request for a DOE witness, it was received less than 2 days ago before the hearing. Today's hearing was precipitated in part because of the large and coordinated document done by the White House, OMB and DOE last Friday afternoon just prior to the start of the three-day federal holiday weekend. We do intend to

hold further hearings on this topic. DOE officials will be included in the testimony. And I look forward to that day.

[The prepared statement of Mr. Upton follows:]

Opening Statement of the Honorable Fred Upton
Chairman, Committee on Energy and Commerce
"Continuing Developments Regarding the Solyndra Loan Guarantee"
October 14, 2011

Eight months ago, we asked Secretary Chu to turn over all documents containing communications between the Department of Energy and the Department of Treasury related to Solyndra. We had to ask again in September, and DOE is only now beginning to respond to our request. The administration claimed our request was too burdensome for a timely response, but it is now apparent that was not the case. We recently asked the Treasury Department to turn over similar documents, and they responded immediately, beginning to turn over the requested documents in less than a week.

What we have seen so far suggests that DOE essentially ignored Treasury after signing off on the $535 million loan guarantee. The documents also reveal a Department of Energy fervently steering more taxpayer cash to Solyndra with complete disregard to the alarm bells coming from Treasury and others within the Obama administration. DOE apparently stonewalled Treasury, failing or refusing to turn over information related to Solyndra's restructuring. In one exchange with OMB in August 2011, Assistant Secretary Mary Miller noted that "since July of 2010, Treasury has asked DOE for briefings on Solyndra's financial condition and any restructuring of terms. The only information we have received about this has been through OMB, as DOE has not responded to any requests for information about Solyndra." This seems to me a clear violation of the Energy Policy Act of 2005, which says DOE shall consult with OMB and the Secretary of the Treasury before granting any deviation in the loan. Putting the taxpayers at the back of the line behind private investors in the event of liquidation is not only a deviation, it is apparently unprecedented.

So what happened? Why did DOE keep Treasury in the dark? Solyndra was burning through cash and the alarm bells were ringing. In February 2011, DOE restructured the terms of the agreement and gave two private investment firms priority over the federal government in the likely event that Solyndra declared bankruptcy; DOE postponed Solyndra's initial interest payments and pushed back the repayment of the loan; DOE waived several requirements Solyndra was obligated to meet before receiving further funding, including Solyndra's consistent failure to comply with the Davis-Bacon Act and their inability to contribute to an agreed-upon reserve fund. While all this was happening, DOE continued to push millions of additional dollars out the door in a futile attempt to save Solyndra. Six months later, as predicted by DOE's own financial models back in 2009, Solyndra went belly up.

Hopefully today's witnesses will help us understand Treasury's involvement at various points in the life of Solyndra's loan guarantee. Does Treasury believe DOE should have consulted with DOJ about the restructuring? You have to wonder, given Treasury's expertise in commercial lending and project finance, if DOE had responded to Treasury's requests for information, would something have been different? Could some of the taxpayers' money been saved?

The Department of Energy has a lot more explaining to do, and we will hear from them again soon. Unfortunately, we also have to ask: how many more Solyndras are there? Were other warning flags ignored, and risky gambles made with the taxpayers' hard-earned money? Today, we focus on the startling development of one cabinet level agency concerned that another's actions were in violation of the law. This investigation will continue until taxpayers get the answers they deserve, regardless of how high in this administration the facts take us.

Mr. GINGREY. Will the gentleman yield?

Mr. UPTON. And I yield to the gentleman.

Mr. STEARNS. The gentleman yields his time.

Mr. GINGREY. I thank the gentleman for yielding. I want to point out the fact that the Department of Energy's witness, the very first witness we had, was Jonathan Silver and we asked him this very question. So we'll be glad to have other witnesses from the Department of Energy, but that was the first witness, and of course now he has resigned, as we all know.

Mr. STEARNS. I thank the gentleman. I think our time has expired here, so we're going to go to the minority and recognize Mr. Waxman.

Ms. DEGETTE. Before you recognize Mr. Waxman, I would just like to say for the record this hearing was noticed last Friday, Mr. Chairman, and then it was a 3-day weekend because of the Federal holiday. The majority did not tell us until Tuesday of this week who the witnesses would be for this hearing, and at that point we asked for our witness. So I just want to clear that with the chairman. And we can yield now to Mr. Waxman.

Mr. STEARNS. I thank the gentlelady. All these huge documents precipitated this hearing that jumped last Friday.

Ms. DEGETTE. The chairman insinuated that we only asked for the witness 2 days ago, and that's because we only found out about these witnesses 3 days ago.

Mr. STEARNS. Well, let me recognize Mr. Waxman for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman. After the subcommittee's last hearing on Solyndra, Ranking Member DeGette and I wrote to Chairman Upton to request that the committee hold hearings on the effectiveness of U.S. policies in promoting clean energy. We asked the committee to examine what steps our Nation needs to take to make sure that we do not cede the clean energy market to China and other countries. Well, no such hearing has been scheduled. In fact, the subcommittee chairman told the media last week that the United States, "can't compete with China to make solar panels and wind turbines."

I cannot disagree more strongly with the chairman's statement. The clean energy economy will be the growth industry of this century. We will lose millions of jobs if we give up the industry to China. We can out-compete China, but to do so we have to reject the defeatist antiscience, antiprogress, antijobs views of those who impose investments in clean energy. Instead of helping America lead the world in clean energy, the Republican-controlled House is doing everything possible to maintain our addiction to fossil fuels and cripple renewable energy companies. Republicans voted against putting a price on carbon, which would have created market opportunities for clean energy. Republicans voted to slash funding for research and development into new clean energy technologies.

And now Republicans are opposing government investments in solar, wind and other clean energy companies. Well, this agenda

may be good for the oil companies, it may be good for the coal companies, but it is terrible for the American people and our economy. This hearing is supposed to be about whether the Department of Energy had legal authority to subordinate the government's loans to Solyndra when the loan was restructured earlier this year. But this is a rigged process. The chairman has invited witnesses from the Treasury Department who raised questions about DOE's legal authority. That's appropriate. Members should have a chance to hear from the Treasury witnesses and why they had concerns. But we should also have a chance to hear from DOE.

The Energy Department disagreed with—the Energy Department disagreed with Treasury, but they are not being allowed to testify. We're going to get only one side of the story, and that's no way to run an investigation. But it gets worse. The committee has received a 6-page document from the Department of Energy that explains in the Department's legal rationale for subordination.

We asked last week if the majority would object if we released this document so the public could understand DOE's rationale. The majority objected. They did not want the public to see DOE's explanation, and they're not going to have a witness who can talk about their explanation. On Wednesday, the Democratic staff asked the Republican staff if there would be any objection if we included a discussion of the DOE legal memorandum in the background memorandum we provide to Democratic members.

Again the Republicans objected. They asked us to withhold this critical information, DOE's legal rationale for its actions from our own members. And yesterday, the Republicans said they don't believe this memo should be made public at this time. This investigation is beginning to resemble a kangaroo court. At our last hearing, witnesses who asserted their lawful constitutional rights were publicly humiliated, and now the Republican majority is withholding exculpatory information from the public while they cast innuendo.

Mr. BARTON. Will the gentleman yield?

Mr. WAXMAN. No.

Mr. BARTON. I would sure like to know what information you have that we don't have.

Mr. WAXMAN. Mr. Chairman, can I get order?

Mr. STEARNS. Regular order, regular order. The gentleman is entitled to be heard and he still has time.

Mr. WAXMAN. I would like the clock stopped from that interruption.

Mr. STEARNS. You have another 10 seconds.

Mr. WAXMAN. And now the Republican majority is withholding exculpatory information from the public. Now, I don't object to an investigation into Solyndra, and based on the record to date, I don't see evidence of wrongdoing by government officials, just a bad investment decision. I don't want to minimize it, but this was a bad decision, as far as we know, made on the merits.

Mr. BARTON. The gentleman's time is expired, Mr. Chairman.

Mr. WAXMAN. But I have repeatedly said I support a fair and thorough investigation. If mistakes were made with taxpayers' money we should understand them and take steps to prevent them in the future, but our investigation needs to be fair. Preventing the Department of Energy from testifying is not fair, suppressing ex-

culpatory evidence is not fair. Mr. Chairman, I believe you are a fair man, but you are not conducting this investigation fairly and impartially, and I hope you will reconsider.

Mr. STEARNS. The gentleman's time is expired. I would say to him, in all deference to him, we think we are. And both you and the President have cited me talking about China and competition, it was taken out of context. And I simply pointed out the fact that China, which subsidized their solar manufacturing at $30 billion a year, have fewer regulations, lower labor costs, access to raw materials, a lack of environmental safety regulations, I think the United States should focus where we have a competitive, financial advantage.

Mr. WAXMAN. Mr. Chairman, since you have spoken out of turn I would like you to yield to me for one minute.

Mr. BARTON. Well, I sure would like to be yielded at some point in time, Mr. Chairman.

Mr. STEARNS. Well, I think the chairman has certain prerogatives. You've been a chair, you understand this.

Mr. WAXMAN. Well, I don't agree with that. Now you want to suppress statements by members.

Mr. STEARNS. Regular order. We are now going to welcome our two witnesses. And let me say to both of you——

Mr. BARTON. Mr. Chairman, are we through with opening statements?

Mr. STEARNS. We are through with opening statements. You'll certainly have an opportunity to ask questions and to extrapolate on your feelings during your questions.

Mr. BARTON. So we are going to let what the ranking member said go un——

Mr. STEARNS. Well, I think in a democracy, you let both sides have their opinion, and Mr. Waxman and Ms. DeGette certainly have an opportunity to make any outrageous, outrageous claims.

Mr. BARTON. I don't have a problem with Ms. DeGette's opening statement.

Mr. STEARNS. Well, I think both of us don't agree, so I'm asking a question in regular order. Let's return to our witnesses. And let me say to both of you, first of all, you're aware that the committee is holding an investigative hearing, and when doing so has had the practice of taking testimony under oath. Do you have any objection to testifying under oath?

Mr. GRIPPO. No, sir.

Mr. BURNER. No, sir.

Mr. STEARNS. OK. The chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today?

Mr. BURNER. No, sir.

Mr. GRIPPO. No.

Mr. STEARNS. Is that case will you please rise and raise your right hand. I'll swear you in.

[Witnesses sworn.]

Mr. STEARNS. You are now under oath and subject to the penalties set forth in Title 18, section 1001 of the United States Code.

You may now give a 5-minute summary of your written statement. Please begin. And we will start with Mr. Grippo.

STATEMENT OF GARY GRIPPO, DEPUTY ASSISTANT SECRETARY FOR GOVERNMENT FINANCIAL POLICY, DEPARTMENT OF TREASURY

Mr. GRIPPO. Well, Chairman Stearns and Ranking Member DeGette and other members of the committee, thank you for inviting us here today to talk about the Treasury's role in the Department of Energy loan guarantee program. My name is Gary Grippo. I'm the Deputy Assistant Secretary for Government Financial Policy at the Treasury. I'm joined here by Gary Burner. He is the CFO of the Federal Financing Bank. He reports to me in the Treasury. I submitted a written statement for the record. I'm not going to read a lengthy opening statement here. In the way of introduction I would just say that the Treasury has two roles, two very distinct roles, in the Department of Energy loan guarantee program, as a consultant and also as a lender.

As I think you know, that as a consultant the statute requires the Secretary of Energy to consult with the Department of Treasury on the terms and conditions of loan guarantees and we provide input on that basis. And as a lender, when the Department of Energy decides to make a 100 percent federally guaranteed loan as opposed to a partially guaranteed loan, whenever they make a 100 percent guaranteed loan, then it is the Federal Financing Bank that actually issues the loan to the private sector entity. So we have a role as a consultant, we have a role in lending, which is largely operational. Mr. Burner and I would be pleased to answer any questions. We thank you again for inviting us here.

[The prepared statement of Mr. Grippo follows:]

Statement of Gary Grippo
Deputy Assistant Secretary for Government Financial Policy
U.S. Department of the Treasury
Before the
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
United States House of Representatives

October 14, 2011

Chairman Stearns, Ranking Member DeGette, Members of the Subcommittee,

Thank you for inviting me to testify today regarding the Treasury Department's role in the implementation of the Department of Energy's (DOE) Title XVII loan guarantee program.

My name is Gary Grippo, and I am the Deputy Assistant Secretary for Government Financial Policy at the Treasury. In this role, I have two primary responsibilities. First, I oversee a policy staff that conducts analysis and develops recommendations for senior Treasury officials on all Government borrowing, lending, and investment, including Federal agency programs that offer loans and loan guarantees to the public. Second, I oversee the Federal Financing Bank (FFB). The FFB is a government corporation, under the general supervision of the Treasury, created by Congress to provide for coordinated, less costly, and more efficient financing of Federal and federally assisted borrowings. I am joined today by Gary Burner, the Chief Financial Officer of the FFB.

The Treasury is involved in the DOE loan guarantee program in two very distinct ways: as a lender and as a consultant. Both roles fall under my portfolio at the Treasury.

As a lender, in accordance with long-standing Federal credit policy, the FFB makes loans to private sector borrowers in cases where a federal agency, such as DOE, provides a 100% guarantee of all principal and interest on the loan. From a public policy perspective, it is typically preferable to have the FFB, rather than a commercial bank, issue the loan in such cases because a 100% Federal guarantee represents a credit risk to the lender that is the equivalent of a Treasury security and obligates the general taxpayer to assume the entire risk of the underlying guaranteed loan in the event of default. If a commercial bank were to make the loan, it would assume no default risk but would still be able to charge a relatively high rate of interest — providing the bank excess returns, while exposing the taxpayer to higher losses in the event of default. Financing these instruments through the FFB avoids these inefficiencies. The FFB sets the interest rate on these loans at a rate that is based on Treasury's rate of interest, which is commensurate with the actual default risk of the guaranteed loan to a lender, and thereby reduces costs to taxpayers if the loan defaults. Additionally, any amount charged by FFB over the Treasury's rate of interest is captured for the benefit of the taxpayer, rather than accruing to the benefit of commercial lenders.

The Treasury's other role in the DOE loan guarantee program, the consultative role, derives from Section 1702 of the Energy Policy Act of 2005, which states that "the Secretary [of Energy] shall

make guarantees under this or any other Act for projects on such terms and conditions as the Secretary determines, after consultation with the Secretary of the Treasury...."[1] This is codified in DOE regulations for the loan guarantee program. For example, 10 CFR Section 609.7(a) states that: "Concurrent with its review process [of completed loan guarantee applications], DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee."[2] In addition, Section 609.9(d) states that, "Prior to, or on, the closing date [of a loan guarantee agreement], DOE will ensure that: ... (4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement ...."[3]

The Treasury's consultative role falls within a particular window of a larger process — a process that ultimately leads to the issuance of a DOE loan guarantee, which DOE has described in previous testimony. Prior to engaging the Treasury on a specific transaction, DOE receives and reviews applications, carries out an initial due diligence, conducts a credit analysis and review, and negotiates an initial term sheet.

DOE consults with the Treasury after DOE has prepared a draft term sheet, but before DOE finalizes that term sheet and enters into a conditional commitment with the borrower. DOE briefs the Treasury on the transaction and provides certain documents, such as a paper summarizing the transaction and the proposed term sheet.

After consulting with Treasury, DOE completes its deal approval process, which culminates with the issuance of a conditional commitment. DOE then follows with additional due diligence, final contractual negotiations, and closing of the loan guarantee agreement. Leading up to closing, DOE may consult with Treasury if substantive changes are made to a guarantee's terms or conditions following conditional commitment.

Thus, the Treasury's limited role of consulting with DOE on the terms and conditions of guarantees falls within the context of a broader undertaking by DOE. In addition, as you are aware, DOE also interfaces with the Office and Management and Budget (OMB) on elements of this process.

Recognizing this broader context, the Treasury's interaction with DOE supplements, rather than duplicates, DOE's efforts, and aims to provide independent insight and input for DOE to consider as it executes its responsibilities under the loan guarantee program. In particular, given Treasury's expertise, we have focused on providing input that may help DOE further align the terms and conditions of a guarantee with the broad objectives of Federal credit policies, which are common to all Federal credit programs and are reflected in OMB Circular A-129: "Policies for Federal Credit Programs and Non-Tax Receivables."[4]

While I have alluded to this above, it is worth clarifying that there are several aspects of the implementation of the loan guarantee program on which the Treasury does not consult. For

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[1] Energy Policy Act of 2005 (Public Law 109-58).
[2] 10 CFR § 609.7 (2009).
[3] 10 CFR § 609.9 (2009).
[4] Available at: http://www.whitehouse.gov/omb/circulars_a129rev/.

example, the statute and underlying regulations require that, before issuing a guarantee, DOE must determine that there is a reasonable prospect of repayment, which involves detailed credit analysis to which DOE devotes substantial effort. DOE must also estimate the credit subsidy cost of the guarantee, which OMB must review and approve. The Treasury is not involved in, and does not consult on, these DOE activities.

Likewise, among a broad pool of applicants, DOE must select those that will receive loan guarantees, consistent with its programmatic objectives. Treasury is not expert with respect to the energy technologies that are the subject of the guaranteed transactions. Treasury's involvement is limited to consulting on the terms and conditions of guarantees after DOE has selected which applicants it will consider for a conditional commitment.

In closing, Treasury's consultative role reflects Treasury's experience with federal credit policies and with providing advice on aligning terms and conditions of guarantees with those policies.

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today to share with you Treasury's limited role in the much larger DOE loan guarantee program. Gary Burner and I would be pleased to answer any questions that you may have.

Mr. STEARNS. And I understand Mr. Burner does not have an opening statement, is that correct?

Mr. BURNER. I do not, sir.

Mr. STEARNS. OK. With that then, I will start my series of questions. The first question I have for you I would like to establish early on. We keep hearing loan guarantee, but I think this is a misnomer. As I understand it, when the DOE gives a loan guarantee to Solyndra, what happens is the Department of Treasury prints the money, gives it to DOE and DOE gives it to Solyndra, there is no private bank involved, there's no other commercial enterprise, except it goes from Treasury printing the money, giving it to DOE and DOE giving it to Solyndra. Is that a fair estimation of what happens?

Mr. GRIPPO. Let me explain what happens when——

Mr. STEARNS. No, just answer my question. Is that approximately what happens? There's no bank involved?

Mr. GRIPPO. There is no commercial bank involved.

Mr. STEARNS. Right. So Solyndra is not going to a bank and saying, to Bank of America or any other bank, saying, would you loan me $535 million because DOE will guarantee? They never did that, they just came to DOE and got a check, is that correct?

Mr. GRIPPO. That is correct.

Mr. STEARNS. OK. I think the American people, a lot of people, when you hear loan guarantee, it means that the government is standing behind a bank, but in this case, the Treasury is printing the money. The other question is, I just want to get this clear, in your estimation, can taxpayers' money be subordinated ever, yes or no?

Mr. GRIPPO. I really could not give you a yes-or-no answer.

Mr. STEARNS. So you legally can't tell me?

Mr. GRIPPO. I cannot.

Mr. STEARNS. In your opinion, and Mr. Burner, has there ever in the history of the United States, Government taxpayers' loan guarantee or money given to investment in private companies like this, ever been subordinated to the private sector, in your experience, your answer is yes or no?

Mr. GRIPPO. I have personally not been involved in any.

Mr. STEARNS. So you can't from experience?

Mr. GRIPPO. I cannot.

Mr. STEARNS. In your limited experience, have you ever seen taxpayers' money be subordinated?

Mr. GRIPPO. I have not personally not been involved in any.

Mr. STEARNS. OK. Mr. Burner, you're the chief financial officer, is that correct?

Mr. BURNER. That's correct, sir.

Mr. STEARNS. So in your experience—how long have you been in the office?

Mr. BURNER. I've been holding this position for 5 years.

Mr. STEARNS. OK. And what was your experience before that?

Mr. BURNER. I've been with the Treasury Department for 28 years.

Mr. STEARNS. How many years?

Mr. BURNER. 28, sir.

Mr. STEARNS. 28. So in your experience of 28 years, plus being the chief financial officer, can and have you ever heard of taxpayers' money being subordinate to outside commercial firms?

Mr. BURNER. No, sir, I have not.

Mr. STEARNS. Never in your entire—that's 28 plus 5, so that would be 33 years?

Mr. BURNER. I'm involved in a limited supply, but, yes, sir.

Mr. STEARNS. So 33 years experience.

Mr. BURNER. It's 28 total, not 33.

Mr. STEARNS. 28 total. In 28 years total you have never seen taxpayers' money subordinated?

Mr. BURNER. No, sir.

Mr. STEARNS. And has your experience been if they do, it's against the law?

Mr. BURNER. I'm not aware of—I can't give you a legal interpretation on that, sir.

Mr. STEARNS. Mr. Grippo, do you think it's against the law for them to subordinate based upon the Energy Policy Act?

Mr. GRIPPO. I'm not in a position to offer a legal interpretation. I'm not a lawyer.

Mr. STEARNS. Now, Mr. Grippo, the Energy Policy Act in 2005 in its regulations require the Secretary of Energy to consult with the Secretary of Treasury regarding the terms of and conditions of a loan guarantee, is that correct?

Mr. GRIPPO. Yes.

Mr. STEARNS. What must DOE do to satisfy this consulting requirement?

Mr. GRIPPO. The Department of Energy must come to the Treasury at a minimum with the terms and conditions in a term sheet prior to issuing a conditional commitment to offer a loan guarantee.

Mr. STEARNS. So basically, DOE must seek approval to go through with a loan guarantee, is that fair to say?

Mr. GRIPPO. That would not be fair to say. We are not approving or rejecting the terms and conditions.

Mr. STEARNS. So it's merely they may need to inform you, that's all they have to do?

Mr. GRIPPO. Yes. They must consult.

Mr. STEARNS. Does Treasury have the ability to approve or reject a loan guarantee under the statute if they find there's problems?

Mr. GRIPPO. We do not have the authority to approve or reject.

Mr. STEARNS. OK. What if Treasury believes the terms and conditions of the guarantee do not protect the government's interest, what do you do then?

Mr. GRIPPO. We raise the questions, we provide suggested changes.

Mr. STEARNS. But there's nothing legally you can do beyond that?

Mr. GRIPPO. No.

Mr. STEARNS. Mr. Grippo, if you will go to tab 18 in your binder, there's an email between OMB staff on March 10, 2009 that states, "'Treasury was apparently not very pleased to have Solyndra sprung on them that day and let Matt Rogers who is DOE's stimulus advisor know about it in no uncertain terms." Is this an accurate description of DOE's consultation with Treasury?

Mr. GRIPPO. We were not aware they were going to come to us with a term sheet for the Solyndra loan at that time.

Mr. STEARNS. Was Treasury——

Mr. GRIPPO. It was the first loan in the process and we had not worked out a routine for conducting the consultation.

Mr. STEARNS. Was Treasury rushed to provide its consultation on Solyndra?

Mr. GRIPPO. We asked for additional time and were given additional time and provided consultation in due course.

Mr. STEARNS. My last question, Mr. Grippo, when did Treasury first learn of DOE's intention to award a conditional commitment to Solyndra, and how did Treasury learn of this and who at the DOE informed Treasury?

Mr. GRIPPO. Well, it would have been around this time of March 10th when we were provided information on the terms and conditions of the loan. I'm not specifically sure what individual transmitted the documents to us, but it would have been here in early March of '09.

Mr. STEARNS. Thank you. My time is expired. I recognize my colleague, Ms. DeGette from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman. Mr. Grippo, the chairman asked you if Treasury was rushed in its decision and you said you were given additional time. So I guess your answer would be no, you weren't rushed?

Mr. GRIPPO. We were not rushed.

Ms. DEGETTE. OK. Now, the majority has highlighted these comments by Mary Miller, who is the Assistant Secretary for Financial Markets, or was, in an August 17th email to OMB Deputy Director Jeffrey Zients regarding restructuring of the Solyndra loan. So if you can take a look at tab 12 in your notebook and look at that email. In the email, Ms. Miller writes, "Our legal counsel believes that the statute and the DOE regulations both require that the loan should not be subordinate to any other loan or debt obligation."

Mr. Grippo, do you know whether the Treasury Department rendered a legal opinion regarding whether subordination of government interests in the Solyndra loan is consistent with the statutory requirements regarding the DOE loan guarantee program.

Mr. GRIPPO. We did not render such a legal opinion.

Ms. DEGETTE. You didn't give a legal opinion, right? I mean, your department. You're not a lawyer so you wouldn't have.

Mr. GRIPPO. The Treasury did not.

Ms. DEGETTE. Right. Does the responsibility reside with the Department of Treasury for interpreting and implementing Title 17 as it relates to the Department of Energy's authority to subordinate loans authorized under statute?

Mr. GRIPPO. It is not the Treasury's responsibility to interpret an Energy statute.

Ms. DEGETTE. In fact, it's the Department of Energy that's charged with implementing the statute that authorizes the DOE loan guarantee program, correct?

Mr. GRIPPO. Correct.

Ms. DEGETTE. And in fact, counsel for DOE's loan program office authored a 6-page memorandum dated February 15, 2011 that pro-

vided a detailed discussion of the legal basis for the subordination during the restructuring of Solyndra's loan guarantee. That's the legal document I referred to in my opening statement. So, Mr. Chairman, today we're talking about why there was subordination and what the legal basis was, and so I want to ask unanimous consent that this February 15, 2011 DOE legal memo regarding subordination be entered in the record. I will tell you, I read it, I'm a lawyer and I found it to have no privileged information or anything like that. I think it would be helpful to have that for today and for future hearings talking about this issue.

Mr. STEARNS. I thank the gentlelady. We will look at it and we will get back to you.

Ms. DEGETTE. Thank you.

Mr. DINGELL. I have a question of the chair.

Ms. DEGETTE. I will yield to the chairman emeritus.

Mr. DINGELL. I ask that the unanimous consent is not going to be considered, it's going to be honored?

Mr. STEARNS. No, Mr. Dingell. What we do is the procedure has been with the ranking member and I that if she submits something and I haven't seen it, then I have the staff and my counsel look at it. Likewise, when I want to put a unanimous consent, I let her and her counsel look at it before we make the decision. And that has been our regular procedure. And I think even you did that when you were chair of this committee.

Mr. DINGELL. It's always been my understanding that these records should be as clean as possible.

Mr. STEARNS. I agree.

Mr. DINGELL. And that everybody ought to know what all the events are that we're dealing with, and that when a member thinks that this is important that it ought to be in the record, it ought to be in the record.

Mr. STEARNS. I think, though, that both sides should have an opportunity to review it.

Ms. DEGETTE. Reclaiming my time, Mr. Dingell, what Chairman Stearns and I have been doing, I've been doing——

Mr. DINGELL. I'm wasting your time.

Ms. DEGETTE. That's oK. I've been doing it with his documents too, is just give him a chance to review it for a minute and then I will renew my motion.

Mr. WAXMAN. Will the gentlelady yield to me?

Ms. DEGETTE. Yes, certainly.

Mr. WAXMAN. This isn't a document they have time to review, this is a document they've had since the very first day of our hearings on Solyndra, it's a document that was discussed whether we could release it. They're familiar with the document. And if you ask unanimous consent, they ought to be able to say yes or no.

Ms. DEGETTE. OK. Well, let's give them 1 minute and if they won't do it then I'm going to make a motion. Well, let me just finish my questioning. Mr. Grippo, have you seen that document?

Mr. GRIPPO. I have not.

Ms. DEGETTE. That memo?

Mr. GRIPPO. No.

Ms. DEGETTE. Mr. Burner, have you seen that memo?

Mr. BURNER. I have not.

Ms. DEGETTE. OK. Are you aware of any of the legal opinions that the Department of Energy expressed in that memo after doing the legal research?

Mr. GRIPPO. I am not personally aware of their legal conclusions.

Ms. DEGETTE. OK. And can you speak to what DOE's views are regarding a legal basis for subordination in a restructuring under the DOE loan guarantee program?

Mr. GRIPPO. I would not feel comfortable speaking to their views and state of mind, no.

Ms. DEGETTE. Because that's a different agency, right?

Mr. GRIPPO. Yes.

Ms. DEGETTE. Mr. Burner, what about you, can you speak to what DOE's views are regarding the legal basis for subordination in a restructuring under the DOE loan guarantee program?

Mr. BURNER. No, ma'am, I cannot.

Ms. DEGETTE. And why is that?

Mr. BURNER. I am not familiar with their authorities.

Ms. DEGETTE. Once again, Mr. Chairman, it would be really helpful to have DOE here. And Mr. Chairman, I renew my request for unanimous consent to put that memo in the record.

Mr. STEARNS. While we're looking at it, and I think there are several other staff to take a look at it first——

Ms. DEGETTE. OK. Well, the staff has seen it, and our staffs have been talking about it, and your staff told my staff they were going to object.

Mr. BARTON. Well, Mr. Chairman, if you want somebody to object, I'll be happy to object.

Mr. STEARNS. The gentleman objects.

Mr. BARTON. I'm reserving the right to object.

Mr. STEARNS. And let me recognize Mr. Barton, the emeritus of the full committee, for his 5 minutes of questioning.

Ms. DEGETTE. Well, wait a minute.

Mr. BARTON. Why don't you and Ms. DeGette finish your business.

Mr. STEARNS. I think you finished your time.

Ms. DEGETTE. I finished my questions, but I have a request for unanimous consent and now Mr. Barton——

Mr. BARTON. I'm reserving the right to object.

Ms. DEGETTE. Well, in that case, what's the basis because——

Mr. WAXMAN. Well, do it or don't.

Mr. BARTON. I haven't seen the memo. I don't know what you're talking about.

Ms. DEGETTE. Well, your staff has seen the memo.

Mr. BARTON. Well, I haven't seen it.

Mr. STEARNS. Well, in all fairness, let Mr. Barton, he's the emeritus of this full committee, if he wants to see the document I think he deserves to see it.

Ms. DEGETTE. Great. OK. Let's give him a copy.

Mr. STEARNS. Well, I think at the same time, we're going to have votes right now, and I think we want to continue our questioning. He has the opportunity to ask his questions. Presumably after he asked his questions, he can read it and we can have a decision.

Ms. DEGETTE. In that case, Mr. Chairman, I would ask unanimous consent that we recess for the votes and when we return from the votes we can——

Mr. BARTON. I do object to recess right now.

Mr. STEARNS. Object. And at this point, Mr. Barton is recognized for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. Let me make one brief comment on Ranking Member Waxman's opening statement. I know when you're in the minority and the President is of your own party, you have an obligation to defend that President to some extent. I would also point out that we've been trying to get the facts on Solyndra for about 6 months and it took a subpoena request to finally get some documents and every member of the minority voted against that subpoena request.

Now, last weekend we got a fairly extensive document done up right at 5 or 6:00. And to the minority's credit, their staff spent all weekend apparently going through the documents, found some documents that the minority felt were worthy of being released, and they exercised their right to do that. And I tip my hat off to them for that. They worked harder and maybe they were tipped off, who knows, but they at least, they took advantage of a situation and did a thing that they thought made sense.

Ms. DeGette said in her opening statement that she wants to get the facts on the table. That's what we're trying to do. There's going to be no lack of witnesses called before this subcommittee from the Department of Energy and other departments.

But today, we're here to talk to the Treasury Department because they're the Department that actually financed the loan, it's not really a loan guarantee, and apparently they're the Department that raised a lot of red flags about it that nobody at DOE or the White House paid any attention to. Now, with that, I want to ask my first question. How did the Treasury Department first find out about the Solyndra loan?

Mr. GRIPPO. About the loan itself?

Mr. BARTON. About the fact that the Department of Energy under President Obama had decided to go forward with it. Were you officially notified, or did you hear about it in the press? What was the first inking that they were thinking about giving this company $500 million?

Mr. GRIPPO. I think the best answer was that it was in March of 2009 when we were submitted documents to provide consultative input.

Mr. BARTON. So you did get an official transmittal from the Department of Energy?

Mr. GRIPPO. Yes.

Mr. BARTON. Is that a part of the record that we can look at, if not, could we see those documents?

Mr. GRIPPO. There certainly would be emails or other documents that delivered the term sheet and other related documents.

Mr. BARTON. Chairman Stearns, in his questions, made the point that in the law we authorized the loan guarantee, which means the private sector makes the loan and the Federal Government agrees to pay if there's a default. But in this case, this was not a loan guarantee, the Treasury Department actually granted a loan. Is

there a decision document that goes through that process and makes that change on the record?

Mr. GRIPPO. There is a, there are a number of longstanding written Federal policies, including Office of Management and Budget circulars and other documents, which state that it is the Federal Government's policy to have the Federal Financing Bank issue a loan when another agency is making a 100 percent guarantee. And if I could, I'll explain why that has been a longstanding policy.

Mr. BARTON. So even though the law stipulates a loan guarantee because there was a decision to do 100 percent financing, existing regulations convert that guarantee to a loan as opposed to a loan guarantee?

Mr. GRIPPO. Well, there's still a guarantee that is issued by the Department of Energy, it's just that in this case, it is issued to a government corporation, the Federal Financing Bank, which is under the supervision of the Treasury, rather than to a commercial bank.

Mr. BARTON. But in layman's terms, the Department of Energy guarantees that one part of the Treasury will pay the other part of the Treasury if the loan is not repaid, that's what it amounts to?

Mr. GRIPPO. The Department of Energy is issuing a loan guarantee to the Federal Financing Bank.

Mr. BARTON. So the Treasury will send $500 million to the Department of Energy who will turn around and send it to the Federal Financing Bank, which is a part of the Department of Treasury, isn't that correct?

Mr. GRIPPO. That is correct. And there are good public policy reasons for doing it that way, because it is the cheapest way to finance that loan for the taxpayer.

Mr. BARTON. Now, there are emails, and I may, I think I'm right on this, that the minority has put into the record, or at least released to the public, that shows that many Treasury officials had grave concerns about this loan. Was the Treasury Department ever in a position to just reject the loan?

Mr. GRIPPO. No. The Treasury Department—neither the Treasury Department nor the Federal Financing Bank would have legal authority to reject the loan.

Mr. BARTON. If asked on the record, or if the President had asked would the Treasury Department approve of this loan being given or would they have objected to it?

Mr. GRIPPO. I'm sorry, could you repeat that question.

Mr. BARTON. Well, my time has expired. If you had been given an opportunity, if the Treasury Department had had the authority to say yes or no on the Solyndra loan at the time it was granted, would the Treasury Department have approved it or disapproved it?

Mr. GRIPPO. One, the Treasury did not have that authority. And two, we did not have all of the due diligence and background information that the Department of Energy had. It's not our job in the process to make a credit decision or a risk decision.

Mr. BARTON. Is it fair to say that based on objections raised before the loan was granted, after the loan was granted, that the Treasury had grave concerns about this loan, is that a fair statement?

Mr. GRIPPO. That's probably not how I would characterize it.

Mr. BARTON. Characterize it correctly, then.

Mr. GRIPPO. We provided consultative input on the originally terms and conditions, we made suggestions, some of those were accepted. Beyond that, throughout 2010 and in 2011, we were certainly aware of issues, we were offering advice and input, we were letting the Department of Energy know that we had expertise in finance, in structured finance and in Federal credit policy, and we were trying to make that available to the Department of Energy, but we did not have specific information about the loan or——

Mr. BARTON. I'm trying to help you out.

Mr. STEARNS. The gentleman's time has expired. We have a vote on the floor. The 10-minute bell just rang, so we're going to allow Mr. Waxman to do his 5 minutes, but I tell all members to come back here and we will have a decision on the unanimous consent of the ranking member, but we will let Mr. Waxman, who has to be on the floor, offer his 5-minute questioning.

Mr. WAXMAN. Thank you, Mr. Chairman. I will have to be on the floor after these series of votes, so I wanted to take my opportunity now to ask you questions. Who has the legal authority to make the decision on the issue of subordination, is it the Treasury Department or the Department of Energy?

Mr. GRIPPO. It is certainly not the Treasury Department.

Mr. WAXMAN. And do you know if it's the Department of Energy?

Mr. GRIPPO. In these instances, I'm not sure if it is the Department of Energy or the Department of Justice or exactly where the authority lies.

Mr. WAXMAN. Well, the Department of Energy runs the program and they heard from you, your department, that there were concerns about the subordination issue, isn't that correct?

Mr. GRIPPO. I think we raised the issue of whether they could compromise a claim owed to government, not specifically whether there was subordination, to be clear about the concern we raised.

Mr. WAXMAN. There was no legal decision or memorandum, you just raised a concern to them, by the way, look at what?

Mr. GRIPPO. No. We did not have a legal conclusion or render a legal judgment. We were flagging an issue for them to consider.

Mr. WAXMAN. OK. You flagged an issue for them to consider, they heard what you had to say, and then their lawyer issued a legal opinion. And a legal opinion is a legal opinion, it's not statement of facts, it's a statement of what they think the law is. And that's the document we're trying to make public. This is a document that the Republicans have had for months. In fact, at the very first hearing we had on Solyndra, Congressman Gingrey read a portion from this legal memo and asked you a question. And the issue before us at this moment in the committee is whether we are going to make this part of the record, whether we are going to make a legal opinion public.

And the chairman is like one of those serials, when we were kids going to the movie, we are not going to get the result until you come back the next time. It suggested that we will know about the unanimous consent decision when we come back from these votes on the floor.

Well, I'm not going to be able to be here, but if they don't give us unanimous consent, I think we ought to have a motion to put it in the record. I don't understand why this shouldn't be part of the record. It's a key document in our investigation, it explains the Department of Energy's legal explanation for the subordination of taxpayer debt, it was produced to our committee, and on September 14th, it was used by Mr. Gingrey. The Republicans may allege that the release of this document could taint fact witnesses in the investigation.

Well, the entry of a relevant document does not pollute an investigation, rather, it creates a more fulsome record so we know what DOE was thinking. We don't have DOE here. We should have DOE here. I don't know exactly what this testimony we're hearing from you has to do with it all, unless we get it in perspective. You flagged an issue for DOE. Now we should say, oK, representative from DOE, the issue was flagged, what was your view of that issue? All we know is that the issue was flagged and their legal counsel wrote an opinion.

Now, the Republicans have released a dozen documents to the press on this investigation, they leaked many more to the national media. The release of this specific document does not take the investigation any more than the release of all these other documents. And the majority wants to enter documents in the record whether it supports their theory of the case and keep documents out that may contradict it. So we'll see what happens in this fight when we come back. And I know that Ranking Member DeGette will do an able job in pointing out why this ought to be part of the record in addition to my comments. But let me ask you——

Mr. BARTON. Would the gentleman issue——

Mr. WAXMAN. No, I will not. It's my time.

Mr. BARTON. I'll ask for additional time, if you will just let me ask——

Mr. STEARNS. Regular order, regular order. We do have a vote and Mr. Waxman can take his time. He has the floor.

Mr. WAXMAN. Thank you, Mr. Chairman. Mr. Grippo or Mr. Burner, I would like to ask about any interactions you've had with Mr. Kaiser on this question of the loan. Did any of you hear from Mr. Kaiser?

Mr. GRIPPO. I did not.

Mr. BURNER. I did not.

Mr. WAXMAN. And when the Treasury conducted its review of Solyndra's term sheet and other information in 2009, did you instruct anyone to give specific advice to DOE on the terms and conditions because of the Mr. Kaiser's donation to the President?

Mr. GRIPPO. No, sir.

Mr. BURNER. Certainly not.

Mr. WAXMAN. Do any of you have reason to believe that anyone at Treasury gave specific advise to DOE on the terms and conditions of Solyndra's loan because of Mr. Kaiser's donation to the President?

Mr. GRIPPO. No.

Mr. BURNER. No, sir.

Mr. WAXMAN. When Treasury determined the interest rate for the loan to Solyndra, did you instruct anyone to take any specific

action regarding this rate because of Mr. Kaiser's donation to the President?

Mr. GRIPPO. No.

Mr. BURNER. No.

Mr. WAXMAN. Are you aware of anything that would suggest that Mr. Kaiser's donation to the President that was a factor in DOE's determination whether to grant or restructure the Solyndra's loan guarantee?

Mr. GRIPPO. No, sir.

Mr. GRIPPO. No, sir.

Mr. WAXMAN. Well, I thank you for your answers and for being here today, and for the limited value it may be. I yield back my time.

Mr. STEARNS. The gentleman yields back. And we are going to temporarily recess the committee and we will come back, and we ask the forbearance of the witnesses.

[Recess.]

Mr. STEARNS. The subcommittee will reconvene. And as we mentioned before the break, we will take up the unanimous consent requests by the ranking member to put in a document dealing with Susan Richardson, the chief counsel of the loan program from DOE dated February 15, 2011. We have had a chance to review it. And I think before I make my final decision, I will recognize the gentleman from Texas, emeritus of the full committee, on his reservation. And Mr. Barton is recognized for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. I do reserve the right to object. And I do want to tell the gentlelady from Colorado, if we have a productive discussion, about my reservation, I am very willing to withdraw the reservation because I am not at all interested in hiding any relevant information from the American public. And the way to get it in the public domain is to obviously put it into the record.

I will start out by saying, after consulting with the majority counsel, it is clear to me that this is a key memo. It is also clear to me that the majority counsel had every intention to probably have—in fact, I would say it would definitely have a hearing specifically on this memo and that the minority counsel was made aware of that at least 2 to 3 weeks ago.

There are apparently at least two memos that are identical in terms of content, with the exception of who they're addressed to. One memo is addressed to Secretary Chu from the general counsel and the other memo—and I think the memo that the gentlelady from Colorado wanted to put into the record is a memo to the general counsel from a lady named Susan Richardson, who is the chief counsel of the loans programs office. The content—at least from what I can tell in trying to read both memos very quickly—is identical, but the salutation and the address are different. That, to me, is somewhat puzzling.

So at the appropriate time, I would hope we would put both memos into the record, if we're going to put one of them: The one addressed to the Secretary of Energy and the one also addressed to the general counsel.

The key part of the facts in the memo is on page 3 and it's got—the paragraph headline is "issue." And here's what—I am going to

read it because I think it's important. "The issue is whether the proposed subordination of certain of the borrower's reimbursement obligations to the DOE is consistent with subsection 1702(d)3 of Title 17." This is of the Energy Policy Act of 2005 of which I was a conference chairman and the committee chairman that supported this provision, and also supported the law.

Subsection 1702(d)(3) provides that the guaranteed obligation shall be subject to the condition that the obligation is not subordinate to other financing." I want to repeat that, Mr. Chairman. "Subsection 1702 d, subsection three provides that the guaranteed obligation shall be subject to the conditions that the obligation is not subordinate to other financing," not subordinate to other financing. That, to me, is explicitly clear.

Now, here's the answer that—either Susan Richardson or the general counsel, depending on which memo you decide to put into the record—here's the short answer to that question. The proposed subordination is permitted under Title 17. The subordination condition contained in subsection 1702(d)(3) is, by its terms, applicable only as a condition precedent to the issue of the loan guarantee. Well, the question I would have for the author of the memo, Mr. Chairman, where does that come from? Under what fairytale do they decide after reading that the obligation is not subordinate just out of the blue make the statement, is applicable only as a condition precedent to the issuance.

Now, as it turns out, Mr. Chairman, the reason that they answered that is that this memo was issued after Solyndra had already received some of its loan proceeds and was in default. This is an opinion on my part. I am not saying it's a fact, but I think it's an informed opinion.

The Department of Energy is looking for a reason to continue the loan and to restructure it but they have a problem in that they can't subordinate it. And the only way to restructure it is if they can. So the rest of this memo, Mr. Chairman, goes through a convoluted explanation of why they think they can subordinate.

And finally, on the bottom of page 6 in a footnote number two, they basically say, we think we can subordinate it because the Secretary of Energy has broad authority to do whatever he wants to do. That's not a real reasoned legal opinion, Mr. Chairman. So I would hope that we will find out how many of these memos are floating around, who actually authored them, have the staffs on both sides depose the authors, probably have a hearing specifically on this topic, and let's get to the bottom of it, because it is clear to me that the Department of Energy violated the law when they agreed to subordinate the taxpayers' money to private investors, some of whom appeared to have been heavy contributors to President Obama's campaign.

And I want to thank the gentlelady for wanting to put the memo in the record. It is one of the key—if not the key documents, but we need to get all the facts on the table, not just this one document.

Mr. STEARNS. All right. I thank the gentleman. I think what we're going to do here is have a—by unanimous consent——

Ms. DEGETTE. I'd ask unanimous consent to respond to the gentleman.

Mr. STEARNS. OK. I certainly was going to do that. I thought we might have a discussion that you might want to have more time on that. I think other members would like to do that. I think we will limit this to 3 or 4 members, maybe perhaps 15, 20 minutes on this discussion if it goes that long. You are recognized for 5 minutes.

Ms. DEGETTE. I just want to respond on the reservation of rights. I want to thank the chairman emeritus for restoring this debate to some sanity. We won't object to the other—if Mr. Barton will—apparently it's the same memo, and it has different addressees.

Mr. BARTON. That is correct.

Ms. DEGETTE. But it has the same text in the memo.

Mr. BARTON. That's my quick reading.

Ms. DEGETTE. I don't object to that coming in either. And I think the chairman emeritus is understanding the point that I have been making all along which is, we need to have a full investigation. We need to have all of the evidence in the record. We need to figure out what happened because just to have Treasury come in and say, "Well, we said it should go to DOJ" without having DOE in to say, "Well, here's what we thought about what Treasury said, and here's why we did this," and to have the actual author of this memo in, we can't know what happened.

And that's really the purpose of the Oversight and Investigations Subcommittee, is to figure out what happened. And so, you know, I think that the chairman emeritus' questions about this legal memo are good questions. I just only wish that Susan Richardson, or somebody else who drafted this memo, was here to answer those questions. So anyway, I am glad we're going to put this memo and the other memo in the record. I think it helps, and I would also ask the chairman after the recess next week, let's have another hearing, let's bring these folks in. I think we really need to know what they're doing.

Mr. STEARNS. As the gentlelady heard me earlier, we intend to bring Secretary Chu in and to bring the Department of Energy in, and I am glad that you support that.

Ms. DEGETTE. Mr. Chairman, with all due respect, I do support bringing Secretary Chu in. And I think it's important to bring him in, but I also think we should bring in the individuals in DOE who actually wrote these memos and who had these communications and who gave these legal opinions. Otherwise, I fear that he might not know the legal basis for this. We need to know it from him but we need to——

Mr. STEARNS. All right. And I would say to the ranking member, my staff has told your staff that we are going to do that.

Ms. DEGETTE. Excellent.

Mr. STEARNS. So I think excellent is a good word to use.

Mr. TERRY. Mr. Chairman?

Mr. STEARNS. The gentleman from Nebraska is recognized for 5 minutes.

Mr. TERRY. Strike the last word.

Mr. STEARNS. Do you request to strike the requisite number of words?

Mr. TERRY. I do.

Mr. STEARNS. You are recognized for 5 minutes.

Mr. TERRY. Thank you, Mr. Chairman.

And I agree with the gentlelady from Colorado and our friend the chairman emeritus from Texas. I am glad these two documents are being submitted to the record. I think that's important.

I do have some concerns. Usually before the documents are submitted, we have some level of understanding about them. And some of the concerns that I have that now we're discussing them, we're discussing them in theory because interviews haven't been done with these parties. Traditionally what happens is, when we get documents that are conflicting, or we have questions about—there are interviews done by staff so that we're better informed. That has not been able to be done, and the staff's point here of not releasing these—of course, Mr. Chairman, as we have been briefed, the minority has had these documents for at least a week, if not more; is that true, Mr. Chairman?

Mr. STEARNS. That's my understanding.

Ms. DEGETTE. If the gentleman will yield. Many of the emails that have been put in the record, interviews have not been conducted with the authors of those emails either.

Mr. TERRY. Let me ask you this: You want to have a hearing next week? I love that. Well, maybe not—well, I would if you would. But I'm not sure our colleagues would agree to having one next week. But the week after. So in the meantime, would you be helpful, gentlelady, the ranking chair, of providing, encouraging Susan Richardson to have an interview, any of the associates with her that wrote this memorandum? I think it's important that even Dr. Chu's staff be involved because the first one was ostensibly written to him, which raises a lot of questions, why was a subsequent one—they felt it was necessary to erase his name out there and to try to hide the original January memo. I think those are important questions to ask because it looks like there's a cover-up to protect Dr. Chu in this.

Ms. DEGETTE. Will the gentleman yield?

Mr. TERRY. Sure.

Ms. DEGETTE. I think that's a pretty incendiary statement, and I don't think we know. They might have had two memos; one with his name, one with Susan Richardson's name. I think that these allegations flying around about cover-ups are exactly the problem with this investigation. And what I would say is——

Mr. TERRY. You not allowing us to go through regular order to address the issue here raises those questions.

Ms. DEGETTE. The gentleman asked would I be willing to encourage the administration to provide Dr. Chu and the other witnesses. I would be happy to do that, recognizing that the administration doesn't always do exactly what I tell them to do, sadly enough.

Mr. TERRY. Well, it would be helpful—reclaiming my time. It would be helpful because, frankly, from my perspective—and the rhetoric from at least the two top people on this committee has been obstruction and diversion. So I appreciate the gentlelady's—what I believe is a sincere gesture of helping give those.

The point was, we hadn't had time to do those interviews. But I will tell you what, when things change from one version to another, it is a legitimate question to say, why was it changed? Why was Dr. Chu's name removed there? That's a valid question, and

it looks like it was to protect him. Why were discussions occurring on subordination in October? So 3 months—3 full months before the January memo was written. And then the February supposed official one made, it looks like—and I want to know this during your interviews, the bipartisan interviews that will occur. It appears that perhaps there may have been another order, maybe verbal, that they were—the legal department was to design a memorandum supporting, supporting subordination as opposed to an unbiased legal analysis that the Department of Justice could have given. So I would appreciate those questions in the interview, and I will yield back.

Mr. STEARNS. OK. The gentleman from Texas, Mr. Burgess, is recognized for 5 minutes.

Mr. BURGESS. Thank you. And striking the requisite number of words on the reservation.

I think it is important here to—when Secretary Zients, former Secretary Zients from the Department of Energy was here, one of the very last things we asked him was, would you make available members of your staff, to our staff, to be able to talk about these issues? And our staff on both sides, I think was doing that due diligence and proceeding. And this has all been difficult because, there was an obstruction at first. We couldn't get the very simplest of documents out of the Department of Energy and Office of Management and Budget until a subpoena was issued in July. And a subpoena was issued along party lines. Every Democrat voted against it. So to say today the Republicans have held exculpatory evidence for months, I am sorry to be incendiary, but that's a lie. That is a lie, and it should not be allowed to stand.

We got the draft memo only as a result of the subpoena. And we got the sanitized memo—if I can use that incendiary language—we got the sanitized memo only because we asked—since this is a draft, do you have a final? That is the issue before us here today. And to say that the Republican staff hid things is, again, I will stand up for them. That's a lie. It's not right. Correct the record. They have done their due diligence, both the staff on both the Democratic and the Republican sides. They did what we asked them to do. We said, Secretary Zients, can we have access to your staff, can we talk to them?

Now again, the word "sanitize" may be incendiary but I have got to tell you, when you look at the so-called draft, attached a legal memorandum respecting the permissibility of the subordination of the context of the proposed restructuring and it's addressed to the Secretary through the general counsel's office. I mean, what are we to think when we see that, even though it says "draft" on this? And the only reason we got this was a subpoena.

Look, the administration needs to hear something today, and it needs to hear that when we ask questions, they need to respond. We ask for documents, they produce. We call a hearing, they show up. If not, we're left to our own imaginations. And, as many of you know, I have a very vivid imagination. So you show me this, and I think, someone's sanitizing something; someone's hiding something. We have members of the press in the room. They're asking me questions when I walked out the door to go vote. What is the deal? Was one memo different from the other? Why was one

cleaned up? I don't know the answer to the question. I would like to know the answer to the question. I would like us to call the relevant people here to this committee and get that straightened out. And I will yield back the balance of my time.

Mr. STEARNS. I recognize Ms. Schakowsky.

Ms. SCHAKOWSKY. I move to strike the requisite number of words.

Mr. STEARNS. The gentlewoman from Illinois is recognized for 5 minutes.

Ms. SCHAKOWSKY. I would like to yield to my colleague, Congresswoman DeGette.

Ms. DEGETTE. Mr. Chairman, I think we should cut this debate off because Mr. Burgess really didn't want to say what he just said.

The documents from the Department of Energy were not produced under subpoena. The only subpoena was for the documents from OMB, not for DOE. All of the documents from the Department of Energy were produced to this committee—65,000 pages—were produced to this committee voluntarily. And this particular memo—and in addition, the other memo which says "draft" on it and Secretary Chu's—oh, the Chu one was the OMB production. But this one was produced many, many months ago. And so, you know, if we want to try to cater to the press and make a scandal where there is none, we can do that, if we want to have a full and thorough investigation. I would suggest we put these memos in, and we bring the DOE people in. We talk to them about why there was one draft and another one and so on instead of making these allegations completely unsupported by any evidence.

And I will also say, Mr. Chairman, that the DOE wasn't even invited to this committee. Mr. Waxman and I wrote a letter to you asking that the DOE be invited to this committee. So to somehow say that the DOE is now trying to hide something about these memos is again inaccurate. I think that emotions are running high. I am glad we're putting both of these memos into the record. Let's bring the DOE in to talk to them about it instead of making these allegations that are completely unsupported by any evidence. And I yield back.

Ms. SCHAKOWSKY. I yield back.

Mr. STEARNS. The gentlelady from Tennessee is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And in response to what Ms. DeGette said regarding Mr. Burgess' comments, I just want to make certain that we all understand that it was the subpoena from OMB under which this draft memo became available. And it is because of this draft memo that was made available under the subpoenaed documents that we then were able to get the final version of this memo after they went back to DOE for that request.

So just for a correction for the record, it was because of that subpoena—and that is exactly what Dr. Burgess was saying in his comments. I think this is such a very serious issue. As we look at not only Solyndra and the situation there, as we look at this loan program in its totality, as we look at the other loan guarantee programs that are with other departments and how they are working, this is the type of issue we need to drill down on. We do need to

have the time for the staff to do their due diligence and for the members to do their due diligence. And I do hope that we will subpoena other members that were involved in this process of writing this email and the attached document that go from January 21, 2011, which is the email that came under the OMB subpoena and then into the final document that goes through detailing the subordination that is the February 15 document. And I would encourage the chairman to continue with moving forward with that hearing.

At this time, would any of my colleagues like the balance of my time?

Mr. TERRY. May I have 30 seconds?

Mrs. BLACKBURN. I yield to Mr. Terry.

Mr. TERRY. Thank you.

Just referencing part of the gentlelady from Colorado's statement about cutting off the discussion here, I mean, let the record reflect that they initiated this discussion about a memo, made specific accusations against the majority of hiding those from them. So it is completely appropriate now that we have the venue to A, defend ourselves against those accusations, and to be able to have a valid discussion about what—the fact that there's two memos with two different headings—and we don't know what else the differences are at this point—are completely appropriate. As a former reformed lawyer that did a lot of trial work, the judge would say, "Madam, you opened the door."

Mrs. BLACKBURN. Reclaiming my time, I yield to Dr. Gingrey.

Mr. GINGREY. I thank the gentlelady from Tennessee for yielding.

It just seems to me that this issue has been brought up by the minority's request for unanimous consent to submit this memo for the record. The minority knows that in consultation with the majority that a commitment was made by the majority to have a subsequent hearing and to have Secretary Chu come and testify about this memo and who gave directions in regard to—essentially who knew what and when did they know it? And the minority, at this hearing today, has sort of preempted that process after seemingly agreement was made between majority staff and minority staff that this would be done in a timely manner under regular order so the dots could be properly connected. And all of a sudden, you know, we get this put on us this morning, unanimous consent to release a memo, a draft, essentially, that's incomplete. And we can't connect these dots.

So I am glad that the gentleman—the chairman emeritus Mr. Barton from Texas is in all probability going to withdraw his objection. But let's get this done and move forward to that hearing that the chairman of the subcommittee, Mr. Stearns, has committed to the minority that we will have. So I think that should end the discussion quite honestly, and let's go on with going back to this issue of subordination of the loan.

Mrs. BLACKBURN. Reclaiming my time and I yield to Mr. Griffith.

Mr. STEARNS. The gentlelady's time has expired. I will recognize Mr. Griffith as the last speaker for us. And I am prepared to rule with Mr. Barton. Mr. Griffith, would you perhaps, give to Mr. Scalise a little bit of time so we can wrap this up? We have two witnesses here and I would like to keep moving because I think the witnesses are showing great forbearance.

Mr. Griffith.

Mr. GRIFFITH. I will do my best, Mr. Chairman. I am actually glad that the memos have come in. I do agree with some of the comments that have been made previously, that the staff was trying to get this thing in the right order so that you didn't have speculation and so forth going on.

But I am glad it's in because I want the press and the lawyers of the United States of America to take a look at this memo. When I read this memo several weeks ago, I made a comment on it then that it looked like a law school project. I even texted my staff and asked them if they could find out when Susan Richardson was admitted to the bar, because I believed it must have been only about 3 months before the memo was written. It turns out she was admitted in 1983, but that was a surprise to me because of the quality of work. There is no reference to court cases in this thing. It references one previous code section. It doesn't give you any court cases on that code section that it says that there is a distinction with. And then you get to the part where it says in here, Once such a condition precedent—that being you can't subordinate—has been satisfied, paren, or waived—and there's nothing in the Code that says "waived"—it has no continuing legal effect. In other words, as I said at the hearing when Mr. Silver admitted that he had not—sitting in the chair you are sitting in, Mr. Grippo—he had not even read the memo before putting the taxpayers of the United States in the back seat to the tune of $75 million, it was astounding to me that this memo was relied upon.

I think it's great that the Department of Treasury at least threw up a warning signal in there somewhere and said, y'all better have Justice look at this, because I, frankly, would like to see not only her asked to be here, but I would like to see Susan Richardson subpoenaed to be here because I want to find out exactly why she was putting a memo together like this. Was she told to come up with this? That's what I believed the very first time I read it.

And what is interesting is, on page 1 it says, "default." And this is what leads you to suspicion and speculation because these are the series of things—you have already heard about footnotes from some of the others. Default on page 1. Well, the Code also requires that if there's a default, the Attorney General be notified. Did that happen? Their own rules require in 609.18, if there's a deviation, Secretary of Treasury is supposed to consult with or notify—I mean the DOE is supposed to notify the Secretary of the Treasury. I'd like to know if that actually happened because this clearly was a deviation after a default.

So they didn't follow their own rules. I don't know if they had notified the Attorney General. It appears from the memos and the emails that we've got they didn't notify Treasury of what was going on. And you know, it just seems like this entire memo—in fact, one of my original notes says, it's inconvenient, boo-hoo. And I think what happened here was, Treasury—excuse me—Department of Energy made a bad loan. They realized they had made a bad loan. They were trying to figure a way to cover up the fact—not that they had done anything illegal but cover up the fact that they had made a bad loan. And they went and broke the law. And with that, I will yield to my colleague.

Mr. STEARNS. The balance of the time is recognized to Mr. Scalise from Louisiana.

Mr. SCALISE. I thank my colleague for yielding.

Mr. Chairman, I thank you for continuing to help us shine light on what is a major scandal that we have been trying to get to the bottom of on this side. And unfortunately, our colleagues on the other side have blocked us and stonewalled us on every front, going back to predating the subpoena. But we had to get a subpoena to get this information and everybody on the minority side voted against that subpoena, voted against going forward with that so we can finally uncover some of the things that we have uncovered. And there is a lot that we have uncovered, and there's even more to come that we are trying to find out. And we continue to get stonewalled on every front. And they keep saying, Why in the Department of Energy here? Well, the Department of Energy's loan program head was here a few weeks ago; and in fact, I asked the head of the Department of Energy's loan program who made the decision to subordinate? And he refused to answer that question under oath.

Finally he acknowledged under oath that he would get me the names of everyone involved in the subordination, everyone involved. He admitted that under oath and then he resigned. And of course I am going to have to question the legal counsel later, Mr. Chairman, if he is still compelled to get us that information. Because just because he resigned, he said under oath he would get us that information. Who made the decision to put the taxpayers in the back of the line? This isn't about the press or you know Republicans and Democrats. There's $535 million of taxpayer money at stake. And when we said we want to get the information, we weren't able to get it until we subpoenaed. And in fact this document wasn't even originally given to us by the Department of Energy. It came through OMB. And then we went back to the Department of Energy and they said, Oh, yes, we forgot to give you this. We forgot to give you this? How could they forget this document? This is the document—and it's a legal counsel opinion that basically says you can ignore the law. Well, you can't ignore the law. The law is very clear. This is the law on subordination. One sentence. It says you can't do it. And yet they went and got a legal opinion anyway? I want to know who else was involved in the decision to subordinate.

Was it just Susan Richardson? Or was she directed by somebody else to come up with this opinion because they wanted to give the loan anyway? We have got memos from the White House saying, Get this thing done. We want the Vice President to be involved in the ribbon cutting. They were concerned about a photo-op so in order to do that they allowed $535 million of taxpayer money to be put in the back of the line of some private venture capital firm based on a phony legal memo from their in-house counsel, and we couldn't even get this information until we forced a subpoena that everybody on the minority side voted against. Those are the facts, and we're trying to get more facts. And we need all of this to come out and we need more hearings because we haven't gotten all of the facts from the people that were involved in this. And thank you.

Mr. GRIFFITH. I thank the gentleman and the chair, and I yield back.

Mr. STEARNS. The chair is prepared to rule. If the gentleman from Texas no longer has a reservation——

Mr. BARTON. Mr. Chairman, I am going to reserve my reservation. I do have a question, though. If I understand Ms. DeGette quickly, she is agreeable to putting both memos in the record?

Mr. STEARNS. She is. She has told me both memos.

Mr. BARTON. On the second memo, there is an addendum to it that has a number of tabular information regarding proposed finances of Solyndra. Does she wish that to go in the record? Is there any objections?

Ms. DEGETTE. I don't know what those tabular items are. If I can see those, I just want to make sure it's not proprietary information or something. But I would assume we wouldn't object.

Mr. BARTON. I would be agreeable to whatever the chair and the ranking member——

Mr. STEARNS. Well, I am going to take the position that both documents, by unanimous consent, will be a part of the record.

Ms. DEGETTE. I reserve objection on the table, on the second one until I can see it. Show it to me.

Mr. BARTON. That's why I am asking the question.

Mr. STEARNS. Here is the tabular.

Mr. BARTON. It is a financial projection for Solyndra for about 5 years into the future. And I am not saying you should. I am just saying it was attached to the memo.

Ms. DEGETTE. Mr. Chairman, I don't object to the addendum. I would ask that the majority and minority staff just review that to make sure there's not proprietary information. It looks like profit and loss statements and it is stamped confidential.

Mr. STEARNS. Without objection, both documents are part of the record, including the tabular. And with that, we are——

Mr. TERRY. I have a question though because what the gentlelady from Colorado said is not what you said.

Mr. STEARNS. Well, I am making the tabular part—by unanimous consent, she can object. But she is not objecting. So the tabular is part of the record.

Mr. TERRY. Regardless of whether it's proprietary?

Ms. DEGETTE. What I am saying is that subject to the agreement of the staff to redaction of any confidential business information. Here's what the problem is: We agreed to these two memos and then the chairman emeritus came in with this——

Mr. STEARNS. Can I say to the ranking, the tabular is such fine print, I don't think either side is going to look at this. I think we should move on, instead of having another discussion about the tabular. I think your decision is——

Ms. DEGETTE. You know, you brought——

Mr. STEARNS. Are you objecting to——

Ms. DEGETTE. I am objecting to the tabular thing until we can review it and decide. The memo itself I do not object.

Mr. STEARNS. Well, then, if you object to that, then I think our side is going to object to putting the original memos in.

Ms. DEGETTE. Fine. Whatever you want to do.

Mr. BARTON. I think we have agreement to put—to put both documents in.

Mr. STEARNS. We do have agreement.

Mr. BARTON. And the gentlelady has made a point that she wants to make sure there is no proprietary——

Mr. STEARNS. OK. Here is the way we are going to put it. We are going to put the two documents in by unanimous consent, part of the record, we are going to put the tabular in subject to the review by the staff for redaction. So ordered.

Ms. DEGETTE. Thank you.

[The information follows:]

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DRAFT 1/19/11

MEMORANDUM FOR THE SECRETARY

THROUGH: SCOTT BLAKE HARRIS
GENERAL COUNSEL
OFFICE OF GENERAL COUNSEL

FROM: SUSAN S. RICHARDSON
CHIEF COUNSEL
LOAN PROGRAMS OFFICE

SUBJECT: SOLYNDRA RESTRUCTURING

FACTS:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank. The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic ("PV") panel fabrication facility located in Fremont California (the "Project"). Construction of the Project is scheduled to be complete on or about June 30, 2011.

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things, (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

A default relating to a financial requirement has occurred under the Loan Guarantee Agreement. When that default occurred, on December 1, 2010, $95 million of the Guaranteed Loan Commitment remained to be advanced. DOE has considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on its collateral. Based on the analysis set forth in Exhibit A hereto, DOE has determined that a restructuring of the Borrower's obligations under the Loan Guarantee Agreement (the "Restructuring") will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's potential loss on the Guaranteed Loan. In light of the financial analysis, and the parties' agreement to negotiate in good faith the definitive Restructuring documentation, DOE

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has continued to permit advances under the Guaranteed Loan, enabling Project construction to continue pending closing of the Restructuring. Absent continued funding of the Guaranteed Loan, the Borrower has indicated that it would file for reorganization under Chapter 11 of the Bankruptcy Code or liquidation under Chapter 7 of the Bankrupcty Code, impeding or preventing Project completion. Given the Borrower's limited operations in the PV space, a Chapter 11 filing would likely lead to a liquidation.

The Restructuring contains the following elements:

(a) DOE's collateral package will be enhanced, as all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

(b) The Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) The Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) The Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A (a new $75 million loan) will have payment priority from the proceeds of a foreclosure (if any) on the collateral securing the Borrower's payment obligations;

(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities, secured on a *pari passu* basis, but with DOE's Tranche D having payment priority; and

(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring (i) for the first two years following closing of the Restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount, in aggregate) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount) in a liquidation only, and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in

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lien and payment priority to the Borrower's obligations to the Third-Party Lenders for Tranches A and C ($150 million principal amount in new loans) until repayment in full.

ISSUE:

Whether the proposed subordination of certain of the Borrower's reimbursement obligations to DOE is consistent with Subsection 1702(d)(3) of Title XVII. Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

SHORT ANSWER:

The proposed subordination is permitted under Title XVII. The subordination condition contained in Subsection 1702(d)(3) is, by its terms, applicable only as a condition precedent to the issuance of a loan guarantee. It is not a continuing obligation or restriction on the authority of the Secretary, and subordination in the context of the proposed Restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

ANALYSIS:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to make loan guarantees for specified categories of energy projects in accordance with Section 1702 (Terms and Conditions). As set forth in the Preamble to the original Final Rule issued under Title XVII, one of the principal goals of the guarantee program authorized by Section 1703 of Title XVII is to encourage the commercial use in the United States of new or significantly improved energy-related technologies. (See "Summary".) One of the principal goals of the American Reinvestment and Recovery Act of 2009, P.L. 111-5, which added Section 1705 to Title XVII, is to preserve and create jobs and promote economic recovery. (Section 3(a)(1).)

The Guarantee qualified under both Sections 1705 and 1703. It was issued under Section 1705, but the Borrower was required, as a matter of policy and by contract, to comply with Section 1703 and the Final Rule. The policies of both 1703 and 1705 are furthered by the Guarantee transaction and the proposed Restructuring.

Section 1702

In setting out the terms and conditions for loan guarantees, Section 1702 is organized to reflect the life cycle of loan guarantees, from origination to default to foreclosure on collateral. More particularly, Section 1702 is subdivided roughly as follows:

- Subsections 1702(b) – (f) set forth threshold requirements for the issuance of loan guarantees;

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- Subsection 1702(g) sets forth the rights and obligations of DOE and the holders of a guaranteed loan in the event of default; and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of the loan guarantee program.

Section 1702(b) – (f) - Loan Origination Provisions

Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term) describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan; that the aggregate available funding is sufficient to achieve project completion; and that the guaranteed obligation is not subordinate to other financing.

~~The requirements of these subsections reflect a Congressional intent that guaranteed~~ loans be structured at the outset to maximize the probability that the project will reach completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1702(g) addresses events and circumstances that may occur after issuance of a loan guarantee, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

The Subordination Restriction in Section 1702(d)(3) Is a Condition Precedent to the Issuance of a Loan Guarantee and Not a Continuing Obligation Restricting Restructuring Options

Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing."

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. We do not believe it can reasonably be read either as a requirement that the

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guaranteed loan may never be subordinated, or as a restriction on the authority of the Secretary following the issuance of a loan guarantee. Commercial loans routinely are subject to conditions precedent that must be satisfied prior to the advance of funds by the lender. Once such a condition precedent has been satisfied (or waived), it has no continuing legal effect. By its plain meaning, and in the context of customary commercial practice, the word "condition" in Subsection 1702(d)(3) can logically be read as such a condition precedent to issuance of a guaranteed loan. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[1]

In addition to the plain meaning of the words, and their placement in the statute, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit terms and conditions that must be satisfied in connection with the issuance of a guarantee, Section 1702 gives the Secretary broad authority to determine the terms and conditions of loan guarantees. It also provides for rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. Emphasizing the importance of Secretarial discretion, Subsection 1702(g)(2)(C) provides that the loan guarantee agreement "shall contain such detailed terms and conditions *as the Secretary determines appropriate* to protect the United States in a default." (Emphasis added.)

A continuing prohibition on subordination would, in our view, be inconsistent with the statutory scheme as it would preclude the use of a common restructuring strategy for a financially distressed borrower. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms. Accordingly, a loan restructuring is the typical means of obtaining additional funding for a distressed company. A fundamental principle of restructuring is that new loans have payment and lien priority over existing loans – without such priority, few, if any, lenders would be willing to extend a loan in distressed circumstances. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is

[1] It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator...shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language to have the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, the change to "is not subordinate" suggests an intent to clarify the language in a manner that reinforces our reading.

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faced with a choice of providing an additional loan itself, subordinating to a lender that provides the needed capital and proceeding either to foreclosure or a bankruptcy filing.

CONCLUSION:

On the current facts, the Loan Programs Office has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the Borrower's obligations under the Loan Guarantee Agreement, and is demonstrably preferable to a liquidation of the Borrower. The supporting financial analysis is set forth in Exhibit A to this memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, a refusal to amend the Loan Guarantee Agreement to effect the proposed Restructuring, which likely would lead to a Chapter 11 filing by the Borrower and, possible, liquidation, could be considered inconsistent with both the specific mandate of Section 1702(g)(2)(C) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans.[2] Moreover, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed Restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and preserving jobs.

[2] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to draw such a line in this memorandum. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

MEMORANDUM FOR THE GENERAL COUNSEL

FROM: SUSAN S. RICHARDSON
CHIEF COUNSEL
LOAN PROGRAMS OFFICE

SUBJECT: SOLYNDRA RESTRUCTURING

DATE: FEBRUARY 15, 2011

FACTS:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank. The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic ("PV") panel fabrication facility located in Fremont California (the "Project"). Construction of the Project is scheduled to be complete on or about June 30, 2011.

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

A default relating to a financial requirement has occurred under the Loan Guarantee Agreement. When that default occurred, on December 1, 2010, $95 million of the Guaranteed Loan Commitment remained to be advanced. DOE has considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on its collateral. Based on the analysis of the Director, Portfolio Management Division of the Loan Programs Office ("Director, PMD"), DOE has determined that a restructuring of the Borrower's obligations under the Loan Guarantee Agreement (the "Restructuring") will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's potential loss on the Guaranteed Loan. In light of the financial analysis, and the parties' agreement to negotiate in good faith the definitive Restructuring documentation, DOE has continued to permit advances under the Guaranteed Loan, enabling Project construction to continue pending closing of the Restructuring. Absent continued funding of the Guaranteed Loan,

the Borrower has indicated that it would file for reorganization under Chapter 11 of the Bankruptcy Code or liquidation under Chapter 7 of the Bankrupcty Code, impeding or preventing Project completion. Given the Borrower's limited operations in the PV space, the Director, PMD believes that a Chapter 11 filing would likely lead to a liquidation.

The Restructuring contains the following elements:

(a) DOE's collateral package will be enhanced, as all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

(b) The Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) The Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) The Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A (a new $75 million loan) will have payment priority from the proceeds of a foreclosure (if any) on the collateral securing the Borrower's payment obligations;

(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities, secured on a *pari passu* basis, but with DOE's Tranche D having payment priority;

(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities; and

(h) Interest on each of the Senior and Subordinate Facilities will be capitalized for limited periods.

Therefore, under the Restructuring (i) for the first two years following closing of the Restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount, in aggregate) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount) in a liquidation only, and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in

lien and payment priority to the Borrower's obligations to the Third-Party Lenders for Tranches A and C ($150 million principal amount in new loans) until repayment in full.

ISSUE:

Whether the proposed subordination of certain of the Borrower's reimbursement obligations to DOE is consistent with Subsection 1702(d)(3) of Title XVII. Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

SHORT ANSWER:

The proposed subordination is permitted under Title XVII. The subordination condition contained in Subsection 1702(d)(3) is, by its terms, applicable only as a condition precedent to the issuance of a loan guarantee. It is not a continuing obligation or restriction on the authority of the Secretary; and subordination in the context of the proposed Restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

ANALYSIS:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to make loan guarantees for specified categories of energy projects in accordance with Section 1702 (Terms and Conditions). As set forth in the Preamble to the original Final Rule issued under Title XVII, one of the principal goals of the guarantee program authorized by Section 1703 of Title XVII is to encourage the commercial use in the United States of new or significantly improved energy-related technologies. (See "Summary".) One of the principal goals of the American Reinvestment and Recovery Act of 2009, P.L. 111-5, which added Section 1705 to Title XVII, is to preserve and create jobs and promote economic recovery. (Section 3(a)(1).)

The Guarantee qualified under both Sections 1705 and 1703. It was issued under Section 1705, but the Borrower was required, as a matter of policy and by contract, to comply with Section 1703 and the Final Rule. The policies of both 1703 and 1705 are furthered by the Guarantee transaction and the proposed Restructuring.

Section 1702

In setting out the terms and conditions for loan guarantees, Section 1702 is organized to reflect the life cycle of loan guarantees, from origination to default to foreclosure on collateral. More particularly, Section 1702 is subdivided roughly as follows:

- Subsections 1702(b) – (f) set forth threshold requirements for the issuance of loan guarantees;

- Subsection 1702(g) sets forth the rights and obligations of DOE and the holders of a guaranteed loan in the event of default; and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of the loan guarantee program.

Section 1702(b) – (f) - Loan Origination Provisions

Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term) describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan; that the aggregate available funding is sufficient to achieve project completion; and that the guaranteed obligation is not subordinate to other financing.

The requirements of these subsections reflect a Congressional intent that guaranteed ~~loans be structured at the outset to maximize the probability that the project will reach~~ completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1702(g) addresses events and circumstances that may occur after issuance of a loan guarantee, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

The Subordination Restriction in Section 1702(d)(3) Is a Condition Precedent to the Issuance of a Loan Guarantee and Not a Continuing Obligation Restricting Restructuring Options

Subsection 1702(d)(3) provides that"[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing."

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. We do not believe it can reasonably be read either as a requirement that the

guaranteed loan may never be subordinated, or as a restriction on the authority of the Secretary following the issuance of a loan guarantee. Commercial loans routinely are subject to conditions precedent that must be satisfied prior to the advance of funds by the lender. Once such a condition precedent has been satisfied (or waived), it has no continuing legal effect. By its plain meaning, and in the context of customary commercial practice, the word "condition" in Subsection 1702(d)(3) can logically be read as such a condition precedent to issuance of a guaranteed loan. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[1]

In addition to the plain meaning of the words, and their placement in the statute, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit terms and conditions that must be satisfied in connection with the issuance of a guarantee, Section 1702 gives the Secretary broad authority to determine the terms and conditions of loan guarantees. It also provides for rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. Emphasizing the importance of Secretarial discretion, Subsection 1702(g)(2)(C) provides that the loan guarantee agreement "shall contain such detailed terms and conditions *as the Secretary determines appropriate* to protect the United States in a default." (Emphasis added.)

~~A continuing prohibition on subordination would, in our view, be inconsistent with the~~ statutory scheme as it would preclude the use of a common restructuring strategy for a financially distressed borrower. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms. Accordingly, a loan restructuring is the typical means of obtaining additional funding for a distressed company. A fundamental principle of restructuring is that new loans have payment and lien priority over existing loans – without such priority, few, if any, lenders would be willing to extend a loan in distressed circumstances. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is

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[1] It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator…shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language as having the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, the change to "is not subordinate" suggests an intent to clarify the language in a manner that reinforces our reading.

faced with a choice of providing an additional loan itself, subordinating to a lender that provides the needed capital and proceeding either to foreclosure or a bankruptcy filing.

CONCLUSION:

On the current facts, the Loan Programs Office has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the Borrower's obligations under the Loan Guarantee Agreement, and is demonstrably preferable to a liquidation of the Borrower. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, a refusal to amend the Loan Guarantee Agreement to effect the proposed Restructuring, which likely would lead to a Chapter 11 filing by the Borrower and possible liquidation, could be considered inconsistent with both the specific mandate of Section 1702(g)(2)(C) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed Restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and preserving jobs. [2]

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[2] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to draw such a line in this memorandum. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

Mr. STEARNS. Now we will move on to our witnesses who have been kind enough to stay with us. And at this point, I think our side is recognized next and that would be Mr. Terry.

Mr. TERRY. All right. Gentlemen, thank you for your patience. I have some rather bland questions. But first I want to make a point about whether or not—I think it was Mr. Grippo, did you say that you didn't feel that you were rushed to provide your information or after the consultation, your feedback?

Mr. GRIPPO. Let me be clear about what happened. We were provided with a term sheet for this deal. We were asked for a very quick turnaround for our consultation. We felt we needed more time. We asked for that.

Mr. TERRY. But you didn't feel rushed?

Mr. GRIPPO. Well, we felt that we needed more time. We asked for it. They agreed that we should have more time and in due course, gave our consultation.

Mr. TERRY. Well, are these dates correct then that I just have in some notes, March 10, 2009, DOE asks Treasury for the consultation. Then March 17, 2009, DOE approves and commits to the loan. March 19, Treasury submits their consultation and questions. It seems to me that your consultation was fairly irrelevant to DOE.

Mr. GRIPPO. I am not aware of that sequence of events myself on those particular things.

Mr. TERRY. All right. We will submit those. They're in the documents, but I am going to get to, in my 3 minutes left, another set of questions here.

Mr. Burner, in tab 2 of your binder is a memorandum that is March 16, 2010 titled Treasury/FFB consultation with the Department of Energy on the Solyndra fab two LLC project or entitled the project. Have you seen this memo before?

Mr. BURNER. Yes, sir I have.

Mr. TERRY. All right. Do you know who drafted the memo?

Mr. BURNER. A member of my staff.

Mr. TERRY. Under your instruction?

Mr. BURNER. Yes.

Mr. TERRY. OK. Why was the memorandum to file drafted almost 1 year after a call with DOE? And I am referring to the first paragraph of the memorandum that seems to be documenting a call a year early.

Mr. BURNER. The staff member was directed to put it in final but did not. I found out about that about a year later and asked that it be put in final at that time. This is the same memo. It has not been changed since it was originally drafted.

Mr. TERRY. All right. So your aide or assistant drafted the memo a year earlier?

Mr. BURNER. Yes.g

Mr. TERRY. But did not submit it or something?

Mr. BURNER. Just didn't get put into final. I felt I would rather explain this to you than explaining that we might have backdated a memo.

Mr. TERRY. Good. I appreciate that. I have had things similar in my office where I had to accept staff members' goof-ups as my own. So I feel for you.

Mr. Burner, again, I would like to address a few points made in the FFB memorandum to file of that date relating to the Treasury's call——

I have got time.

Mr. STEARNS. I am sorry. You've got time.

Mr. TERRY. The memo that the FFB staff made two conclusions about the Solyndra project that the equity Solyndra had in the project was 27 percent as opposed to what appears to be a standard of 35 percent.

I can't find where 35 percent is referenced. Is that one of the conditions precedents in a rule that I don't know about? Where does that 35 percent come from?

Mr. BURNER. In discussions before that, we were under the impression that there would be 35 percent loan equity put in the deals as a standard.

Mr. TERRY. So this is a Solyndra-specific issue, that you were under the impression that Solyndra had said there would be 35 percent equity by the ownership?

Mr. BURNER. It was in going forward and reviewing deals, we had expected to see 35 percent equity put into the deals, and that was not what happened.

Mr. TERRY. So it is not Solyndra-specific but deals, plural?

Mr. BURNER. Yes. Yes, sir, you are correct.

Mr. TERRY. OK. And in that regard, where can I find the reference to the standard of 35 percent? And then after that, why is that important that they have 35 percent equity?

Mr. BURNER. The equity—the number actually comes from—if this was a partially guaranteed loan, it would be 80 percent of 80 percent, which would be 36 percent equity. So, oK, we rounded it to 35 percent as sort of a standard. 80 percent is sort of a guarantee. It's sort of a Federal credit policy that things be partially guaranteed rather than fully guaranteed as preference.

So this would have put the government on an equal basis in terms of risk, if there was 35 percent equity as opposed to—and 35 percent equity on a fully guaranteed deal as opposed to having a 20 percent equity and having the loan be 80 percent guaranteed.

Mr. TERRY. And the risk then means having unbalanced risk, what are the potential consequences to the government?

Mr. BURNER. It was felt that it was a better risk for the government if there was more equity in the deal.

Mr. STEARNS. The gentleman's time has expired.

I recognize the chairman emeritus on the ranking side, Mr. Dingell, the distinguished gentleman from Michigan.

Mr. DINGELL. Mr. Chairman, I thank you. And I express to you the deep sympathy over the difficulties we are having this morning. I have never seen such a big fuss over such a small matter in this committee.

I have a couple questions for our witnesses.

Gentlemen, the issue here of subordination of the Federal guarantee and guaranteed loan did not occur when the initial transaction took place. It occurred later after Solyndra began to get close to failure, yes or no?

Mr. GRIPPO. That is correct, yes.

Mr. DINGELL. OK. And the United States has, from time to time over history, submitted itself to a subordination and to a lower treatment of its rights in order to carry out some public policy, is that not right?

Mr. GRIPPO. I am not personally aware of those transactions, but it could be well the case that that's permitted.

Mr. DINGELL. Well, these two documents that we are hearing about, these are essentially work papers which are defining what the government should do, is that right?

Mr. GRIPPO. I am sorry. Which documents are you referring to?

Mr. DINGELL. The two of which we have had such a splendid fuss.

Mr. GRIPPO. Forgive us, but I don't think we have been privy to those memos.

Mr. DINGELL. Now, I would note that the memorandum for the general counsel has some very interesting remarks. It says here, "Based on the analysis of the directorate portfolio, management division of the loan program's office, (Director PMD) DOE has determined that a restructuring of the borrower's obligations under the loan guarantee will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's potential loss on the guaranteed loan." Is that right? Yes or no?

Mr. GRIPPO. I have not seen the memo.

Mr. DINGELL. All right. But that's in there.

Now when the government confronted this problem, they looked to see how they were going to save this loan and how they were going to save the businesses, Solyndra. Is that right? And so they felt that the approach which was taken was the best, is that right?

Mr. GRIPPO. I believe that was the Department's view.

Mr. DINGELL. Now what was the policy impact of the Treasury on this? Did you superintended or second-guess or come up with any corrections to the Department of Energy? Or did you just approve the release of the money? Which was the course that you took?

Mr. GRIPPO. It was not our statutory decision to make. We rendered no legal judgment.

Mr. DINGELL. You just saw to it that the money was properly released, is that correct?

Mr. GRIPPO. I'm sorry?

Mr. DINGELL. You just saw to it that the money was correctly and properly released according to the rules and regulations——

Mr. GRIPPO. Yes.

Mr. DINGELL [continuing]. Of the Treasury Department? That was all you did?

Mr. GRIPPO. The Department of Energy certified to us that the money should be released.

Mr. DINGELL. I think, Mr. Chairman, if we are going to have a proper discussions of this, we ought to bring DOE in and let DOE tell us about why it was they came to the conclusions about which we are in this great befuddlement today.

And I simply would make a couple of observations here. We have developed the technology for new batteries and all kinds of things like that that are being made in China, in Korea, in Germany, and in all kinds of other places. The result of that is that other people

are making batteries that essentially were designed over here. And when the Chevy Volt drove out of the factory brand-new, it was an American car, drove out of an American factory with Korean batteries which were designed in this country. And what we're trying to do is to get back control of the battery industry because our people in the auto industry—and I do have some familiarity with that endeavor—have come to the conclusion that if the United States doesn't control this kind of technology, that it is going to see the entire manufacturing industry of automobiles move overseas. That doesn't seem to me to be very good sense.

So we're trying to develop an industry that will enable us to compete on the production of batteries. And the Congress came to this policy when we passed the legislation that we are discussing today. And it was our decision that we wanted to have these kinds of subsidies so we can compete with the Germans. Now the Germans have as much sunshine over there as does Alaska. No more. And yet they're big in this whole business and they're controlling this industry. They and the Japanese and the Koreans and the Chinese. And the United States is little by little being frozen out. And we want to be in this new technology. But we are not seeing ourselves in it because they subsidize and finance the efforts of their industry and we do not. So we started out.

So it's pretty clear we made some mistakes on the matter. And they were big mistakes and they cost us a lot of money. But the hard fact of the matter is, losing control of this technology is going to cost us a heck of a lot of more money and it's going to cost this industry and jobs, not just of the new technology, which is where our hope is as a manufacturing nation, but also unfortunately in preserving existing industry.

So Mr. Chairman, I thank you for your courtesy. And I hope that this committee will look at this as something where we had a mistake or a bunch of mistakes and set out to try and correct those mistakes but understand two things, first of all there's no criminal or serious misbehavior here. There just was some dumbness. And unfortunately, we find ourselves in the awkward position where we have got to go forward and try to save these kinds of industries for the benefit of future generations of Americans and quite frankly for the health of this one. Thank you, Mr. Chairman.

Mr. STEARNS. The gentleman's time has expired. I recognize the gentleman from Pennsylvania, Mr. Murphy, for 5 minutes.

Mr. MURPHY. I thank Mr. Chairman. I thank you gentlemen for being here. We appreciate your candor. I also want to make sure it is very clear, Republicans support clean energy. As a matter of fact, we would love to follow through on the President's constant promises we ought to be cleaning up coal. We are, however—primarily the purpose of these hearings, protect taxpayers for potential or actual corruption, incompetence, violations of law, or ignoring the law, and that's why we're having this hearing.

But Mr. Burner, again, thanks for being here. On February 10, 2011, you sent an email to the loans programs office general counsel and director of the Department of Energy loan monitoring program, am I correct on that?

Mr. BURNER. You are, sir.

Mr. MURPHY. That email is on tab 8 of your minder binder. You are probably familiar with that. In the email you have learned that DOE is "close to implementing a set of adjustments to the Solyndra guarantee including subordination of DOE 's interests," is that correct?

Mr. BURNER. That is correct.

Mr. MURPHY. In this email, what did you recommend that the Department of Energy do?

Mr. BURNER. Absent other authorities, we recommended the Department of Energy go seek and consult with the Department of Justice.

Mr. MURPHY. Can you describe the context of this email that led you to ask for a Department of Justice consultation?

Mr. BURNER. In my experience with our client agencies, when there is a workout situation potentially developing that the Department of Justice is consulted with, they have statutory authority over such matters. I do need to say though that some agencies have their own authority so, it's not a 100 percent call every time.

Mr. MURPHY. But that's out of your agency. In your area, that's one that you push for to make sure things are done correctly and follow the law. Am I correct in assuming that?

Mr. BURNER. I am sorry?

Mr. MURPHY. Out of the Treasury, that is something that you practiced to make sure that other departments are following the law as——

Mr. BURNER. This was advice to a couple of colleagues on an area of law that they may—I was not sure they were aware of.

Mr. MURPHY. Thank you. Were other Treasury officials involved in the drafting of this email you sent to DOE?

Mr. BURNER. Yes, sir. I am part of a team. And this was a group effort and then I was the person who transmitted the email.

Mr. MURPHY. So given this, why did Treasury think it was important to write Department of Energy and ask it to seek Department of Justice approval of the Solyndra restructuring? What specifically was it that was your concern there.

Mr. BURNER. The concern is that the authority to compromise a claim against the government is Department of Justice's unless they have their own authority. We do not know what their actual authorities are. And that's why we wrote the email to them, was to warn them.

Mr. MURPHY. But you were not legally required to contact Department of Justice in this?

Mr. BURNER. No, sir.

Mr. MURPHY. Are you aware of the following Federal statute, 31 USC 3711(b) which says, "Unless otherwise provided by law, when a principal balance of a debt exclusive of interest penalties of administrative costs exceeds $100,000 or any higher amount authorized by the Attorney General, the authority to accept the compromise rests with the Department of Justice." Are you aware of that?

Mr. BURNER. I am aware of the authority lies with Department of Justice. I am not a lawyer so I am not familiar with the statutes themselves.

Mr. MURPHY. Certainly this seems to fit in with the issue that this exceeds $100,000 in interest penalties and administrative costs. I just wanted to get this on the record.

Mr. Burner, also, DOE responded to your email of February 10, 2011, asking Department of Justice to seek approval of the Solyndra restructuring. They did respond to you, am I correct?

Mr. BURNER. Yes, they did.

Mr. MURPHY. And in fact, DOE staff debated, and I quote, that there is "gross misunderstanding of the outcome of the restructuring of the Solyndra obligation." Now you talked to DOE about your email, am I correct?

Mr. BURNER. That is correct.

Mr. MURPHY. What was the substance of that conversation?

Mr. BURNER. The primary purpose of the conversation was to make sure that DOE was aware that they may have an obligation to consult with the Department of Justice.

Mr. MURPHY. And why didn't they believe it was necessary to talk with Department of Justice?

Mr. BURNER. They believed that the results of the deal, the reorganization, restructuring did not compromise the claim so that it had not reached a point where they needed to take it to the Department of Justice.

Mr. MURPHY. Did they convince you it wasn't necessary to go to the Department of Justice? Was their discussion convincing, in your mind?

Mr. BURNER. They were in a workout situation. I thought it would have been wise for them to go to the Department of Justice.

Mr. MURPHY. Now given all of the information you have seen at that time and since then, to your knowledge, do you believe today that the Department of Energy should have sought Department of Justice approval?

Mr. BURNER. Yes. I have said that I believe that they—that it would have been wise for them to seek Department of Justice approval.

Mr. MURPHY. And given the problems with Solyndra, have you raised concerns about potential default for any other loans approved by the Department of Energy or paid out by the Federal Financing Board?

Mr. BURNER. At this time, I have not been made aware of any other deals that are in a workout situation.

Mr. MURPHY. Thank you. And Mr. Chairman, I just want to make sure we're aware that Solyndra told Department of Energy it needed to restructure the loan in October of 2010. And the memo that was the subject of so much debate here wasn't written until January. And at no point did Department of Energy's legal counsel ask Department of Justice if this was legal, even though both OMB and Treasury staffers thought Energy needed to do that. So I just want to make sure we are clear on that.

Mr. STEARNS. I thank the gentleman from Pennsylvania. I think your point as well as the distinguished gentleman from Michigan, we need the Department of Energy up here. We are going to have a hearing. The senior loan officer, Jonathan Silver, of course has resigned. But DOE will be here. I know the Secretary of Energy Mr. Chu had indicated that the senior loan officer, Jonathan Silver,

was an outstanding loan officer. So that in mind I think a lot of us are very concerned. So we will have this hearing. And with that, I recognize the gentleman from Massachusetts, Mr. Markey, for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. Grippo, I would like to ask you a few straightforward business questions. Let's just say you are considering a loan guarantee for a company and the price of the product that this company sells has declined by 63 percent over the last several years, including by more than 20 percent since February. Without knowing anything else about this company, does that sound like a relatively high risk or low risk project?

Mr. GRIPPO. I am sorry. Could you just restate that? I want to make sure I am understanding the question.

Mr. MARKEY. A product that sells drops 63 percent over the last several years and 20 percent since February. Is that a high risk or a low risk?

Mr. GRIPPO. If the price of their product is falling?

Mr. MARKEY. Yes.

Mr. GRIPPO. Assuming that the costs of the company are not commensurately falling, then that would have risk to it.

Mr. MARKEY. What if the same company's business model was predicated on demand for its product expanding dramatically, but due to fundamental changes in the market, people just were not buying this product like everyone thought they would? Would that further increase or reduce the financial risk of the company?

Mr. GRIPPO. Again, let me just ask you to repeat that so I make sure I am understanding the assumptions in the hypothetical.

Mr. MARKEY. If it was predicated on demand for its product increasing, but instead because of fundamental changes in the market it was decreasing, would that increase or decrease the financial risk of that company?

Mr. GRIPPO. If a creditor was making an assumption or had knowledge that demand would increase, that would tend to reduce the risk.

Mr. MARKEY. Yes. Now what if it also turns out that there were better financed competitors, including one that already had a very large government-backed loan guarantee? And what if that company's technology had so many problems that the technical experts at the Department of Energy assigned to your loan guarantee application actually asked the company to withdraw it at one point because they didn't think it could be commercially viable? Would that increase or decrease the risk of our hypothetical company defaulting on its loan?

Mr. GRIPPO, If I understood what you have laid out, it sounds like that would increase the risk.

Mr. MARKEY. That would increase the risk. Thank you.

So I am not talking about Solyndra. I am talking about the United States Enrichment Corporation which has asked DOE for a $2 billion loan guarantee to make fuel for nuclear reactors, almost four times as much as Solyndra.

Now, Members of Congress have continued to insist that DOE approve it, even as the price for uranium has dropped 22 percent since Fukushima melted down, even as utility after utility has

abandoned their plans to build new nuclear reactors, and even after DOE awarded another loan guarantee to another company to do the exact same thing.

And 2 years ago, DOE did, in fact, ask USEC to withdraw its application because of the grave concerns that DOE had with the technology. Based on the circumstances that I have described, a shrinking customer base, declining prices, intense competition, and problematic technology, do you agree that DOE should exercise particular caution before we risk billions in taxpayer dollars?

Mr. GRIPPO. I can certainly say that the Department of the Treasury's input and view would be that extreme care should be taken in putting the taxpayer at risk or offering any exposure to the taxpayer.

Mr. MARKEY. Well, 13 House Republicans, including one on this committee, wrote the Energy Secretary in February, urging him to quickly approve this uranium enrichment product. Last week, Speaker Boehner stated that a denial of this loan guarantee was tantamount to the Obama administration betraying southern Ohio. Not giving a loan guarantee to a company that has these kinds of obvious financial problems, it seems to me, is not a betrayal of the taxpayers. Do you agree with that?

Mr. GRIPPO. I would prefer not to offer an opinion on that, sir.

Mr. MARKEY. So in my opinion, what the betrayal is is in the Republican budgets that cut investments in clean energy by 70 percent next year and 90 percent over the next 3 years. That's solar and wind. That's what they're talking about. Not coal, not nuclear. Wind and solar, the competitors to those incumbent industries. That's what this is all about. Kill the competition that Peabody Coal or the nuclear industry has feared for years is finally arriving in wind and solar. That's what the hearings are all about. Keep the loan guarantees for those old industries. And that's what is happening out on the House floor right now. That's what continues to happen in this committee, attacks on the Clean Air Act, attacks on wind and solar, attacks on the future. And this is really a debate about the past versus the future. And we can see that in the insistence that Republicans have that loan guarantees be given to a corporation, which obviously has a business model which is failing.

So I thank you, Mr. Chairman. I yield back the balance of my time.

Mr. TERRY [presiding.] Thank you, Mr. Markey. And now the gentleman from Texas, Dr. Burgess, is recognized.

Mr. BURGESS. Thank you, Mr. Chairman. I listened with some interest to what Mr. Markey was saying and certainly might be willing to work with him on that concept if he would be willing. And I think that's an important part of our discussion, and certainly is something that the members of this committee should look at. Let me also just say that I favor renewables. I've got a solar manufacturing company in my district. I'm not aware that they've gotten any loan guarantees. I might be wrong. I know I've got a big wind turbine manufacturer in my district. I know they haven't gotten any loan guarantees. They do a great job, they sell a good product, they're a strong competitor in the market, they do compete against imports of foreign manufactured blades, but just remind people that cheap Brazilian blades will not stand up against the harsh

Texas winds like good old Texas blades that are made in Gainesville, Texas. I always encourage people to buy locally when they're buying long wind turbine blades.

You answered—Mr. Burner, you answered Dr. Murphy's question, he asked if there were any other loan guarantee deals out there that were of concern, and your answer was you're not aware of any deals that are in a workout situation. Did I hear that correctly?

Mr. BURNER. That's correct.

Mr. BURGESS. Did Solyndra come to your attention only when it was in a workout situation? Was there any point along the line when you were concerned about what was happening with Solyndra before it got to the point where it was in a workout situation?

Mr. BURNER. Only through the news, sir.

Mr. BURGESS. Well, oK. Let me phrase this in a different way. I mean, a lot of us are concerned because Solyndra seemed to create some of its own problems by accelerating the—or actually the Office of Management and Budget and the Department of Energy created some of the problems because Solyndra was pushing because they that a photo-op coming up in September of 2009, I believe, with the Secretary and Vice President Biden was going to be brought in on a telecommunications device.

So you worry when there are time pressures on these loans if everything is done correctly. And just last week, or two weeks ago, at the end of the fiscal year there was a big push to get, I think it was almost a third of the total renewable energy budget in the stimulus bill, there was a push to get that out the door relatively quickly. And I, for one, worried about that. I wanted this committee to scrutinize that, but apparently there wasn't time to do so. Are there any of those deals now that are now made and the money has gone out the door but they went through rapidly, are there any out there that give you heartburn, not necessarily because they're in a workout situation, but just because the business model itself reminds you of something that might not work?

Mr. BURNER. I'm not exactly sure how to answer that question, sir. I didn't review every single project that came through.

Mr. BURGESS. Are there any of those projects that keep you up at night now?

Mr. BURNER. No, sir, not this minute, because we don't make the credit decisions on these programs. When we reviewed those we reviewed the term sheets and things of that nature, so I don't really have the kind of knowledge.

Mr. BURGESS. But the review of the term sheets, you're absolutely at peace with all of the ones that have gone through your office?

Mr. GRIPPO. Let me offer an answer. We did review all of the conditional commitments offered and indeed loan guarantees issued. We did offer, we had time to and did offer comment to the Department of Energy on all of them. If I could just take a step back and say this. In all of these deals, the Treasury is looking to do two things, and we did these in all the deals over the last 6 weeks or last month. We're looking to make sure that the subsidy that is offered is needed to get the project done, in other words,

could this occur through the commercial markets without a government subsidy, and if subsidy is needed, is it minimized so that the taxpayer isn't exposed to more risk than it needs to be.

Mr. BURGESS. I'm going to interrupt you there for just a minute because if there is a change in the environment, as Mr. Markey was talking about, is that something that crosses the threshold that gets your attention?

Mr. GRIPPO. I'm sorry?

Mr. BURGESS. If there's something in the market that changes, you know, the prices, competitors that enter the market, does any of that enter into your decision?

Mr. GRIPPO. We focus on the terms and conditions of the actual loan guarantee, but we certainly would look at general market conditions, and if we see something, we would offer advice.

Mr. BURGESS. Well, something that concerns me about a lot of these, and it's not part of this investigation or even this discussion, but the Waxman-Markey bill that was debated and passed through this committee and then passed through the floor of the House in June of 2009 contained in it a provision for providing credits, payments to companies that would sell carbon offsets to other companies that weren't as green or clean, that never materialized. And I worry that some of these projects were developed in an environment where the Secretary thought that, or someone thought that these credits would be there, these sales would be there to other companies, and that did not materialize because the legislation never got through the Senate and never got signed into law. Did you all take that into account at any level?

Mr. GRIPPO. If we are aware of it, we would definitely take that into account, and if we could analyze it, would provide input to Energy on it.

Mr. BURGESS. Can I just ask you one follow-up thing? You have an inspector general at Treasury, correct?

Mr. GRIPPO. Indeed.

Mr. BURGESS. Has that individual been involved in looking into any of this activity?

Mr. GRIPPO. The inspector general is looking at our activities.

Mr. BURGESS. Mr. Chairman, can I ask that that report be made available to this committee when it is completed?

Mr. TERRY. Yes, you can ask that.

Mr. BURGESS. Thank you. You've been most generous with your time, and I appreciate the lightness of the gavel that you've had today.

Mr. TERRY. At this time we recognize Mrs. Blackburn for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And I want to thank both of you for your time and your attention and your patience today. This is an issue that the taxpayers continue to come to us with. They're concerned about what took place with the Solyndra process and they are concerned that this is being repeated, the lack of attention to detail for the loan guarantees are being repeated in other programs. I do have a couple of questions that I want to ask, and I know we want to finish with you all before we head for votes again.

Mr. Burner, you have been with Treasury for 28 years, is that correct?

Mr. BURNER. That's correct.

Mrs. BLACKBURN. How often does a loan workout situation come before you? And in reading the documents for the hearing today and looking at your email chain that you had with DOE and with your staffers, you know, the workout language was repeated regularly in a couple of those emails. So how often does this come before you?

Mr. BURNER. We don't see workouts very often because they're handled usually by the guaranteeing agencies, for example, and we may not even know that a workout has taken place, because under the guarantee, the agency may pay us directly and leave the original documents in place.

Mrs. BLACKBURN. So basically, your part of the due diligence is to provide the guidance that is given in the February 10th email that you had to Frances and Susan, I guess that would be correct, stating that if there are to be adjustments that may include subordination of Solyndra's loan, then this would need to be a referral to DOJ for the authority?

Mr. BURNER. In this case, I was just attempting to offer some experience and advice to a couple of colleagues on something they may or may not have been aware of.

Mrs. BLACKBURN. All right. Then let me take you on through, let's see, there is another email that I have, on August 12, 2011, an email at 11:51 a.m., where you are asking Frances, "Can we get an update on the status of Solyndra today, if so please call Pearl." Would you like to comment on that? Why was Solyndra still on your plate?

Looking at Solyndra, if you were there to offer the guidance and then to help them with how to go then why would you have reentered that process in August and sought an update?

Mr. BURNER. In this case, the request for getting an update came from my supervisor, and I think people were hearing, starting to hear that there were problems with Solyndra.

Mrs. BLACKBURN. OK. And the supervisor?

Mr. BURNER. Was Mary Miller.

Mrs. BLACKBURN. Mary Miller. And is she a Treasury employee?

Mr. BURNER. She's the Assistant Secretary.

Mrs. BLACKBURN. Assistant Secretary. And she had expressed to you?

Mr. BURNER. I heard it indirectly through someone else, but there was a request that we see if we can get a briefing on Solyndra.

Mrs. BLACKBURN. All right. That is great. And I see that—I have an L.A. Times article that I had looked at, a September 26, 2011 article, that references a White House meeting in late October, Lawrence H. Summers, then-director of the National Economic Council, and Tim Geithner the Treasury Secretary, expressed concerns that the selection process for federal loan guarantees wasn't rigorous enough and raised the risk that funds could be going to the wrong companies, including ones that didn't need the help.

So is it fair to say that the problems with this process, with loan guarantees such as Solyndra, had risen to the level of the Assistant Secretary Mary Miller and to the Secretary himself?

Mr. GRIPPO. Why don't I answer that. There were principles and deputies at all these agencies, the Department of Energy, the Treasury Department, the Office of Management and Budget, going up the line to the Deputy Secretary and Secretary, who would periodically review the status of this program. And as I think that memo you've quoted alludes, one of the issues that was discussed was the amount of subsidy that may be needed in order to carry out some of these projects, which is what I was talking about a little earlier.

Mrs. BLACKBURN. OK. Let me ask you this: When we look at repayment to the American taxpayers, will FFB structure how we're repaid or will Treasury restructure how that will be repaid, has there been a discussion on that issue?

Mr. GRIPPO. In the case of Solyndra are you asking?

Mrs. BLACKBURN. Yes.

Mr. GRIPPO. No. That would be an issue for the Department of Energy, and it would not be the Treasury.

Mrs. BLACKBURN. And you all would not be involved in that at all. Thank you. I yield back.

Mr. TERRY. The gentlelady yields back. The gentlelady from Colorado.

Ms. DEGETTE. Thank you. Mr. Chairman, I just want to clarify once and for all the unanimous consent that we have on these documents. We have unanimous consent that the February 15, 2011 legal memo and the draft January 19, 2011 legal memo on subordination will be entered into the record with no redactions. In terms of the financial information that is the addendum, our staffs have agreed that they will work together to make sure that there's no confidential information, proprietary or other sensitive information, they'll work together to redact whatever they can and then they'll put that in the record as well.

Mr. TERRY. That is my recollection, but I will refer to counsel to agree that I agree.

Mr. BILBRAY. Mr. Chairman.

Mr. TERRY. So counsel and I agree with your verbiage. But Mr. Bilbray.

Mr. BILBRAY. Just to clarify, I think the ranking member meant that they would redact what was necessary, not what they can.

Ms. DEGETTE. Yes, correct.

Mr. TERRY. Only what would be determined in a bipartisan way to be proprietary or sensitive business information.

Mr. BILBRAY. Thank you, Mr. Chairman.

Mr. TERRY. All right. So we're clear?

Ms. DEGETTE. Yes.

Mr. TERRY. All right. Mr. Bilbray, you are recognized for 5 minutes.

Mr. BILBRAY. Thank you, Mr. Chairman. Mr. Chairman, seeing there's a lot of statements about agendas here, I just want to make it quite clear that this member does not have an ax to grind with the Secretary of Energy. I just want it on the record that I think that finally we have a Secretary of Energy who is a scientist, a

physicist, not a political operative. And so this member's intentions is to get to the facts and find out how this could have happened. Especially when you have somebody like Secretary Chu running a Department and seeing what appears to have happened indicates to me that the biggest problem here was that it appears that politics and prejudice and bad policy created a situation that could have very possibly crossed the line later into a legal item that we will clarify obviously in the coming weeks. But just for the record, I just don't want anybody to think that this member has an ax to grind against the Secretary.

I hope to God that this does not cause him to have to do what Silver did, and that is basically step aside and step out because of this problem. So just so everybody understands where this member comes from, in fact, I think this Secretary has the possibility of finally fulfilling the goals of the Energy Department by creating energy opportunity rather than continuing to allow it to dwindle.

Mr. Grippo, I got some questions specifically about the DOE loan guarantees that were just given out under the stimulus deadline on the 30th. In fact, on the day of the deadline, it's closing, $4.7 billion of loans were given right on the last day. Was the Treasury consulted about each of these deals before the close?

Mr. GRIPPO. Yes, we were. In some cases well before the closing.

Mr. BILBRAY. OK. Do you believe the Treasury had adequate time to consult on all these items?

Mr. GRIPPO. Yes.

Mr. BILBRAY. All these deals? Your review—in your review, do you believe the financial model for these deals were ripe, do you think they were sound?

Mr. GRIPPO. Let me be very clear about how I answer that. Because we do not do all the due diligence that the Department of Energy does. We're not privy to all of the background information.

Mr. BILBRAY. Well, obviously they don't do all the due diligence that the taxpayers would like either. But go ahead, I'm sorry.

Mr. GRIPPO. So we are not making a credit decision, right. We are not determining whether this is an appropriate risk and whether a loan should go forward. We are commenting on the terms and conditions of the loan guarantee. What should the interest rate be, what should the duration of the loan be. So we did not have insider provide comment on the details of the actual financial model.

Mr. BILBRAY. OK. Let's look at it from the holistic point of view. What do you think about the overall health of the DOE's loan guarantee portfolio at this time?

Mr. GRIPPO. It's difficult for us to judge without all the information, but I think the best answer I could give is that it is too early to tell how the overall portfolio will perform and it may take some time. There are 30 some odd transactions in the portfolio. We've obviously been talking about one of 30. We're not aware that others are having problems. And so it will take time to watch the portfolio perform.

Mr. BILBRAY. Wow. I mean, if you were my stockbroker and telling me that—gave me that I would not be really enthusiastic about putting more investment into it until I see how this thing shakes out. Is that a fair perception from an investor's point of view?

Mr. GRIPPO. It would not be. I am not implying that we perceive that there are problems, other problems.

Mr. BILBRAY. It's just that it hasn't, but you still stated that we need to see how this works out?

Mr. GRIPPO. As you indicated, many of these deals just closed a few weeks ago, and obviously we have to wait to see them perform.

Mr. BILBRAY. OK. The memorandum about the conditions in 2009, the Treasury expressed concerns about there wasn't enough equity in the deal, basically that there are concerns there wasn't enough skin in the game for some of these guys. Under the 1705 portfolio do you think that there was enough skin in the game in this instance with Solyndra?

Mr. GRIPPO. I do not actually recall the details myself of that analysis, but it would not be uncommon for us to comment on the amount of skin in the game and to argue for other equity investors to have more skin in the game to protect the taxpayer.

Mr. BILBRAY. Thank you very much. And you're basically—everything that was done last week basically we don't know how much of a risk it is, we've got to wait and see how it evolves?

Mr. GRIPPO. I think that's fair to say.

Mr. BILBRAY. Thank you. I yield back.

Mr. TERRY. Thank you, Mr. Bilbray. Dr. Gingrey, you're recognized.

Mr. GINGREY. Mr. Chairman, thank you. Mr. Grippo and Mr. Burner, thank you for testifying from the Department of Treasury, and thank you for your patience. Some of these questions that I'm going to ask may have already been asked. I had to miss some of this to go do an interview. But first of all, Mr. Burner, in your experience as chief financial officer of this Federal Financing Bank, which actually made the loan, provided the funds, have you been involved in restructuring of loan guarantees before either in or out of government?

Mr. BURNER. Only peripherally.

Mr. GINGREY. Let me ask you then, maybe it's a bit hypothetical, but in cases where the terms of a loan guarantee were changed or restructured by other agencies have those agencies sought the approval of the Department of Justice to your knowledge?

Mr. BURNER. If they don't have their own authority then they would seek approval of Department of Justice, if they have their own authority they would not.

Mr. GINGREY. Then let me ask Mr. Grippo, because what you just said I think is the crux of this matter. Is that the reason, Mr. Grippo, in your opinion, that the Department of Treasury said to the Department of Energy, look, there's a tab here, there's a red flag, and it is our strong advice that you consult the Department of Justice before going ahead with this restructuring?

Mr. GRIPPO. We did not know what all of the Department of Energy's authorities were. We did not even know the details of the restructuring. We had heard that there would be a restructuring and it seemed like good advice in our consultative role to tell them to seek, to go to the Department of Justice which is customary.

Mr. GINGREY. And I commend you for that. I think you're absolutely correct in doing that. Either one of you, why do you think that the DOE then was so hesitant to seek DOJ approval to get,

you know, a little bit more security, cover their back, you know, to—why do you think they didn't do that?

Mr. GRIPPO. I don't have an answer for you.

Mr. GINGREY. Mr. Burner, do you have any opinion on that?

Mr. BURNER. I'm sure they had their reasons. I'm not really sure. They had a legal theory on this, I'm sure.

Mr. GINGREY. Yes, yes. Well, if DOE, the Department of Energy, was so confident in their legal analysis that the subordination was permitted, why not go to the DOJ, the Department of Justice, just to cover yourbase, just to get a little back-up, you know, CYA rather than CYB? Other agencies typically seek the Department of Justice's approval of loan guaranteeing restructuring. And I asked you that question and you said you're not really sure of that. Is that your answer, that you don't know—Mr. Grippo, I didn't ask you that specifically. Other agencies, do they typically seek the Department of Justice approval of loan guarantee restructuring?

Mr. GRIPPO. Well, I don't have specific knowledge about other loan guarantees, but I'm generally familiar with what the statute says. And unless an agency has its own authorities, the procedure is to talk to the Department of Justice. And that's what we were doing. We were making a procedural call and saying we can't make a judgment on what's going on here, we're not making a legal opinion or drawing a legal conclusion.

Mr. GINGREY. Well, I'm not putting words in your mouth. I don't want to do that. But it sounds like to me that you were strongly suggesting to them since they did not have the statutory authority—I mean, I will refer back to the Energy Policy Act of 2005 under title 17 incentives for innovative technology section 1702 terms and conditions, paragraph D, subparagraph 3, subordination. And you have heard this several times from members on our side of the aisle. The obligation, that is the loan, shall be subject to the condition that the obligation, the loan, is not subordinate to other financing. So that was your concern, was it not?

Mr. GRIPPO. We were not interpreting that statute, we were recognizing it and offered the advice.

Mr. GINGREY. Well, it doesn't require—I think my first grade grandson could pretty much read and interpret that. It doesn't take a rocket scientist. That's as plain as the nose on your face. And they literally ignored the warnings and went ahead with this. And the result, of course, is the taxpayer is in a subordinate position to $75 million worth of additional investment.

And when Mr. Silver was here we asked him these questions, and we have it on video and audio, I mean it's clear what he said to us, look, we were thinking, in our mind, that the taxpayer would come out better if we found a way to circumvent and break the law, and that's what it's all about. Mr. Chairman, I yield back.

Mr. TERRY. Thank you, Mr. Gingrey. At this time, we will recognize the gentleman from Louisiana, Mr. Scalise.

Mr. SCALISE. Thank you, Mr. Chairman. Again, I appreciate the witnesses being here to answer questions as it relates to the Department of Treasury's role in the Solyndra scandal. As I look through the emails, starting with the February 10th email of 2011, Mr. Burner, that was when you had sent an email over to the Department of Energy expressing your concern about the restruc-

turing. You were later sent an email back. I think your original email was on February 10th. And on February—later that day you got the email that said could you give me a call to discuss. This was the email from the Department of Energy's legal counsel where they asked you to discuss this. There's no email chain here. Who were all of the people involved in discussions that you had about this concern that you were raising, was it just the legal counsel staff over at the Department of Energy? Because now we're off of emails, we're just on phone calls or conversations off line. Who were all the people involved that you——

Mr. BURNER. Do you mean on the phone call itself or?

Mr. SCALISE. Well, just in general. As you were raising concerns and maybe others around Treasury, I think you were getting your information from the Office of Management and Budget that there was possibly a subordination coming down, and by, I guess, your legal counsel's review they felt that that was illegal, it was in violation of the statute, you cited in your February 10th email.

So obviously you were having other conversations at Treasury, but then you were also having conversations with people outside of Treasury, whether it was the Department of Energy, was it the White House as well. Who were the other people that were involved in conversations that aren't included in the email documents we have?

Mr. BURNER. Members of my staff, as we say in the email, we heard from some OMB staff that this was going to be an issue, other people at the Treasury Department and staff lawyers at the Office of the General Counsel at Treasury.

Mr. SCALISE. OK. And then when you get outside of Treasury, clearly as you were emailing with the Department of Energy about the concerns that you expressed on February 10th, and you actually cited a number of statutes that I'm sure your legal counsel had given you the statutes to cite, but you specifically cited some statutes and then went further to discuss your concerns that a subordination putting the taxpayers in the back of the line didn't meet legal muster. That's when you said you should go consult the Department of Justice.

Mr. BURNER. We weren't making a judgment on what they were doing because we didn't really know what they were doing.

Mr. SCALISE. Right. But if you were hearing—because you were hearing this from OMB, you were hearing they may be subordinating the taxpayer, and then you cited some statute and said, you can't do it basically, you don't have the legal authority, that's why you need to consult the Department of Justice. Because I think in your email, reading from your February 10th email, unless other authorities exist, the statute rests with DOJ and the authority to accept the compromise of a claim of the U.S. Government in those instances where the principal balance of a debt exceeds $100,000. So you specifically said you can't subordinate the taxpayer unless you got some approval from the Department of Justice.

Mr. BURNER. We were specific on the fact that they should go to the Department of Justice, but we were not commenting on what they were saying.

Mr. SCALISE. The next email you got back was could you call me, could you give me a call to discuss, thanks. And that's from the De-

partment of Energy's legal counsel. So again, now we're going off the emails. Who all were involved in those discussions? Not emails, but actual discussions. Was it just the Department of Energy? Was anyone from the White House involved in those discussions?

Mr. BURNER. I had no calls from the White House, sir, no.

Mr. SCALISE. All right. Who else at the Department of Energy?

Mr. BURNER. There were four of us on the phone call that had the discussion.

Mr. SCALISE. You and who were the other three?

Mr. BURNER. A member of my staff, the director of portfolio management and Susan Richardson from the Department.

Mr. SCALISE. OK. Then there was a gap from the February 11th email. And the next email we have here is August 12th. So there's a pretty substantive gap. And then in those emails, we've got the folks over at DOE and some other people at Department of Treasury get involved in this. And in fact, we've got, I guess, your superior at the Department of Treasury, Mary Miller. You said she's the Assistant Secretary?

Mr. BURNER. Actually, Mr. Grippo here is my superior.

Mr. SCALISE. Because Mary Miller is involved in an email where she says, I may be on a call tomorrow morning about the Solyndra loan restructuring. What does the statute say about putting the government in a subordinate position? We told DOE that they need to consult with Department of Justice. Again, this is Mary Miller above you expressing concerns. At any point, and she even refers to, in a later email, a July 2010 concern that the Department of Treasury raised with the Department of Energy. At any step of the way, was there a feeling that they're not going to comply with the law, because you all say this in your emails, they're not following what we're saying about getting Justice involved. Why didn't you all get Justice involved? We're talking about $535 million here. There's another $4.7 billion that went out the door just a few weeks ago.

Mr. GRIPPO. Congressman, why don't I answer that because this refers to a variety of emails here, and obviously that's an important question and an important question for the committee. It is not our role to interpret the Department of Energy's statutes and authorities. And in no case were we ever doing that. We were never rendering a legal judgment as to whether they were complying with the law or not.

Mr. SCALISE. You were telling them they should consult with the Department of Justice.

Mr. GRIPPO. We were identifying an issue and asking a question. We weren't answering it or drawing any legal conclusions. And in fact——

Mr. SCALISE. You're citing specific statutes.

Mr. GRIPPO. We are citing statutes, but we are not——

Mr. SCALISE. I mean, if you're concerned that somebody—please don't comply with the law, and then you don't hear back from them, at some point, if you keep hearing they're not going to comply with the law, don't you feel compelled to then go and alert the Department of Justice who you're telling them to alert, but they're ignoring it?

Mr. GRIPPO. It is really not the role of the Department of the Treasury to manage——

Mr. SCALISE. You are all cutting the checks, you are cutting the taxpayer checks.

Mr. GRIPPO. These are all Department of Energy authorities, and it would be highly unusual for us to insert ourselves in that way in management of another agency's program.

Mr. TERRY. Thank you.

Mr. SCALISE. Mr. Chairman, I do have a point of information, because I did ask, and I got an answer from the head of the loan program at our last hearing under oath. He said he would get this whole committee the names of all the people involved in the chain to subordinate the taxpayer from the White House on down. I asked him under oath and he said he would get me that information under oath. And I know he's resigned now. But I have a question to legal counsel or somebody on staff, are we still going to be able to get that information?

Mr. TERRY. Yes.

Mr. SCALISE. Because that is critical information.

Mr. TERRY. It will be added to the questions for the record.

Mr. SCALISE. Thank you. I yield back.

Mr. TERRY. The gentleman from Colorado, Mr. Gardner is recognized.

Mr. GARDNER. Thank you, Mr. Chairman. And thank you as well to the witnesses for spending the time with us today. A couple of questions and to follow up with what Mr. Scalise had said. You identified that your roles at the Treasury Department are two-fold, both as lender and as consultant. As a lender don't you have a responsibility to refer this to DOJ?

Mr. GRIPPO. We actually do not. If you look at the statutes which govern the Federal Financing Act——

Mr. GARDNER. But you consider yourself a lender.

Mr. GRIPPO. It is processing a loan, but the Department of Energy is making the credit decision.

Mr. GARDNER. Then why do you call yourself a lender, because as a lender, you're the Federal finance bank, don't you have an obligation, a fiduciary obligation as a lender to the people of this country?

Mr. GRIPPO. We certainly, in our consultative role, have a responsibility to raise these issues and questions, which is what we were trying to do.

Mr. GARDNER. And your consultative role includes going to the Department of Justice and saying, hey, we are afraid. And I think at one point you made the statement, you had said that—on things that raise issues of compromising a claim of the Federal Government.

Mr. GRIPPO. Well, in that instance, our advice was to refer the matter to the Department of Justice.

Mr. GARDNER. And so why wouldn't you go to the Department of Justice?

Mr. GRIPPO. The Treasury Department?

Mr. GARDNER. Yes.

Mr. GRIPPO. Because it's not our statute, we did not have all the facts, we did not have the details.

Mr. GARDNER. Why didn't you have all the facts?

Mr. GRIPPO. Because it's not our program. To be clear about our role in the restructuring.

Mr. GARDNER. But you're the lender, I mean, you call yourself a lender?

Mr. GRIPPO. The Federal Financing Bank did issue the loan. But to be very clear about the responsibilities, it's the guarantor agency, in this case, the Department of Energy which is assuming 100 percent guarantee of the loan, is deciding whether to make it, they're responsible for monitoring it, they're responsible for all of the financial aspects of that credit risk.

It is not the Treasury's responsibility to monitor that, and indeed we would not have the information to do so.

Mr. GARDNER. I guess when you call yourself a lender, as the Federal finance bank, and in this particular instance because you gave 100 percent of the money, there was no bank as an intermediary, and I would like a list of all other loan guarantees that you're actually not just guaranteeing a loan, you're actually paying 100 percent of the money, cutting out the bank itself, if I could get the information on other instances where you've given the money just directly, I would appreciate that for the record, if we could. But if you're the lender, I don't understand why you wouldn't ask these questions.

I do have some other questions that I want to get to. And Mr. Grippo, I would refer to tab 3 in your binder. There's an email dated July 26, 2010 between Treasury, OMB and DOE staff. The email references a conversation between the agencies on Solyndra and DOE's monitoring plan. Did this—why did this conversation happen in the first place?

Mr. GRIPPO. I was not a party to this email. This took place in July of 2010. And the most complete answer I can give you is that the various agencies, predominantly OMB and the Department of Energy, were having weekly discussions on the status of the loan program and the efforts to monitor the portfolio.

Mr. GARDNER. Were you concerned about DOE's monitoring of Solyndra?

Mr. GRIPPO. We do not have any specific information from the Department of Energy, and certainly didn't have any direct contact with Solyndra, that would inform our judgments.

Mr. GARDNER. You were not concerned about DOE's monitoring of Solyndra?

Mr. GRIPPO. As a general matter, we felt that the portfolio should be properly monitored, but we did not have any specific information about Solyndra.

Mr. GARDNER. Now, this email exchange actually took place shortly after Solyndra had pulled back their IPO, is that correct?

Mr. GRIPPO. Yes, I believe that's correct.

Mr. GARDNER. And 3 months after its auditors had doubted Solyndra's ability to continue is a going concern, is that correct?

Mr. GRIPPO. That is correct.

Mr. GARDNER. So in this email, it appears that OMB and Treasury, since you are both on this email, are asking for a number of pieces of information from Solyndra that would indicate its financial health, is that correct?

Mr. GRIPPO. Yes.

Mr. GARDNER. Financial statements, financial model, current market prices, cost data. Why were you asking about this?

Mr. GRIPPO. Our role is, as the consultant to the Department of Energy under the statute, is to be helpful wherever we can. We felt we had experience with federal credit policy and with corporate finance that could be of use. This is an email from the Office of Management and Budget to the Department of Energy. We contributed to this because we felt we had something to add and can help.

Mr. GARDNER. So were you concerned then with this loan or the monitoring?

Mr. GRIPPO. We——

Mr. GARDNER. You asked for a lot of information here. I mean, current financial statements, financial model, latest IE report, tare sheet summary, actual performance numbers, monthly variance reports, market price, monthly production, credit committee papers, it goes on and on. Were you concerned about the loan?

Mr. GRIPPO. Again, this is an email from the Office of Management and Budget to the Department of Energy.

Mr. GARDNER. And Treasury is on the email.

Mr. GRIPPO. We did contribute to it. But we were not responsible for the sending of this or for the monitoring of the portfolio.

Mr. GARDNER. Are you concerned that there are others out there like Solyndra?

Mr. GRIPPO. No, I'm not at this time. I don't have any information that would lead me to have additional concerns one way or the other.

Mr. GARDNER. Mr. Chairman, I have additional questions. I'd ask if I could submit those for the record.

Mr. TERRY. Yes, you may submit those for the record. The gentleman from Virginia, Mr. Griffith, is now recognized.

Mr. GRIFFITH. Thank you, Mr. Chairman. Mr. Burner, you sent an email to Frances and Susan, and I believe that's Susan Richardson and Frances, and I apologize, I can't pronounce her last name, is that correct?

Mr. BURNER. That's correct, sir.

Mr. GRIFFITH. Can you pronounce her last name for me so I can get it right? If you can't it's oK, I understand.

Mr. BURNER. I could try, but I will apologize to Frances formally, but Nwachuku.

Mr. GRIFFITH. Nwachuku. All right. And you wrote that to both of them on February 10th. You got a message back from Frances on that same day that says there's been a gross misunderstanding, is that correct?

Mr. BURNER. That's correct, sir.

Mr. GRIFFITH. And then on February 11th, you got an OMB circular from Frances. Susan does not appear to be on this, is that correct? Which says, and I don't know where we are, it's somewhere, I don't know where, I can't keep track. I don't have tabs, so I have to try to figure it out by counting.

Mr. BURNER. There's an excerpt from an OMB circular that Susan sent.

Mr. GRIFFITH. And that says workouts—do you have a copy of that in front of you?

Mr. BURNER. Yes, sir, I do.

Mr. GRIFFITH. OK. And that says, does it not, that workouts mean plans that offer options short of default? That's the first phrase, is it not?

Mr. BURNER. Yes, sir.

Mr. GRIFFITH. And then it goes on to explain that that's not modifications, that that's not a modification at the very end, is that correct?

Mr. BURNER. That's correct, sir.

Mr. GRIFFITH. At the time that you received that you were not aware of the legal memorandum that DOE had that Susan Richardson was in draft form, and then later on February 15th became a formal form, or at least according to what we have today, you were not aware of that legal memorandum, isn't that correct?

Mr. BURNER. That's correct, sir.

Mr. GRIFFITH. And notwithstanding the fact that you were getting data, or a copy of an OMB circular from Frances that said that, let me quote that again, that said workouts mean plans that offer options short of default. And what she was basically saying to you was we don't think that we're modifying this loan or we're doing something that would create the necessity to consult with you all, isn't that correct? That was the purpose of these emails and conversations, we don't believe that we're making a change that puts—that compromises the taxpayers' position, isn't that correct?

Mr. BURNER. As I recall, that's what they were saying.

Mr. GRIFFITH. That was the general demeanor. And yet they're sending this to you on February 11th, but these memos that we had the big fight about today are dated January 19th, and as I pointed out in my comments earlier, first line of the third paragraph, and I know that you don't know anything about this, but I'm just pointing it out to you, a default relating to a financial requirement has occurred under the loan guarantee agreement in relationship to Solyndra.

Is there any way in your mind that Frances wouldn't have known that the legal opinion was already rendered that said that there had been, in fact, a default but now we're going to try to fix it when she's trying to tell you that workout means plans that offer options short of default?

Mr. BURNER. I can't comment on what Frances knew.

Mr. GRIFFITH. And further it is, in fact—do you know Peter B–I-E–G-E–R?

Mr. BURNER. Mr. Bieger, yes.

Mr. GRIFFITH. And Mr. Bieger is an attorney, is he not?

Mr. BURNER. He is a staff attorney at the Treasury Department.

Mr. GRIFFITH. So he works with you all?

Mr. BURNER. Yes, sir.

Mr. GRIFFITH. And subsequent to that, are you aware that he stated in a memo that claim compromises include loan workouts, are you aware of that? Again, I can't tell you what tab that is. I'm back here on Mr. Bieger's, Wednesday, October—excuse me, August 17, 2011, memorandum, authority to compromise—it's titled "Authority to Compromise claims owed to the government."

Mr. BURNER. It's the first time I have seen this memo, sir, but it does say that.

Mr. GRIFFITH. It does say that, does it not?

Mr. BURNER. Yes, sir.

Mr. GRIFFITH. Yes, it does. And so I would have to say to you, based on the evidence that you now know that there was a subordination of $75 million, that it appears that in the restructuring, they may have agreed to forebear payments totaling $30 million for 3 years, wouldn't you agree that those terms sound like a substantial change under the regulations regarding this loan guarantee program?

Mr. BURNER. A substantial change? It was certainly a change, sir. Whether it was substantial is a——

Mr. GRIFFITH. But it would be your opinion, would it not, and I'm asking you for your opinion——

Mr. GRIPPO. That's really something that the Department of Energy would have to answer, "it" being their statute and indeed, their program and Treasury would not have offered, and even in these emails, is not offering any legal interpretation. It is citing statutes only.

Mr. GRIFFITH. So if they had agreed just to completely forebear the entire loan, it wouldn't matter they didn't discuss it with you if they decided it wasn't a substantial change, is that what you're saying?

Mr. GRIPPO. I'm saying that I personally am not a lawyer, could render that judgment, and it's not the Treasury's role institutionally to render that judgment for DOE.

Mr. GRIFFITH. So what's the purpose of having you in the loop if you have no authority? Thank you. I yield back.

Mr. TERRY. Thank you. I ask unanimous consent for Mr. Pompeo to be able to ask questions since he's not a member of this subcommittee. Hearing none, Mr. Pompeo, you are recognized.

Mr. POMPEO. Thank you, Mr. Chairman. Thank for granting unanimous consent for me to ask a couple of questions. I will try and be brief. I appreciate you gentlemen being here today. This is the third time we've had folks come and we still can't get anybody to take responsibility. We had an OMB official, now a former DOE official, we had two senior Solyndra executives who took the fifth, and today we hear lots of that's not my job, that's not my role.

And so I hope you can appreciate the frustration that we're having as we try to get folks to answer questions about these very important matters. Mr. Grippo, let me start with you. I want to go back to almost the very beginning. There was an email to tab 1. It's March 19th. And the Treasury review board at this point had approved a conditional commitment on March 19th—excuse me, on March 17th, and you all expressed concerns on March 19th. That seems backwards to me. So you talk about your role consultatively, are you with me? If you look in tab 1, there was an email expressing about 15 or 16 concerns the Treasury Department had.

Mr. GRIPPO. I'm looking at that tab, yes.

Mr. POMPEO. Right. And the conditional commitment by the credit review board had happened two days earlier on March 17th.

Mr. GRIPPO. I have to say I'm not aware when the conditional commitment was.

Mr. POMPEO. If it was on March 17th, would you find that odd that your consultation, your comments, were still being worked after the date that the conditional review had been made?

Mr. GRIPPO. I really can't say. I'm not sure.

Mr. POMPEO. So you think it would be oK? Assume the fact that March 17th was the date that the conditional review had been approved. Would you find it odd that you were still making comments after that?

Mr. GRIPPO. Again, I don't know when the conditional commitment was offered.

Mr. POMPEO. That's not what I asked.

Mr. GRIPPO. I understand. I don't know when the conditional equipment was offered. We had the opportunity to provide this input, is my understanding.

Mr. POMPEO. Got you. Very good.

Mr. Burner, let me turn to you. Let me turn sort of more towards the end. Tell me what your role is today now that this business is in bankruptcy as the lender trying to collect this money on behalf of the taxpayer.

Mr. BURNER. We have no role in the collection to the taxpayer. We have the guarantee. So DOE is paying us when as due. And it's my understanding that they are in bankruptcy court at this point.

Mr. POMPEO. So has DOE paid you?

Mr. BURNER. DOE has paid us, has and will pay us when as due according to the guarantee.

Mr. POMPEO. And so when would that be?

Mr. BURNER. We receive regular payments, and then at some point, I assume the loan will be extinguished by full payment.

Mr. POMPEO. And so when is the next payment due from DOE?

Mr. BURNER. I don't have that on the top of my head, sir. It's a semi-annual loan.

Mr. POMPEO. And DOE has not missed a single payment to the FFB to date?

Mr. BURNER. No, sir.

Mr. POMPEO. It made all those payments. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. TERRY. The gentleman yields back. And there's no other members wishing to ask questions, so I want to thank—so I ask unanimous consent that the contents of the document and binder be introduced into the record and to authorize the staff to make appropriate redactions. No objection.

So without objection the document will be entered into the record with any redactions that the staff deem appropriate.

[The information appears at the conclusion of the hearing:]

Mr. TERRY. So at this time we thank you. The ranking member and I thank you for your patience, for your dedication and your testimony here today. The committee rules provide that members have 10 days to submit additional questions for the record to the witnesses. And there's already been one member that has suggested there will be additional questions submitted to you, so we do appreciate your time. And we are adjourned.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
Continuing Developments Regarding the Solyndra Loan Guarantee
October 14, 2011

Exhibits Index

TAB	DESCRIPTION	DATE
1	Treasury Staff Email to Treasury Staff Subject: Re: Could you type up in short bullets your questions/concerns so I can quickly turn out the list of Treasury concerns for Karthic and Ken this PM (000021-000022)	03.19.09 2:25 PM
2	Treasury Memorandum Subject: Treasury/FFB Consultation with the Department of Energy on the Solyndra Fab 2 LLC Project (000035-000036)	03.16.10
3	OMB Staff Email to DOE Staff Subject: Solyndra Follow up (000081-000083)	07.26.10 5:13 PM
4	Treasury Staff Email to DOE Staff Subject: Solyndra (000087)	11.03.10 8:58 PM
5	Treasury Staff Email to DOJ Staff Subject: may I call you about A.G.'s "compromise of claim" authority? (000066)	01.07.11 4:17 PM
6	Treasury Staff Email to DOJ Staff Subject: RE: may I call you about the A.G.'s "compromise of claim" authority? (000067-000068)	01.07.11 4:22 PM
7	Treasury Staff Email to DOE Staff Subject: Solyndra (000005)	02.10.11 2:05 PM
8	DOE Staff Email to Treasury Staff Subject: RE: Solyndra (000006)	02.10.11 4:44 PM
9	DOE Staff Email to Treasury Staff Subject: RE: Solyndra (000013-000015)	02.11.11 10:55 AM
10	Treasury Staff Email to DOE Staff Subject: RE: Solyndra (000090-000092)	08.12.11 11:51 AM
11	Treasury Staff Email to Treasury Staff Subject: RE: DOE Loan Guarantees (000017)	08.16.11 9:52 PM
12	OMB Staff Email to Treasury Staff Subject: RE: Solyndra (000002)	08.17.11 8:57 AM
13	Treasury Staff Email to Treasury Staff Subject: RE: Materials for tomorrow's 9:30 briefing (000037-000038)	08.17.11 9:13 AM
14	Treasury Staff Email to Treasury Staff Subject: authority to compromise claims owed to the government (000018-000019)	08.17.11 1:01 PM
15	Treasury Staff Email to OMB Staff Subject: Solyndra (000050-000051)	08.17.11 3:25 PM
16	OMB Staff Email to Treasury Staff Subject: Fw: update on solyndra (000003)	08.17.11 5:52 PM
17	Treasury Staff Email to Treasury Staff Subject: Re: Solyndra (000060-000061)	08.28.11 4:40 PM

[redacted]

From: [redacted]
Sent: Thursday, March 19, 2009 2:25 PM
T : [redacted]
Subject: RE: Could you type up in short bullets your questions/concerns so I can quickly turn out the list of Treasury concerns for Karthic and Ken this PM

Great Questions -- all of them!! Thanks

From: [redacted]
Sent: Thursday, March 19, 2009 2:16 PM
To: [redacted]
Subject: RE: Could you type up in short bullets your questions/concerns so I can quickly turn out the list of Treasury concerns for Karthic and Ken this PM

What is phase 2's economic impact on phase 1?
Does it impact repayment potential?
Is phase 2 constructed concurrent or sequential to phase 1?

Shared facilities: does phase 2 reimburse phase 1 for economic depreciation it causes of the loan collateral?

What is the difference between budgeted contingency funds (included in base costs) and overrun project costs?

If contingency funds are removed do we need to bump up the overrun equity commitment?

What's the initial base equity commitment?

Who determines the interest rate (FFB or DoE)?

Par or Market Prepayment?

What is the collateral requirement / % of loan backed by collateral / when is collateral valued...

Can sponsor remove equity as they repay / prepay loan (as long as they maintain 27% equity)?

Pricing mechanism for sales of output of the project (arms length)?
Independent auditor?
Who owns projects improvements to sponsor's intellectual property?

What are customary exceptions to subordination to full repayment of guaranteed loan?

Valuation of alternative asset for Debt Service Reserve Account?

Who is the insurer and how did they prove they were financially sound.

Is the 90 percent stripping threshold standard (see SBA)?

What is 90% of useful life of the project?

How is a significant equity investment determined?

[redacted]
Financial Economist
Office of Debt Management
Department of Treasury

E-mail: [redacted]@do.treas.gov
Phone: [redacted]

From: [redacted]
Sent: Thursday, March 19, 2009 1:46 PM
T : [redacted]
Subject: Could you type up in short bullets your questions/concerns so I can quickly turn out the list of Treasury concerns for Karthic and Ken this PM

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 16, 2010

Memorandum To Files

From: FFB Loan Administration Staff

Subject: Treasury/FFB Consultation with the Department of Energy (DOE) on the Solyndra Fab 2 LLC Project ("the Project")

Treasury and FFB staff convened a conference call with members of DOE's Loan Guarantee Program Office (LGPO) on March 19, 2009 to discuss a potential loan guarantee to be issued under Title XVII of the Energy Policy Act of 2005. A guaranteed loan totaling $535 million is requested by the applicant to finance its Fab 2 manufacturing facility for thin-film onmi-facial solar modules targeting the commercial rooftop market.

Attendees from DOE included David Frantz, LGPO, and Bill Miller, LGPO.

Attendees from FFB were Gary Burner, Whitney Culbertson, Leona Cosby, and Pearl Buenvenida. Attendees from Treasury's Office of Policy and Legislative Review were Paula Farrell, Preston Atkins, Karen Weber, Colleen McLoughlin, and Ed Garnett. Nathan Struemph and Mike Dai from the Office of Debt Management also attended.

Key points made by DOE in their briefing materials include:

- Innovative technology of cylindrical tube photovoltaic panels that are lighter weight, provide a lower wind profile, and are less expensive to install than other solar panels available.
- Solyndra is in the ramp-up and optimization phase of its initial production line (Fab 1); experience developed from Fab 1 will be for the benefit of the Fab 2 project.
- Experienced management team has a demonstrated ability to raise capital ($750 million to date) to support the project.

FFB staff conclusions based on the presentation and written materials provided are:

- Equity contribution is merely 27% of the Project costs, which is low for a start-up company. We also note that this is below the original expectation of 35% equity contributions when the Title XVII program was first designed. The borrower claims that it cannot raise additional capital in this market.
- Deal is structured to protect the sponsor's interest in the first production line (Fab 1) such that the government cannot grab this asset along with the intellectual property (IP) in the event of default.

- Christian Gronet, Founder and CEO of Solyndra, maintains a sizeable share of the company's equity. He is its single largest shareholder (12.6%).
- Substitution effects with other solar panel manufacturers remain a challenge to meeting the product's expected market penetration.

[redacted]

From: [redacted]@omb.eop.gov]
Sent: Monday, July 26, 2010 5:13 PM
To: Frantz, David [redacted]
Cc:
Subject: RE: Solyndra Follow Up

Dave,

Thanks again for the conversation last week regarding the status of Solyndra and DOE's monitoring plan. Given the critical importance of monitoring and recent accounts of the Solyndra project, we appreciate your time in providing an overview of the steps DOE is taking on this front and an update on Solyndra specifically. Given information recently reported in the media, I'm sure you can understand our interest in understanding the current status of this project and associated taxpayer risk. We look forward to following up with the new director of monitoring now that she is onboard to get a better understanding of the organization, systems, processes, etc. DOE will use in monitoring and analyzing loans going forward.

Per our conversation, we have pulled together the items requested July 16, items DOE indicated they planned to provide on Wednesday's call, and follow up items from our discussion so that we have a common list of items. Please let me know if you have any questions.

Thanks.

Summary of Follow Up Items

1. Follow-up items per the July 16 email, including updated parent financial statements and financial model for the project and parent, as well as the latest IE report.
2. Please provide the latest tear sheet summary for the project.
3. Actual performance against the loan covenants, including *pro forma* impact (if any) as a result of the *recent sale* of the $175mm of secured convertible promissory notes
4. Monthly variance reports: As we discussed this may serve as a proxy for the type of information we are looking for until DOE develops a more standard and systematic way of collecting and reporting key data. For the Sponsor: Variance analysis against Sponsor's 2010 plan. For the Borrower: Variance analysis per the construction schedule (timing) and budget (cost).
5. Current market price, production, productivity (e.g., watts / panel), and cost data vs. the pro forma projections at closing. This may include:
    a. Monthly production and sales figures since financial close in 2009.
    b. An update to the chart on page 22 of the Credit Committee Paper (March 2009) regarding the cumulative yield for Fab1. Also an updated analysis of the increase in conversion efficiency per panel (175 watts per module in March 2009).
    c. Please provide additional information around the comment that the manufacturing "cost" was approximately $1.50 (assuming this means per watt). How has this performance compared to the base case projections and why? Please describe how this compares to Solyndra's December 2009 S-1 filing which

indicated 17.2MW sold and $10B,321K in cost of revenue (or an implied cost per watt of $6.30) for the 9 months ended October 31.

d. Updates to Solyndra's sales contracts:

i. Page 12 of the Credit Committee Paper (March 2009) gave pricing and volume details for Solyndra's existing contracts. Please provide a current update to that table (including additional contracts signed) and any market color that explains why average selling price is now only $2.50/watt. Please describe how this compares to Solyndra's December 2009 S-1 filing which indicated 17.2MW sold and $58.814K in revenue (or an implied $3.42 average price/watt) for the 9 months ended October 31.

6. Please provide a breakdown of the cost data by source (i.e. manufacturing overhead – including depreciation, materials, labor, etc.) and a crosswalk to cost data for other solar manufacturers as was provided in support of the Abound request, including estimated balance of plant costs.

7. Summary of terms of $175mm secured convertible promissory notes, and description of how Solyndra's business plan and creditworthiness has been impacted by the decision to raise funds in this manner, instead of accessing the public equity markets (including any impact that the security interest has on the parent company's ability to meet its obligations).

8. Citation for the accounting standards governing going concern statements and any written response by Solyndra to the auditor's statement with specific financial information supporting their position.

9. Additional detail on the nature of the transaction being contemplated by the reference to the sale of 'excess production capacity' in the July 2010 Quarterly Portfolio Report.

10. What changes has Solyndra requested (per the July 16 email)? Please provide a summary of each request and any implications of these changes. Please also describe what these changes would mean in terms of taxpayer risk. Please also describe how the sub-lease and sale of 'excess capacity' would be booked by the parent and project. Please describe the changes to the Common Agreement that Solyndra has requested (per June 2010 Quarterly Portfolio Report).

11. Please describe the 'changes to the construction line items' and any implications of these changes.

12. Prior to closing, OMB requested the following: *Can DOE provide the results of an independent test which verifies Solyndra's claim regarding higher electricity generation per rooftop and lower balance of system costs? That is, have they provided results for any tests which compare the costs of two similar rooftops – one with Solyndra and the other with conventional panels that demonstrate the greater generation and the lower costs?* Could DOE provide this information based on the current data available?

Also, as we discussed, we should think about a systematic way to track the loan guarantees after they have closed. Particularly, it would be helpful to have advance notification of any issues that arise so that folks are not surprised by reports in the media. This would also help in collecting information we will ultimately need in the re-estimate process. We look forward to working with DOE to develop some way to track this information. We have made good progress on similar reports for tracking the pipeline of deals on the front end of the process. Now that we have some deals that are closing, we should think about similar reports for that stage as well.

Please let me know if you have any questions.

Thanks.

From: [redacted]
Sent: Monday, July 19, 2010 4:35 PM
To: [redacted]@do.treas.gov
Cc: [redacted]
Subject: RE: Solyndra Follow Up

We can make this work but let's please plan on a tel-conference. It is much more efficient as we can't afford the time away from the office. Just send us a number for dial in for 3:30.

Many thanks,

Dave

David G. Frantz
US Department of Energy
Director, Loan Guarantee Office, CF-1.3
Office: [redacted] *Fax:* [redacted]
David.Frantz@[redacted]

From: [redacted] [mailto:[redacted]@omb.eop.gov]
Sent: Monday, July 19, 2010 4:27 PM
To: Frantz, David; [redacted]@do.treas.gov
Subject: Solyndra Follow Up

Dave and[redacted]

In follow up to our discussion earlier regarding Solyndra, any time Wednesday afternoon from 3:30 on works for us. Let me know what time works for you. If you send clearance information to me or [redacted] by Wednesday morning, that would be great.

Thanks.

[redacted]

From: [redacted]
Sent: Wednesday, November 03, 2010 8:58 PM
To: 'Frances.Nwachuku@[redacted]
Cc: [redacted]
Subject: Solyndra

Frances:

I hope this finds you doing well. [redacted] and I work on behalf of Assistant Secretary Mary Miller to coordinate Treasury's consultative role in the DOE Loan Guarantee Program. Dave Frantz suggested that I reach out to you regarding a request we have about current DOE work on Solyndra.

I understand that your group met with OMB in recent days, and is doing some additional analysis before circling back with OMB in a week or two. When you do circle back with OMB, we would greatly appreciate it if you could loop us in to those discussions, so that we can keep abreast of your assessment of the situation, and the courses of action you are considering. If you'd like to touch base in the meantime, feel free to give me a ring.

We'll look forward to meeting you sometime soon.

Thanks,
[redacted]

[redacted]
Office of Environment and Energy
U.S. Department of the Treasury
Phone: [redacted]
Fax: [redacted]
Email: [redacted]@do.treas.gov

[redacted]

From: [redacted]
Sent: Friday, January 07, 2011 4:17 PM
T : [redacted]
Subject: may I call you about the A.G.'s "compromise of claim" authority?

[redacted]

I just want to be sure I'm up-to-date when I say to another agency: "You need to talk to DOJ before you start going down that road."

If you prefer, you can refer me to someone else in your office

[redacted]

[redacted]
Deputy Assistant General Counsel
(Banking and Finance)
Department of the Treasury
Room 2030, Main Treasury Building
1500 Pennsylvania Avenue NW
Washington, DC 20220

Tel:
Fax:
Email: [redacted]

[redacted]

From: [redacted]
Sent: Friday, January 07, 2011 4:22 PM
To: [redacted]
Subject: RE: may I call you about the A.G.'s "compromise of claim" authority?

I'll call [redacted] on Monday.

Thanks!

[redacted]

-----Original Message-----
From: [redacted] [mailto:[redacted]@usdoj.gov]
Sent: Friday, January 07, 2011 4:19 PM
To: [redacted]
Subject: RE: may I call you about the A.G.'s "compromise of claim" authority?

[redacted] is our resident expert [redacted] She's out today but back on Monday. I can talk today but may be less facile with the subject. ;-)

From: [redacted]@do.treas.gov [mailto:[redacted]@do.treas.gov]
Sent: Friday, January 07, 2011 4:17 PM
To: [redacted]
Subject: may I call you about the A.G.'s "compromise of claim" authority?

[redacted]

I just want to be sure I'm up-to-date when I say to another agency: "You need to talk to DOJ before you start going down that road."

If you prefer, you can refer me to someone else in your office.

[redacted]

[redacted]
Deputy Assistant General Counsel
(Banking and Finance)
D partment of the Treasury
Room 2020, Main Treasury Building
1500 Pennsylvania Avenue NW
Washington, DC 20220

Tel: [redacted]
Fax:
Email: [redacted]@do.treas.gov

[redacted]

From: Burner, Gary
Sent: Thursday, February 10, 2011 2:05 PM
T : 'susan.richardson@[redacted]; 'Frances.Nwachuku@[redacted]
Subject: Solyndra

Dear Frances and Susan,

Treasury staff has learned from the Office of Management and Budget that the Department of Energy is close to implementing a set of adjustments to the Solyndra Loan Guarantee Agreement in response to Solyndra's financial condition. We understand that these adjustments may include subordination of Solyndra's $535 million reimbursement obligation to DOE and possibly the forgiveness of interest. Unless DOE has other authorities, these adjustments may require approval of the Department of Justice pursuant to 31 USC 3711 and 31 CFR Part 902. Unless other authorities exist, this statute rests with DOJ the authority to accept the compromise of a claim of the U.S. Government in those instances where the principal balance of a debt exceeds $100,000. Let me know if you need the name of a contact at DOJ.

Will you be referring the contemplated adjustment to DOJ or are there other authorities that DOE is using to compromise this debt?

Please let us know if the FFB can be of any assistance as you move forward. If you need to modify any FFB agreements, please let me know.

Sincerely,
Gary

[redacted]

From: Nwachuku, Frances[redacted]
Sent: Thursday, February 10, 2011 4:44 PM
To: Burner, Gary; Richardson, Susan
Subject: RE: Solyndra

Hi Gary,

I believe there is a gross misunderstanding of the outcome of the negotiated restructuring of the Solyndra obligation to DOE. Could you give me a call to discuss. Thanks.

Frances

Frances I. Nwachuku
Director,
Portfolio Management Division
Loan Programs Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Direct: [redacted]
Mobile: [redacted]
Fax: [redacted]

From: Gary.Burner@[redacted] [mailto:[redacted]
Sent: Thursday, February 10, 2011 2:05 PM
To: Richardson, Susan; Nwachuku, Frances
Subject: Solyndra

Dear Frances and Susan,

Treasury staff has learned from the Office of Management and Budget that the Department of Energy is close to implementing a set of adjustments to the Solyndra Loan Guarantee Agreement in response to Solyndra's financial condition. We understand that these adjustments may include subordination of Solyndra's $535 million reimbursement obligation to DOE and possibly the forgiveness of interest. Unless DOE has other authorities, these adjustments may require approval of the Department of Justice pursuant to 31 USC 3711 and 31 CFR Part 902. Unless other authorities exist, this statute rests with DOJ the authority to accept the compromise of a claim of the U.S. Government in those instances where the principal balance of a debt exceeds $100,000. Let me know if you need the name of a contact at DOJ.

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Please let us know if the FFB can be of any assistance as you move forward. If you need to modify any FFB agreements, please let me know.

Sincerely,
Gary

[redacted]

From: Nwachuku, Frances [redacted]
Sent: Friday, February 11, 2011 10:55 AM
T : Burner, Gary
Cc: [redacted]
Subject: RE: Solyndra

Gary,

Below is the language.

OMB Circular A-11 185.3 (ab):

"Work-outs mean plans that offer options short of default or foreclosure for resolving troubled loans or loans in imminent default, such as deferring or forgiving principal or interest, reducing the borrower's interest rate, extending the loan maturity, or postponing collection action. Work-outs are expected to minimize the cost to the Government of resolving troubled loans or loans in imminent default. They should only be utilized if it is likely that the borrower will be able to repay under the terms of the workout and if the cost of the work-out is less than the cost of default or foreclosure. For post-1991 direct loans and l an guarantees, the expected effects of work-outs on cash flow are included in the original estimate of the subsidy cost. Therefore, to the extent that the effects of work-outs on cash flow are the same as originally estimated, they do not alter the subsidy cost. If the effects on cash flow are more or less than the original estimate, the differences are included in reestimates of the subsidy and are not a modification."

Frances

Frances I. Nwachuku
Director,
Portfolio Management Division
L an Programs Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Direct: [redacted]
Mobile: [redacted]
Fax: [redacted]

-----Original Message-----
From: Gary.Burner@[redacted] [mailto[redacted]
Sent: Friday, February 11, 2011 9:07 AM
To: Nwachuku, Frances
Subject: Re: Solyndra

11AM is fine.

----- Original Message -----
From: Nwachuku, Frances [redacted]
To: Burner, Gary
Sent: Thu Feb 10 22:58:57 2011
Subject: Re: Solyndra

I have a 10am, but can talk at 11am.

Frances

----- Original Message -----
From: Gary.Burner[redacted]
To: Nwachuku, Frances; Richardson, Susan
Sent: Thu Feb 10 17:54:22 2011
Subject: RE: Solyndra

Frances,

Thanks for your quick response. Do you have some time tomorrow around 10:00AM?

Gary

-----Original Message-----
From: Nwachuku, Frances [mailto:[redacted]
Sent: Thursday, February 10, 2011 4:44 PM
To: Burner, Gary; Richardson, Susan
Subject: RE: Solyndra

Hi Gary,

I believe there is a gross misunderstanding of the outcome of the negotiated restructuring of the Solyndra obligation to DOE. Could you give me a call to discuss. Thanks.

Frances

Frances I. Nwachuku
Director,
P rtfolio Management Division
L an Programs Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Direct: [redacted]
Mobile: [redacted]
Fax: [redacted]

From: Gary.Burner[redacted]
Sent: Thursday, February 10, 2011 2:05 PM
To: Richardson, Susan; Nwachuku, Frances
Subject: Solyndra

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Please let us know if the FFB can be of any assistance as you move forward. If you need t modify any FFB agreements, please let me know.

Sincerely,
Gary

[redacted]

From: Burner, Gary
Sent: Friday, August 12, 2011 11:51 AM
T : Nwachuku, Frances
Cc: [redacted]
Subject: RE: Solyndra

Frances,

Can we get an update on the status of Solyndra today? If so, please call [redacted] on [redacted] and she can conference me in. I am offsite today.

Gary

From: Nwachuku, Frances [redacted]
Sent: Friday, February 11, 2011 10:54 AM
To: Burner, Gary
Cc: [redacted]
Subject: RE: Solyndra

Gary,

Below is the language.

OMB Circular A-11 185.3 (ab):

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Frances

Frances I. Nwachuku
Director,
Portfolio Management Division
Loan Programs Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

[redacted]

----Original Message-----
From: Gary.Burner@[redacted]
Sent: Friday, February 11, 2011 9:07 AM
To: Nwachuku, Frances
Subject: Re: Solyndra

11AM is fine.

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From: Nwachuku, Frances [redacted]
To: Burner, Gary
Sent: Thu Feb 10 22:58:57 2011
Subject: Re: Solyndra

I have a 10am, but can talk at 11am.

Frances

----- Original Message -----
From: Gary.Burner@[redacted]
To: Nwachuku, Frances; Richardson, Susan
Sent: Thu Feb 10 17:54:22 2011
Subject: RE: Solyndra

Frances,

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Gary

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Sent: Thursday, February 10, 2011 4:44 PM
To: Burner, Gary; Richardson, Susan
Subject: RE: Solyndra

Hi Gary,

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Frances

Frances I. Nwachuku
Director,
Portfolio Management Division
Loan Programs Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Direct: [redacted]
Mobile:

[redacted]

From: [redacted]
Sent: Tuesday, August 18, 2011 9:52 PM
To: Miller, Mary
Cc: Grippo, Gary
Subject: RE: DOE Loan Guarantees

Sure. I will be there.

The Title XVII statute and the DOE regulations both require that the guaranteed loan shall not be subordinate to any loan or other debt obligation.

The DOE regulations state that DOE shall consult with OMB and Treasury before DOE grants any "deviation" from the requirements of the regulations (to the extent such requirement is not specified by the statute) that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement.

But I will bet a quarter that the DOE lawyers have some kind of theory on how whatever restructuring they have done and whatever they are considering doing does not violate these requirements. Can't wait to hear it.

[redacted]

From: Miller, Mary
Sent: Tuesday, August 16, 2011 7:41 PM
To: [redacted]
Cc: Grippo, Gary
Subject: DOE Loan Guarantees

[redacted]– I may be on a call tomorrow morning about the Solyndra loan restructuring. I need to know from you what Treasury's role should be in this. What does the statute say about putting the government in a subordinate position to new loans? We told DOE that they needed to consult DOJ about changing the terms of the loan. Apparently they did not consult DOJ. Should we press for that now as they consider another restructuring? There is a small amount of funds left at the FFB that has not been drawn down. Should we release that? I have a number of questions. It might be good for you to listen in on the call tomorrow. I think it will be in the 9:30 to 10AM range. Are you available?

Mary J. Miller
Assistant Secretary for Financial Markets
[redacted]

[redacted]

From: Zients, Jeffrey D. [redacted]
Sent: Wednesday, August 17, 2011 8:57 AM
T : Miller, Mary
Cc: Wolin, Neal
Subject: RE: Solyndra

Thanks Mary.
JZ

From: Mary.Miller@ [redacted]
Sent: Wednesday, August 17, 2011 8:24 AM
To: Zients, Jeffrey D.
Cc: Neal.Wolin@ [redacted]
Subject: Solyndra

Jeff – prior to our call today I wanted to clarify an important point. Since July of 2010 Treasury has asked DOE for briefings on Solyndra's financial condition and any restructuring of terms. The only information we have received about this has been through OMB, as DOE has not responded to any requests for information about Solyndra. Our legal counsel believes that the statute and the DOE regulations both require that the guaranteed loan should not be subordinate to any loan or other debt obligation. The DOE regulations also state that DOE shall consult with OMB and Treasury before any "deviation" is granted from the financial terms of the Loan Guarantee Agreement. In February we requested in writing that DOE seek the Department of Justice's approval of any proposed restructuring. To our knowledge that has never happened.

While I expect that DOE has a view about why loan subordination can occur without DOJ approval or Treasury consultation, I wanted to correct any impression that we have acquiesced in the steps to dat e. We are studying the materials for the call later today. Thanks for your assistance.

Mary J. Miller
Assistant Secretary for Financial Markets
[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, August 17, 2011 9:13 AM
To: Miller, Mary; Grippo, Gary; Burner, Gary; [redacted]
Subject: RE: Materials for tomorrow's 9:30 briefing

Here are my initial thoughts in case we don't get a chance to talk much before the call:

- I think we need some additional pieces of information to evaluate the proposed restructuring, including:

  - What do we think the liquidation value of Solyndra is right now, considering all tangible and intangible assets in which DOE has security?

  - What consideration was given to taking control of the company and selling to a strategic investor?

  - What are reasonable projections of the company's cash margins if one excludes consideration of sunk costs/existing debt (that is, the value if we were to sell the company--I found the historical financials somewhat confusing given the widening gap between operating margins and EBITDA over time, but I may be reading something wrong)?

  - We should also get clarity on the assumptions behind the revenue and cost projections with respect to assumed product pricing, sales volumes, and costs? We're in this place because they have historically been overly optimistic. Are they now sufficiently conservative?

  - We should also ask for a break-even analysis of the financial projections at which liquidating the company or selling to a strategic investor becomes more attractive than the proposed restructuring.

Finally, the proposed restructuring is clearly favorable to the other investors (DOE would presumably say this is necessary to entice new cash infusions). In short, the other investors go from having $610 million above their subordinated debt/equity to having $325 million above their equity with 60 cents on every dollar that goes to equity. Further, the additional money that they are proposing to put in the project would be riskless as long as they are confident that S's liquidation value would be at least $250 million.

From the USG's perspective, we would go from having $75 million above us to having $175 million above all but $75 million of our capital, and only 40 cent recovery on every dollar going to equity. This is why I think the above break-even analyses are critical.

[redacted]
Office of Environment and Energy
U.S. Department of the Treasury
Phone: [redacted]
Fax:
Email:

-----Original Message-----
From: Miller, Mary
Sent: Wednesday, August 17, 2011 8:02 AM

To: Grippo, Gary; Burner, Gary; [redacted]
Subject: FW: Materials for tomorrow's 9:30 briefing

A call was scheduled for 9:30 this morning, but now may be pushed back. I would like your quick analysis of the attached document. I realize this is short notice (and that Gary Grippo is traveling), but I want to have the best understanding of this that I can from any of you that can access and read this. I will let you know when the call is rescheduled. Please do not forward on this document. Thanks

-----Original Message-----
From: [redacted]
Sent: Tuesday, August 16, 2011 10:01 PM
To: 'Jeffrey_D._Zients[redacted]; 'Sally_C._Ericsson[redacted];
[redacted] Miller, Mary; [redacted]
Cc: [redacted] Silver, Jonathan; Poneman, Daniel; [redacted]
Subject: Materials for tomorrow's 9:30 briefing

All - per your request, attached please find Lazard/DOE's preparatory materials for the Solyndra discussion tomorrow morning, including historical financials, current status, a comparison of the original deal terms to the current restructured deal terms, projected financials, and a draft restructuring proposal.

An invitation with dial-in information will follow. If you have any questions, please don't hesitate to contact me at your convenience.

Best,

Morgan

[redacted]
Loan Programs Office
U.S. Department of Energy
[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, August 17, 2011 1:01 PM
To: [redacted]
Subject: authority to compromise claims owed to the government

Unless DOE has other authorities, compromises of claims require approval of the Department of Justice pursuant to 31 USC 3711 and 31 CFR Part 902. Unless other authorities exist, this statute rests with DOJ the authority to accept the compromise of a claim of the U.S. Government in those instances where the principal balance of a debt exceeds $100,000. Claim compromises include loan work-outs.

31 U.S.C. § 3711. Collection and compromise

(a) The head of an executive, judicial, or legislative agency--
(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;
(2) may compromise a claim of the Government of not more than $100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe that has not been referred to another executive or legislative agency for further collection action, except that only the Comptroller General may compromise a claim arising out of an exception the Comptroller General makes in the account of an accountable official; and
(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.
(b)(1) The head of an executive, judicial, or legislative agency may not act under subsection (a)(2) or (3) of this section on a claim that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws.
(2) The Secretary of Transportation may not compromise for less than $500 a penalty under section 21302 of title 49 for a violation of chapter 203, 205, or 207 of title 49 or a regulation or requirement prescribed or order issued under any of those chapters.
(c) A compromise under this section is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact. An accountable official is not liable for an amount paid or for the value of property lost or damaged if the amount or value is not recovered because of a compromise under this section.
(d) The head of an executive, judicial, or legislative agency acts under--
(1) regulations prescribed by the head of the agency; and
(2) standards that the Attorney General, the Secretary of the Treasury, may prescribe. [FN1]

31 C.F.R. § 902.1 Scope and application.

(a) The standards set forth in this part apply to the compromise of debts pursuant to 31 U.S.C. 3711. An agency may exercise such compromise authority for debts arising out of activities of, or referred or transferred for collection services to, that agency when the amount of the debt then due, exclusive of interest, penalties, and administrative costs, does not exceed $100,000 or any higher amount authorized by the Attorney General. Agency heads may designate officials within their respective agencies to exercise the authorities in this section.

(b) Unless otherwise provided by law, when the principal balance of a debt, exclusive of interest, penalties, and administrative costs, exceeds $100,000 or any higher amount authorized by the Attorney General, the authority to accept the compromise rests with the Department of Justice. The agency should evaluate the compromise offer, using the factors set forth in this part. If an offer to compromise any debt in excess of $100,000 is acceptable to the agency, the agency shall refer the debt to the Civil Division or other appropriate litigating division in the Department of Justice using a Claims Collection Litigation Report (CCLR). Agencies may obtain the CCLR from the Department of Justice's National Central Intake Facility. The referral shall include appropriate financial information and a recommendation for the acceptance of the compromise offer. Justice Department approval is not required if the agency rejects a compromise offer.

The office within the Justice Department that routinely handles compromises of claims, including "work-outs" of debts owed to the government, is The Commercial Litigation Branch in the Civil Division.

[redacted]
Deputy Assistant General Counsel
(Banking and Finance)
Department of the Treasury
Room 2020, Main Treasury Building
1500 Pennsylvania Avenue NW
Washington, DC 20220

Tel:
Fax:
Email: [redacted]

[redacted]

From: [redacted]
Sent: Wednesday, August 17, 2011 3:25 PM
To: 'Ziemb, Jeffrey D.'
Cc: [redacted]
Subject: Solyndra

Jeff,

Following this morning's call, we had a few thoughts that may help inform DOE and Lazard's review of Solyndra options. Since we imagine that OMB will have follow-up questions for DOE, we thought it would be best to share these thoughts with you, and you should feel free to incorporate them in anything you send to DOE. While this should not impede option evaluation, we should preface these thoughts by reiterating our current understanding that the authority to approve a potential restructuring resides with the Department of Justice.

- Goldman Sachs' presentation to, and analysis of, potential strategic buyers may offer a useful assessment of Solyndra's firm value, and the value of a strategic sale under a restructuring.
- It may be useful to see a table of potential USG and investor recoveries under a range of assumptions about pre- and post-restructuring firm value under BOTH current and proposed capital structures. DOE's deck focused only on USG recoveries under the proposed structure. This table would:
  - Allow evaluation of what must be assumed about current firm value and post-restructuring value accretion to conclude that the proposed restructuring is preferable to the existing structure.
  - Indicate alignment of USG and investor incentives for the proposed restructuring.
- Along these lines, quick back-of-the-envelope calculations suggest that:
  - Making $75 million of Tranche B USG debt pari passu with Tranche A is only valuable if firm value without restructuring is less than [redacted] Presumably this is unlikely if investors would consider investing more money in the firm.
  - If firm value today is between [redacted] the proposed restructuring would only increase the USG's recovery if it increases firm value by at least [redacted] relative to today's value [redacted] is the assumed amount of new Tranche C investor debt that would be senior to all but the Tranche B USG claim).
  - The higher the current firm value is above [redacted] the more the proposed restructuring must increase firm value in order to increase USG recovery relative to the current structure. This is because the USG would be trading [redacted].
- In evaluating the potential to attract a strategic buyer absent restructuring, it may be worthwhile better understanding the ability to attract buyers even after a temporary shutdown.
- It may be helpful to get more details on what must be assumed about future product pricing, sales volumes, costs, and earnings multiples to conclude that the restructuring will increase USG recovery.
- DOE's deck only provided an income statement/projection. Option evaluation could be improved if the company's balance sheet and cash flow statement/projections were available.
- It may be useful to clarify whether Tranche E creditors could still force the company into bankruptcy at any point under the proposed restructuring, as this would affect option evaluation.

Regards,
[redacted]

[redacted]
Office of Environment and Energy
U.S. Department of the Treasury
Phone:
Fax:
Email: [redacted]

[redacted]

From: Zients, Jeffrey D. [redacted]
Sent: Wednesday, August 17, 2011 5:52 PM
To: Miller, Mary; [redacted] Wolin, Neal; [redacted]
Subject: Fw: update on solyndra

From: [redacted]
To: [redacted]
Sent: Wed Aug 17 17:47:35 2011
Subject: update on solyndra

[redacted] called to let me know that in the initial conversations today with Solyndra's investors, they were not interested in the straw proposal. DOE will be trying to have an additional conversation tonight, but they're not expecting a different outcome, as DOE has learned that the company has begun shut down planning. It's unclear what that means in terms of how many people are involved at Solyndra, but we're now in a place where this could break at any time. DOE communications will be reaching out to WH comms shortly to coordinate.

[redacted]

From: [redacted]
Sent: Sunday, August 28, 2011 4:40 PM
To: Miller, Mary; Grippo, Gary
Subject: Re: Solyndra

Here are a few quick thoughts based on my read of the material:

- Why are the investors offering to put up another 10MM given the forecasted recovery levels and the USG's senior position?

- I think DOE should be thinking through whether the proposed deal is just giving the investors more time to extract more value from the firm before bankruptcy (and hence reduce USG collateral), in which case it's clearly in the investors' interest regardless of the firm's prospects.

- For example, is there discounting in the factoring of ARs such that investors are getting more than one dollar of ARs per dollar invested, in which case the USG loses more than 1 dollar in collateral for each dollar the investors put in.

- It would also be good to get clarity on whether we could still sell the company as a going concern (rather than be forced to liquidate assets) after a temporary shutdown (ie if no more funding were provided at this time). If so, even if a temporary shutdown would reduce the value to a strategic investor relative to if there were no shutdown, this makes the case for continued funding weaker.

- To date, DOE has been suggesting that a near-term shutdown takes selling the company (rather than the individual pieces of equipment) off the table. But it's not clear why.

----- Original Message -----
From: Miller, Mary
Sent: Sunday, August 28, 2011 03:27 PM
To: [redacted]
Subject: Fw: Solyndra

This is the 5pm call which I will join a few minutes late. It's intended to have Lazard update their numbers before the 5:30 call. I expect we will rehash this then.

----- Original Message -----
From: [redacted]
Sent: Saturday, August 27, 2011 02:19 PM
To: [redacted]@who.eop.gov>; Poneman, Daniel [redacted]@who.eop.gov' [redacted]@who.eop.gov>; 'Jeffrey_D._Zients@[redacted]; Miller, Mary; Silver, Jonathan [redacted]@omb.eop.gov' [redacted]
Cc: [redacted] Wolin, Neal; [redacted]
Subject: Re: Solyndra

All-

We are confirmed for a conference call with Lazard tomorrow at 5pm. We can use the following call-in number: [redacted]

[redacted]

----- Original Message -----
From: [redacted]
Sent: Saturday, August 27, 2011 01:02 PM
To: Poneman, Daniel; [redacted] Zients, Jeffrey D. [redacted] mary.miller; [redacted]
Silver, [redacted]
Cc: Levy, Jonathan; [redacted] 'neal.wolin@[redacted]
<neal.wolin@do.treas.gov>
Subject: Re: Solyndra

Great. Let us know when its set up and if you need a conference line.

----- Original Message -----
From: Poneman, Daniel [redacted]
To: [redacted]; Zients, Jeffrey D.; 'mary.miller[redacted] Silver, Jonathan [redacted]
Cc: [redacted] 'neal.wolin[redacted]
Sent: Sat Aug 27 11:53:07 2011
Subject: Re: Solyndra

If we have power, that works for me.

----- Original Message -----
From: [redacted]
Sent: Saturday, August 27, 2011 11:07 AM
To: Poneman, Daniel; [redacted] Zients, Jeffrey D. [redacted] 'mary.miller@[redacted]
Silver, Jonathan; [redacted]
Cc: [redacted] 'neal.wolin@[redacted]
Subject: Re: Solyndra

Our team was already planning a call sunday. Could we ask them to do briefing at 5pm on Sun? If weekend isn't an option, 8:30 Mon.

----- Original Message -----
From: Poneman, Daniel [redacted]
To: [redacted] Zients, Jeffrey D.; 'mary.miller[redacted] Silver, Jonathan [redacted]
Cc: [redacted] 'neal.wolin[redacted]
Sent: Sat Aug 27 10:12:47 2011
Subject: Solyndra

Per our telcon yesterday, I would like to ask LPO to organize a conf call at the earliest opportunity for lazard to brief the options they see for solyndra under current circumstances. Impending whether counsels for today. I am available any time after noon. If people would reply w availabilities, LPO will take it from there. Many thanks. DP

age 598

[redacted]

From: [redacted]
Sent: Wednesday, December 15, 2010 9:57 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Solyndra

There are some questions at the staff level about how DOE is going about the restructuring for Solyndra. At least one involves the legal question of what 1703(d) (3) means for their plan to make some of the debt "junior" to the new debt. (see below) I think they have stretched this definition beyond its limits.

(3) SUBORDINATION.—The obligation shall be subject to the condition that the obligation is not subordinate to other financing.

-----Original Message-----
From: [redacted]
Sent: Wednesday, December 15, 2010 8:17 AM
To: [redacted]
Subject: Fw: Solyndra

I agree with [redacted] thoughts here. Note she had the same question on pricing future deals as ~~we discussed yesterday~~.

CONFIDENTIAL

----- Original Message -----
From: [redacted]
To: [redacted]
Sent: Wed Dec 15 07:39:10 2010
Subject: Re: Solyndra

I agree with your questions, and wonder whether this workout is really giving more to the parent than recovering for doe. I think we need to see DOE's write up of the terms and analysis of what happens absent the change. I had a very hard time following the details over the phone.

DO NOT COPY

For a workout, we need to determine do we agree that 1) the project ~~truly is in imminent~~ default (sounds close here); and 2) the changes lead to the optimal recoveries from the Govt.

A workout sometimes will have different terms than the statute holds for the original loan but I think your questions would add color to #2 above. Is it really a better deal than nothing? If the answer is still yes, then we would need to price into future deals recovery rate that DOE will accept lower than optimal recoveries.

----- Original Message -----
From: [redacted]
To: [redacted]
Sent: Wed Dec 15 07:22:54 2010
Subject: Solyndra

On Solyndra, do you have thoughts on whether the proposed changes constitute a re-estimate vs a modification? Also, I am looking at whether the junior debt is consistent with the statute. More broadly, if the debt is discounted, I'm curious if that is consistent with a reasonable

prospect of repayment. If a modification (vs workout), this seems problematic to me. Do you have thoughts?

MEMORANDUM October 17, 2011

To: Honorable H. Morgan Griffith
Member, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations

From: Clinton T. Brass, Analyst in Government Organization and Management, 7-4536

Subject: **Post-Hearing Response to Question About Obama Administration Proposals to Change the Federal Budget Process**

This memorandum responds to one of your questions from an October 5, 2011, hearing that was held by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. The hearing was titled "Administration Efforts on Line-by-Line Budget Review." At the hearing, you requested that CRS get back to you with information about recommendations from the Barack Obama Administration to make the federal budget process more transparent for the public, or "smoother or easier," where you said that moving to a biennial budget would be an example of the latter kind of proposal.

In recent years, many presidential proposals to change the budget process have been included in the *Analytical Perspectives* volume of the President's annual budget proposal. This memorandum briefly identifies some of the Obama Administration's proposals that have been included in this annually submitted volume. Next, the memorandum discusses testimony from the Obama Administration about biennial budgeting. Finally, the memorandum describes some transparency-related provisions of the American Recovery and Reinvestment Act of 2009, which the Administration supported and may have helped to formulate. To place these topics and proposals in context, the memorandum begins by describing three major phases of the federal budget process.

Background

Changes to the federal budget process, including changes that may result in increased transparency, might occur in any of the process's major phases. Three phases may be highlighted, insofar as the budget process pertains to executive branch agencies. First, in the "executive branch budget formulation process," most agencies, the Office of Management and Budget (OMB), and the President work to formulate the President's budget proposals. By law, the President annually submits these proposals to Congress.[1] In the second phase, Congress may consider these proposals during action on appropriations or

[1] With enactment of the Budget and Accounting Act of 1921 (42 Stat. 20), now codified in part at 31 U.S.C. § 1105, Congress required the President to annually submit a consolidated budget proposal to Congress. OMB closely manages and monitors the budget formulation process on behalf of the President to, among other things, prevent so-called "pre-decisional" information from leaving the executive branch.

authorizing legislation, or may disregard the proposals.[2] Statutes and rules of the House of Representatives and Senate provide a framework for this "congressional budget process." In the third phase, "budget execution" occurs. During each federal fiscal year, agencies implement federal laws, obligating and expending funds along the way as directed by relevant statutes.

These three phases sometimes may overlap with one another. In addition, Congress may be involved in any of these three phases through lawmaking or oversight. For example, Congress may statutorily change the processes of budget formulation or budget execution for one or more agencies.

Budget Process Reform Proposals in *Analytical Perspectives* Volume of President's Budgets for FY2010, FY2011, and FY2012

In recent years, Presidents have included proposals for changes to the federal budget process in the *Analytical Perspectives* volume of the President's budget. As of the time of this writing, the Obama Administration has submitted annual budget proposals to Congress for FY2010, FY2011, and FY2012. Many of the Obama Administration's budget process proposals have focused on changing the congressional budget process or the President's role in the congressional budget process, as opposed to formulation of the President's budget. The following items provide an illustration of proposals and plans that were included in the FY2010, FY2011, and FY2012 *Analytical Perspectives* volumes.[3]

- Statutory Pay-As-You-Go (PAYGO): a statutory budget enforcement mechanism generally requiring that direct spending and revenue legislation enacted into law not increase the budget deficit.[4] A version of this sort of mechanism was enacted in 2010.[5]
- Expedited procedures for presidential rescission proposals: a statutory mechanism that attempts to generally require Congress to consider and vote on presidential proposals for rescissions.[6] These kinds of expedited procedures have not been enacted into law.[7]
- OMB controls on agency entitlement programs: a non-statutory mechanism requiring agencies to seek OMB approval before they take actions allowed by law that would result in mandatory spending higher than what OMB assumed in its most recent projection of spending.[8] These procedures have been implemented by OMB since 2005.[9]

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[2] For discussion, see CRS Report 98-721, *Introduction to the Federal Budget Process*, coordinated by Bill Heniff Jr.

[3] U.S. Executive Office of the President, Office of Management and Budget (hereafter OMB), *Budget of the U.S. Government, FY2010, Analytical Perspectives* (Washington: GPO, 2009) (hereafter *FY2010 Analytical Perspectives*); OMB, *Budget of the U.S. Government, FY2011, Analytical Perspectives* (Washington: GPO, 2010) (hereafter *FY2011 Analytical Perspectives*); and OMB, *Budget of the U.S. Government, FY2012, Analytical Perspectives* (Washington: GPO, 2011) (hereafter *FY2012 Analytical Perspectives*).

[4] *FY2010 Analytical Perspectives*, p. 215. See also *FY2011 Analytical Perspectives*, p. 143, and *FY2012 Analytical Perspectives*, p. 145.

[5] For additional discussion, see CRS Report R41157, *The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History*, by Bill Heniff Jr.

[6] *FY2010 Analytical Perspectives*, p. 215. See also *FY2011 Analytical Perspectives*, p. 150, and *FY2012 Analytical Perspectives*, p. 156.

[7] If enacted, a rescission constitutes the permanent cancellation of designated budget authority that was previously appropriated. For additional discussion, see CRS Report R41373, *Expedited Rescission Bills in the 111th and 112th Congresses: Comparisons and Issues*, by Virginia A. McMurtry.

[8] *FY2010 Analytical Perspectives*, p. 215. See also *FY2011 Analytical Perspectives*, p. 144, and *FY2012 Analytical Perspectives*, p. 149.

The first two items, above, do not address transparency in the budget formulation process, but might be viewed as providing additional salience to the budget deficit and presidential budget proposals, respectively. The third item has operated with little transparency to Congress and the public. With regard to the question of whether proposals and plans like these would result in the budget process working more smoothly or easily, that judgment may be in the eye of the beholder. As noted in the CRS reports that are included in the footnotes for these items, Members of Congress sometimes have differed on the advisability of the proposals and plans.

Biennial Budgeting Proposals

Biennial budgeting is a concept that may involve several variations, including two-year budget resolutions, two-year appropriations, as well as other changes in the timing of legislation related to revenue or spending.[10] As noted in another CRS report,[11] proponents of biennial budgeting have generally advanced three arguments—that a two-year budget cycle would (1) reduce congressional workload by eliminating the need for annual review of routine matters; (2) reserve the second session of each Congress for improved congressional oversight and program review; and (3) allow better long-term planning by the agencies that spend federal funds at the federal, state, or local level. Critics of biennial budgeting have countered by asserting that the projected benefits would prove to be illusory. Projecting revenues and expenditures for a two-year cycle requires forecasting as much as 30 months in advance, which might result in less accurate forecasts and could require Congress to choose between allowing the President greater latitude to make budgetary adjustments in the off-years, or engaging in mid-cycle corrections to a degree that might undercut workload reduction or intended improvements in planning. Opponents also have argued that less frequent review of appropriations may diminish congressional influence over agencies, and may correspondingly increase the President's influence.

The Obama Administration has not expressed a formal position on biennial budgeting. In September 2010, at a Senate confirmation hearing for OMB Director-designate Jacob J. "Jack" Lew, Mr. Lew was asked whether he thought biennial budgeting was a good idea. He answered that the "annual budget process gives us precious little time to focus on program implementation, both in the executive branch and in the legislative branch," but also that "there are many challenges to biennial budgeting."[12] In his oral testimony, he further elaborated on these issues.

American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) may provide an example of changes proposed by the Obama Administration for the budget execution process that resulted in greater transparency. In the wake of a rapidly deteriorating economic picture and year-long recession that the

(...continued)

[9] For additional discussion, see CRS Report R41375, *OMB Controls on Agency Mandatory Spending Programs: "Administrative PAYGO" and Related Issues for Congress*, by Clinton T. Brass and Jim Monke.

[10] This section draws on CRS Report R41764, *Biennial Budgeting: Options, Issues, and Previous Congressional Action*, by Jessica Tollestrup.

[11] Ibid.

[12] U.S. Congress, Senate Committee on the Budget, *Nomination of the Honorable Jacob J. Lew, of New York, to be Director of the Office of Management and Budget*, hearing and executive business meeting, 111th Cong., 2nd sess., September 16, 2010, S.Hrg. 111-737 (Washington: GPO, 2010), pp. 24-25.

Congressional Budget Office called the most severe since World War II,[13] Congress passed ARRA in early 2009. An early version of the legislation reportedly was drafted by then President-elect Barack Obama's transition team working with Members of the House Committee on Appropriations.[14] ARRA was enacted in two divisions. Division A, titled "Appropriations Provisions," included many discretionary appropriations provisions in 16 titles. Division A also included substantive legislative provisions in some titles. These included provisions to, among other things, create a variety of mechanisms and entities focused on oversight of ARRA funds (Title XV). For example, Title XV required recipients of funds to provide information to agencies for posting on a public website. In addition, the public website was required to include a plan from each federal agency receiving funds from Division A on how it would use the funds. A title containing general provisions for Division A also focused on oversight (Title XVI).

***

I trust that this memorandum is responsive to your request. Please feel free to contact me if you have questions or would like to discuss any of these topics further. In areas outside my subjects of expertise, I also would be happy to put CRS analysts or attorneys in touch with you or your office.

[13] U.S. Congressional Budget Office, *A Preliminary Analysis of the President's Budget and an Update of CBO's Budget and Economic Outlook*, March 2009, pp. 19, 33.

[14] For further discussion, see CRS Report R40572, *General Oversight Provisions in the American Recovery and Reinvestment Act of 2009 (ARRA): Requirements and Related Issues*, by Clinton T. Brass.

Urie, Matthew

From: Richardson, Susan
Sent: Wednesday, August 19, 2009 10:54 AM
To: 'Loren.Romano@do.treas.gov'
Cc: 'Joseph.Culbertson@do.treas.gov'
Subject: RE: OMB

Ok thnx

-----Original Message-----
From: Loren.Romano@do.treas.gov [mailto:Loren.Romano@do.treas.gov]
Sent: Wednesday, August 19, 2009 10:44 AM
To: Richardson, Susan
Cc: Joseph.Culbertson@do.treas.gov
Subject: RE: OMB

Susan:
Re: deviation ... Given Pete's limited availability, would it be possible for Roger to draft a couple paragraphs requesting the deviation, outlining the "special circumstances" and reasons why the deviation is necessary ... and then we can ask Pete to OK the language ....
I think this is the fastest way to tee this up ...

Thanks,
Loren

-----Original Message-----
From: Richardson, Susan [mailto:Susan.Richardson@hq.doe.gov]
Sent: Wednesday, August 19, 2009 9:33 AM
To: Romano, Loren
Subject: RE: OMB

I do indeed. One of them is getting Solyndra closed. I left a vmx for Gary asking that he be sure the Pete Beiger is focused, as we need his sign off on docs, and our outside counsel will need to discuss opinions w/ him. Also, we need request from Treasury for "Deviation" under rule to permit pmnts on guaranty before 60 days. (609.15(f); 609.18). Maybe you could help Gary get that out? It can be simple, but we need something. Thanks!

Urie, Matthew

From: Richardson, Susan
Sent: Wednesday, September 02, 2009 5:12 PM
To: 'Gary.Burner@do.treas.gov'
Subject: RE: Solyndra/ FFB Docs

Thanks for all of your help Gary

-----Original Message-----
From: Gary.Burner@do.treas.gov [mailto:Gary.Burner@do.treas.gov]
Sent: Wednesday, September 02, 2009 5:03 PM
To: Brad.Lerner@do.treas.gov; rstark@curtis.com
Cc: Richardson, Susan; FJenney@mofo.com; davram@curtis.com; dlenihan@curtis.com; Peter.Bieger@do.treas.gov
Subject: RE: Solyndra/ FFB Docs

Attached is a pdf. We will deliver the original when you are ready.

-----Original Message-----
From: Lerner, Brad
Sent: Wednesday, September 02, 2009 4:08 PM
To: 'Stark, Roger D.'
Cc: Susan Richardson (E-mail); FJenney@mofo.com; Avram, Dario D.; Lenihan, Daniel R.; Bieger, Peter; Burner, Gary
Subject: RE: Solyndra/ FFB Docs

Item #1 below is already taken care of per Gary's e-mail and he has already executed item #2 below and will send to you. Thanks.

-----Original Message-----
From: Stark, Roger D. [mailto:rstark@curtis.com]
Sent: Wednesday, September 02, 2009 2:32 PM
To: Lerner, Brad
Cc: Susan Richardson (E-mail); FJenney@mofo.com; Avram, Dario D.; Lenihan, Daniel R.
Subject: FW: Solyndra/ FFB Docs

Brad:

Just a brief note to call your attention to two additional, and I believe uncontroversial, issues related to the one we discussed earlier today:

1. As reflected in the email below, there is a "clean up" edit pending on the Program Financing Agreement that Peter agreed to before his departure (scroll down to Pete's email below)--I will send you a mark-up of the relevant line of the document shortly; and

2. We are awaiting an executed version of the FFB Deviation Request Memorandum in the form Pete agreed to earlier today (I will send you a copy of that email string under separate cover).

Thanks again for your assistance,

Roger

-----Original Message-----
From: Stark, Roger D.

Sent: Wednesday, September 02, 2009 12:22 PM
To: 'Peter.Bieger@do.treas.gov'; Susan.Richardson@hq.doe.gov; FJenney@mofo.com
Cc: Bill.Miller@hq.doe.gov; Avram, Dario D.; Lenihan, Daniel R.; Wade.Boswell@hq.doe.gov; MPaist@mofo.com; TEldert@mofo.com; MVelamoor@mofo.com; MRyan@mofo.com; 'Brad.Lerner@do.treas.gov'
Subject: RE: Solyndra/ FFB Docs

The execution version of the Program Financing Agreement does not reflect the change agreed to in the email below (i.e. section 4.3 still contains the "additional language"). Please make the agreed correction.

Thanks,
Roger

-----Original Message-----
From: Peter.Bieger@do.treas.gov [mailto:Peter.Bieger@do.treas.gov]
Sent: Tuesday, September 01, 2009 9:48 AM
To: Susan.Richardson@hq.doe.gov; Stark, Roger D.; FJenney@mofo.com
Cc: Bill.Miller@hq.doe.gov; Avram, Dario D.; Lowin, Benjamin; Lenihan, Daniel R.; Wade.Boswell@hq.doe.gov; MPaist@mofo.com; TEldert@mofo.com; MVelamoor@mofo.com; MRyan@mofo.com
Subject: RE: Solyndra/ FFB Docs

Agreed. We could correct the reference to the obligations under Note Purchase Agreement terminating under those circumstances, but we've already covered that in the NPA. So, I agree -- no additional language in sec 4.3 of the PFA.

-----Original Message-----
From: Richardson, Susan [mailto:Susan.Richardson@hq.doe.gov]
Sent: Tuesday, September 01, 2009 9:13 AM
To: Stark, Roger D.; Bieger, Peter; FJenney@mofo.com
Cc: Miller, Bill; Avram, Dario D.; Lowin, Benjamin; Lenihan, Daniel R.; Boswell, Wade; MPaist@mofo.com; TEldert@mofo.com; MVelamoor@mofo.com; MRyan@mofo.com
Subject: RE: Solyndra/ FFB Docs

Absolutely right - was not thinking clearly PFA needs to survive for future deals.

-----Original Message-----
From: Stark, Roger D. [mailto:rstark@curtis.com]
Sent: Tuesday, September 01, 2009 8:58 AM
To: Richardson, Susan; Peter.Bieger@do.treas.gov; FJenney@mofo.com
Cc: Miller, Bill; Avram, Dario D.; Lowin, Benjamin; Lenihan, Daniel R.; Boswell, Wade; MPaist@mofo.com; TEldert@mofo.com; MVelamoor@mofo.com; MRyan@mofo.com
Subject: Re: Solyndra/ FFB Docs

Pete:
Sorry, I think I misread your email first time around. I don't think we want the PFA to terminate if Solyndra fails to timely commence construction. Roger

---

From: Richardson, Susan
To: Peter.Bieger@do.treas.gov ; FJenney@mofo.com

Cc: Miller, Bill ; Stark, Roger D.; Avram, Dario D.; Lowin, Benjamin; Lenihan, Daniel R.; Boswell, Wade ; MPaist@mofo.com ; TEldert@mofo.com ; MVelamoor@mofo.com ; MRyan@mofo.com
Sent: Mon Aug 31 22:26:55 2009
Subject: Re: Solyndra/ FFB Docs

Sounds right to me

----- Original Message -----
From: Peter.Bieger@do.treas.gov <Peter.Bieger@do.treas.gov>
To: FJenney@mofo.com <FJenney@mofo.com>
Cc: Richardson, Susan; Miller, Bill; rstark@curtis.com <rstark@curtis.com>; davram@curtis.com <davram@curtis.com>; blowin@curtis.com <blowin@curtis.com>; dlenihan@curtis.com <dlenihan@curtis.com>; Boswell, Wade; MPaist@mofo.com <MPaist@mofo.com>; TEldert@mofo.com <TEldert@mofo.com>; MVelamoor@mofo.com <MVelamoor@mofo.com>; MRyan@mofo.com <MRyan@mofo.com>
Sent: Mon Aug 31 22:08:43 2009
Subject: RE: Solyndra/ FFB Docs

May I put the following language at the end of sec 4.3 of the PFA like we have added it to the end of section 5.3 of the NPA?

"and FFB's obligations and commitments under this Agreement will terminate."

-----Original Message-----
From: Jenney, Frederick E. [mailto:FJenney@mofo.com]
Sent: Monday, August 31, 2009 2:26 PM
To: Bieger, Peter
Cc: Susan.Richardson@hq.doe.gov; bill.miller@hq.doe.gov; rstark@curtis.com; davram@curtis.com; blowin@curtis.com; dlenihan@curtis.com; wade.boswell@hq.doe.gov; Paist, Mark C.; Eldert, Thomas L.; Sanchez Velamoor, Marysol; Ryan, Molly C.
Subject: FW: Solyndra/ FFB Docs

Greetings Pete --
Here are our comments on the FFB documents.
Let us know if you have any questions -- I think we're ready for execution counterparts at this point.
Regards,
-- Rick
Frederick E. Jenney
Morrison & Foerster LLP
2000 Pennsylvania Ave., N.W., Suite 5500 Washington, D.C. 20006 Direct Telephone: 202-887-1522 General Telephone: 202-887-1500 Fax Number: 202-887-0763 Fax Confirmation: 202-887-8747 mailto:fjenney@mofo.com

> _____
> From: Sanchez Velamoor, Marysol
> Sent: Monday, August 31, 2009 2:24 PM
> To: Jenney, Frederick E.
> Subject: Solyndra/ FFB Docs
>
> <<Blackline - Advance Request - 1.DOC>> <<Blackline - DOE Guarantee
> - 1.DOC>> <<Blackline - Secretarys Certificate - 1.DOC>> <<Blackline
> - Promissory Note FFB - 1.DOC>> <<Blackline - Note Purchase Agreement

> FFB - 1.DOC>> <<Note Purchase AgmtFFB08-30-09 - 3.DOC>> <<Advance

> RequestFFB08-30-09 - 3.DOC>> <<DOE Guarantee08-30-09 - 3.DOC>>
> <<Promissory NoteFFB08-30-09 - 3.DOC>> <<Secretary
> CertificateDOE08-30-09 - 3.DOC>>
>
> Rick:
>
> Attached please find the following FFB Documents along with redlines
> against their prior versions:
>
> 1. Advance Request
> 2. DOE Guarantee
> 3. Secretary's Certificate
> 4. FFB Promissory Note
> 5. FFB Note Purchase Agreement
>
> Thanks,
>
> Marysol

Stone, Carla

From: Carroll, J. Kevin
Sent: Tuesday, January 11, 2011 4:44 PM
To: Lyberg, Sarah A.; Colyar, Kelly T.; Saad, Fouad P.; Stein, Nora; Mertens, Richard A.
Subject: RE: Solyndra

And that Congress had no intent to govern the program with the statute.

-----Original Message-----
From: Lyberg, Sarah A.
Sent: Tuesday, January 11, 2011 4:25 PM
To: Colyar, Kelly T.; Carroll, J. Kevin; Saad, Fouad P.; Stein, Nora; Mertens, Richard A.
Subject: RE: Solyndra

I think that's right.

Question: How do you all feel about DOE's argument that just because subordination is prohibited in the original loan doesn't mean DOE can't do it later, even if it costs money? It seems that basically DOE could modify to allow subordination on any loan, at any time, for any reason, if one were to push this to the extreme.

-----Original Message-----
From: Colyar, Kelly T.
Sent: Tuesday, January 11, 2011 3:55 PM
To: Lyberg, Sarah A.; Carroll, J. Kevin; Saad, Fouad P.; Stein, Nora; Mertens, Richard A.
Subject: RE: Solyndra

I think there are a couple of points here:

1. Had 'the company' filed for bankruptcy, it would have been the parent company. DOE's loan is with the project company and as such would be bankruptcy remote. DOE could have taken action under the technical default provisions to avoid a bankruptcy and therefore, DOE's debt would not have been subjected to subordination to new debt at the parent level.
2. The statute and regulations require DOE to consult with DOJ in a payment default. If there was threat of bankruptcy, it might be worth asking DOE if they have consulted with the AG.

-----Original Message-----
From: Richardson, William
Sent: Tuesday, January 11, 2011 3:39 PM
To: Colyar, Kelly T.; Aitken, Steven D.; Lyberg, Sarah A.; Carroll, J. Kevin; Mas, Alex; Ericsson, Sally C.; Saad, Fouad P.; Stein, Nora; Mertens, Richard A.; DeGolia, Alexander H.
Subject: RE: Solyndra

I spoke today to Susan Richardson and Ken Cestari about the legal basis for a refinancing that includes subordination. They provided the following analysis, which I asked them and they have agreed to provide to us in writing, in the form of a preliminary draft of part of the presentation they plan to provide to the Secretary and OMB. They will also be reaching out to Kelly to provide a revised version of their expected values analysis that addresses the questions she has outlined. I'll circulate a meeting request for sometime tomorrow so we can discuss next steps.

DOE's theory is similar to what we expected, except that it does not (as we had thought) rely on a specific determination that this is a workout scenario under A-11 and FCRA. Based on the present tense language and structure of the provision, they read the no subordination language as applying only at the time DOE makes the original guarantee, and not as a restriction on refinancing down the road that DOE believes is necessary to serve the government's interests. They argue that the provision is set forth in a section relating to the creation of the loan documents, and not in a later section regarding defaults that they believe to govern financial distress down the road. This argument is supported somewhat by a 2009 revision of their regulations in other respects, in which they indicate that the later section relates to the post-closing default scenario while this provision deals with "threshold" requirements at the loan stage. I believe their bottom line position to be that Congress did not clearly and expressly deprive the Secretary of the ability of a guarantor to address financial distress down the road by adopting commercially reasonable methods to protect the interests of the United States in the event of default (a purpose they point out is set forth in the default section). As a demonstration that this is a well recognized situation for agreeing to subordination in order to attract new money, they noted that had the company filed for bankruptcy as it was about to, the bankruptcy laws would have provided for new financing to be entitled to a senior position. (I have asked them for some information on the legislative history of the predecessor provision to this statute, but we don't expect it will shed any more light on the question.)

They agree that we need to understand the answers to Kelly's questions in order to ensure that their analysis is reasonable and their folks will be reaching out to her.

Questions for the Record for the Hearing Entitled:
"Continuing Developments Regarding the Solyndra Loan Guarantee"

Question for Deputy Assistant Secretary Gary Grippo from Representative Burgess

1. **Will the Department confirm that it will supply the Inspector General report on this matter to the Committee when the report is completed?**

The Department of the Treasury ("Treasury") supports transparency and openness, and we appreciate the important oversight role of the House Energy and Commerce Subcommittee on Oversight and Investigations ("Committee") and the Office of the Inspector General for the Department of the Treasury ("OIG"). Treasury is cooperating fully with the OIG's ongoing review of Treasury's role in the Department of Energy's loan guarantee program and, in particular, the loan guarantee provided to Solyndra. Given the independent role of inspectors general, Treasury typically defers to OIG regarding the disclosure of its reports to Congress and the public. Of course, we would not object to any such disclosure, and we expect that OIG would be happy to provide the Committee with any report on this matter.

Questions for Deputy Assistant Secretary Gary Grippo from Representative Sullivan

1. **Mr. Grippo, in your review of the Solyndra deal at conditional commitment, is Treasury making a decision about the creditworthiness of Solyndra or about its technology?**

The Department of the Treasury ("Treasury") is involved in the Department of Energy ("DOE") Loan Guarantee Program in two very distinct ways: as a lender and as a consultant.

As a lender, in accordance with long-standing Federal credit policy, the Federal Financing Bank ("FFB") – an independent government corporation created by Congress in the Federal Financing Bank Act of 1973 – makes loans to private sector borrowers in cases where a federal agency, such as DOE, provides a 100% guarantee of all principal and interest on the loan. As a consultant, Treasury reviews and consults on the terms and conditions that DOE proposes for its loan guarantees. Treasury's consultative review occurs prior to DOE's issuance of a conditional commitment to the borrower.

Prior to engaging Treasury on a specific transaction, we understand that DOE receives and reviews applications, carries out due diligence, conducts a credit analysis and review of a project's creditworthiness, and negotiates an initial term sheet. Given DOE's expertise in energy technology and energy markets, Treasury's consultation does not focus on DOE's assessment of a project's creditworthiness or technology. Rather, Treasury's consultative input focuses on Treasury's area of expertise – providing independent insight and input that may help DOE further align the terms and conditions of a guarantee with the broad objectives of Federal credit policies, which are common to all Federal credit programs and are reflected in OMB Circular A-129: "Policies for Federal Credit Programs and Non-Tax Receivables."

a. If Treasury is looking at the company's creditworthiness, what was Treasury's assessment of the Solyndra financial model?

We understand that, prior to engaging Treasury, DOE analyzed Solyndra's creditworthiness and technology, and conducted due diligence in several other areas. Treasury's consultation on DOE's loan guarantee to Solyndra did not focus on the company's creditworthiness.

b. We have seen emails from DOE staff, expressing concern about the liquidity of the project and stating that, under the financial model, the company would be out of cash by September 2011. What did Treasury conclude about the project's liquidity?

We understand that, prior to engaging Treasury, DOE analyzed Solyndra's creditworthiness, including its liquidity, and conducted due diligence in several other areas. Treasury's consultation on DOE's loan guarantee to Solyndra did not focus on the company's creditworthiness, and as such Treasury did not offer any conclusions as to the project's liquidity.

c. Liquidity was a serious problem for Solyndra going forward, correct? Do you believe DOE took adequate steps to address that issue?

Although Treasury sought to remain apprised of DOE's monitoring of the Solyndra project after DOE issued the loan guarantee in September 2009, and to offer consultative input where possible, Treasury generally was not involved in the regular management of the loan guarantee. As such, Treasury is not in a position to render an opinion about the steps DOE took in monitoring the project and addressing any issues that may have arisen.

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