

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 22, 2011

To: Democratic Members of the Subcommittee on Oversight and Investigations

Fr: Subcommittee on Oversight and Investigations Democratic Staff

Re: Hearing Titled “From DOE Loan Guarantee to Bankruptcy to FBI Raid: What Solyndra's Executives Knew”

On Friday, September 23, 2011, at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing titled “From DOE Loan Guarantee to Bankruptcy to FBI Raid: What Solyndra's Executives Knew.” Solyndra LLC is a solar photovoltaic systems manufacturer based in Fremont, California, which received a loan guarantee for \$535 million under a Department of Energy program initiated under the Energy Policy Act of 2005. The Subcommittee has invited as hearing witnesses Solyndra executives Brian Harrison, President and CEO, and W.G. Stover, CFO. Mr. Harrison and Mr. Stover indicated to the Subcommittee in a letter from their attorneys on September 20, 2011, that while they were willing to appear before the Subcommittee, they planned to invoke their constitutional rights under the Fifth Amendment and will not provide testimony.

On September 6, 2011, Solyndra filed for Chapter 11 bankruptcy protection. On September 8, 2011, FBI agents working in conjunction with the DOE Inspector General raided Solyndra’s corporate headquarters and the home of Mr. Harrison.¹ On September 14, 2011, the Subcommittee held a hearing to obtain testimony from DOE and Office of Management and Budget officials concerning Administration actions on the Solyndra loan guarantee. The attached memo for that hearing provided background on the DOE loan program, the loan guarantee for Solyndra, and the Committee’s investigation.

At the September 14 hearing, a number of assertions were made that appear incorrect or overstated based on the evidence the Committee has received to date, or that raised issues on

¹ Associated Press, *FBI Questions Executives of Bankrupt Solar Company* (Sept. 10, 2011).

which hearing testimony provided additional context. This memo discusses some of these issues.

I. ISSUES RAISED AT SEPTEMBER 14, 2011, HEARING

A. January 2009 Administration Actions on the Solyndra Loan Guarantee Application

One claim several members made at the September 14 hearing was that the Bush Administration had rejected the Solyndra loan guarantee application only to have the Obama Administration switch course and rapidly advance the application. For example, Rep. Sullivan stated, “On January 9, 2009 the credit committee during the Bush administration found the Solyndra deal to be premature and reprimanded – and stopped all further work. . . . And yet on January 26, 2009, after the Obama administration came in, a DOE staffer notes in an email that, ‘DOE has decided to restart the approval process for Solyndra.’”² Rep. Burgess stated, “the stimulus was about shovel-ready projects. It appeared that the shovel that this project was ready for was to bury it somewhere. And yet it was resurrected.”³

Documents and testimony obtained by the Committee provide information relevant to this claim. On January 9, 2009, the Department of Energy Credit Committee issued a recommendation regarding the Solyndra loan. This document does not contain an order to stop “all further work” on the project. Rather, the Committee wrote, “the number of issues unresolved makes a recommendation for approval premature at this time. Therefore, the committee, without prejudice, remands the project to the LGPO [Loan Guarantee Program Office] for further development of information.”⁴ The Committee raised some concerns, including the need for an independent market study, the need to access Solyndra’s existing sales agreement, questions about the “nature and strength of the parent [company] guarantee for the completion of the project,” and the “scale-up of production” at the facility. However, its remand of the application was “without prejudice” and it noted that the project “appears to have merit” and that it was “encouraging to see the apparent progress” in Solyndra’s product development.⁵

The January 26, 2009, document that some members suggested “resurrected” the Solyndra application states: “[a]s we are approaching the beginning of the approval process for Solyndra again, I wanted to highlight the questions below that remain outstanding . . . I want to ensure that the specific concerns Credit Policy and Credit Committee have indicated are reflected in the negotiated terms.”⁶ This e-mail was between the same career DOE officials who had

² House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

³ *Id.*

⁴ Department of Energy, *Solyndra Fab 2, LLC Credit Committee Recommendation* (regarding Jan. 9, 2009 Credit Committee meeting).

⁵ *Id.*

⁶ E-mail from [redacted] to [redacted] (Jan. 26, 2009).

worked on the Solyndra application during the Bush Administration and appears to be a response to the Credit Committee's January 9 recommendations.

At the September 14 hearing, Jonathan Silver, the Executive Director of the Loans Programs Office at Department of Energy, testified: “[B]y the time the Obama Administration took office, the career staff had already established a timeline for issuing the company a conditional loan commitment in March 2009.”⁷ Numerous documents produced to the Committee confirm the accuracy of his testimony. For example, a DOE document from 2008 titled “Solyndra Solicitation Management Plan” lays out a timetable for the Solyndra loan guarantee application predicting a conditional commitment in January 2009 and final closing on the loan guarantee in March 2009.⁸ Additionally, in a December 15, 2008, presentation to the DOE Credit Review Board, Bush Administration DOE officials listed Solyndra as the first of the “three highest priorities through January 15, 2008 [sic].”⁹

With respect to the January 9, 2009, Credit Committee recommendation to remand the Solyndra project to the Loan Guarantee Program Office without prejudice for supplementation, Mr. Silver testified this action “would be typical of a credit committee in both the public and private sector” when supplementary data were necessary.¹⁰ Mr. Silver further testified that additional analysis was conducted and Solyndra's application was approved in March 2009. Mr. Silver testified that the Credit Committee referred to in the e-mails and documents consisted of career professionals.¹¹ The Obama Administration did not formally close the loan until September 3, 2009, more than seven months after the January 26, 2009, e-mail.

B. Political Favoritism

Some members on the Committee have alleged that Solyndra may have been awarded the loan guarantee due to political favoritism, citing the fact that George Kaiser was a major fundraiser for President Obama in 2008.¹² One of the primary private investors in Solyndra was

⁷ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

⁸ Department of Energy, *Solyndra Solicitation Management Plan* (Nov. 21, 2008).

⁹ E-mail (Dec. 15, 2008).

¹⁰ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

¹¹ *Id.*

¹² See, e.g., *White House-Backed Solar Energy Company Collapses*, ABC News (Aug. 31, 2011) (quoting Chairman Cliff Stearns); Letter from Chairman Fred Upton and Chairman Cliff Stearns, to Kathryn Ruemmler, Counsel, The White House (Sept. 1, 2011).

Argonaut, a private equity firm that makes investments from mutually exclusive funding streams, either the George Kaiser Family Foundation or George Kaiser individually.¹³

At the hearing, Mr. Silver testified that he and his staff had not met nor spoken to Mr. Kaiser. Mr. Silver and Jeffrey Zients, the Deputy Director for Management and Chief Performance Officer at the Office of Management and Budget, testified that they did not instruct anyone to award the loan guarantee to Solyndra or restructure the loan because of donations from Mr. Kaiser to President Obama. Mr. Silver and Mr. Zients also testified that no one in the Obama Administration had instructed their staffs to grant or restructure the loan guarantee due to Mr. Kaiser's fundraising efforts. The two witnesses further testified that decisions relating to Solyndra were made on the merits and there was no political favoritism shown.¹⁴

To date, the Committee has received no documents indicating political favoritism played a role in the decisions involving the loan guarantee for Solyndra.

C. Whether the Loan Guarantee Approval Process Was Rushed

On September 4, 2009, Department of Energy Secretary Chu appeared in person at Solyndra and Vice President Biden appeared via video to announce the loan guarantee approval. Several members suggested that documents obtained by the Committee showed OMB officials felt pressured to evaluate the credit subsidy cost in advance of the event. Chairman Stearns characterized these documents as follows: "What the documents also show, is that the rush to push out stimulus dollars may have impacted the depth and quality of DOE and OMB's review."¹⁵

OMB reviews the credit subsidy scores for proposed loan guarantee projects. Regarding this process, Mr. Zients stated: "Scheduling requests had no impact whatsoever on the credit subsidy score that was given to this project."¹⁶ Mr. Zients continued: "In preparation for this hearing, I talked to the OMB career staff, and no one hesitated in my discussions with them as to whether they were comfortable with the final determination of the credit subsidy score for this project. And as I said, the credit subsidy score was increased, i.e., made more conservative as a result of the OMB analysis and DOE agreed with that."¹⁷ He also underscored that in regards to

¹³ Briefing from trustee of George Kaiser Family Foundation to House Committee on Energy and Commerce Majority and Minority Staff (Sept. 15, 2011).

¹⁴ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver and Jeffrey Zients, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

¹⁵ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

¹⁶ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jeffrey Zients, *Hearing on Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (Sept. 14, 2011).

¹⁷ *Id.*

the e-mails concerning the scheduling logistics for the Vice President, OMB officials were, at that time, only assigning the correct credit subsidy amount, not determining whether or not the loan guarantee to Solyndra should be awarded.¹⁸

Mr. Zients was asked to comment on agency e-mails including one dated August 27, 2009, in which an OMB official wrote, “As long as we make it crystal clear to DOE that this was only in the interest of time and that there was no precedent set, then I'm OK with it. But we also need to make sure they don't jam us on later deals so there isn't time to negotiate those too.”¹⁹ Mr. Zients explained that “OMB's role at that point is to make sure that the credit subsidy score is correct from a budgeting cost perspective. It is not about the -- the loan overall at that stage. It's about the credit subsidy score. And my understanding, having talked to staff in preparation for this hearing, is that staff was very comfortable and had no hesitation as to its final determination of the credit subsidy score, which as I mentioned earlier, the credit subsidy score has actually increased as a result of OMB's analysis and DOE concurred with that.”²⁰

D. E-mail Reflecting DOE Official's Projections on Solyndra Cash Balances

At the hearing, members questioned the witnesses on an e-mail sent between Department of Energy officials on August 20, 2009. In the e-mail, a DOE employee writes: “The issue of Working Capital remains unresolved. . . . [T]he issue is cash balances, not cost. [Redacted] seems to agree that the model runs out of cash in Sept. 2011 even in the base case without any stress. This is a liquidity issue.”²¹ Mr. Silver testified that this analysis reflected one of several modeling scenarios. He stated that a scenario showing a lack of working capital “would not be surprising in a modeling scenario. That is in fact what you use modeling to do, to identify where there are holes in the project.”²²

Additional communications produced by the Department of Energy show internal dissent over the conclusion drawn by the analyst in the e-mail cited by members. In an e-mail responding to the August 20, 2009, e-mail, one career agency official who served in the Bush Administration responded: “I think that you have overlooked the major factor in the response regarding the model artifact that might point to a potential liquidity issue in September 2011. That is, for this period of time the Project has not yet reached Project Completion, as defined in the agreements.”²³ This e-mail further stated: “After investing over \$1 billion in cash equity at

¹⁸ *Id.*

¹⁹ E-mail from [redacted] to [redacted] (Aug. 27, 2009).

²⁰ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jeffrey Zients, *Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (2011).

²¹ E-mail from [redacted] to [redacted] (Aug. 20, 2009).

²² House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver, *Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (2011).

²³ E-mail (Aug. 20, 2009).

the parent and project levels, the equity investors will simply not permit any potential projected short term liquidity shortfall to prevent reaching Project Completion.”²⁴ The e-mail further noted, “there are essentially no working capital requirements at the project level.”²⁵

E. Restructuring of the Solyndra Loan

At the hearing, some members raised concerns that in restructuring the loan agreement with Solyndra in 2011, DOE decided to subordinate the interest of the government with respect to new funds raised by private investors. Rep. Scalise asked, “[W]ho made the decision to put the taxpayers in the back of the line and subordinate, in violation of federal law?”²⁶ Rep. Stearns asked, “Why did DOE and OMB allow the government to be subordinated to the private investors in an apparent violation of the law?”²⁷

Solyndra secured an additional \$75 million from private investors as part of the loan restructuring. At the hearing, Mr. Silver testified that it was “typical” for new investments to have priority in the case of liquidation. He said the decision to subordinate was reviewed by loan guarantee counsel, Department of Energy counsel, and by OMB counsel and they agreed that there was legitimate legal basis to subordinate the government’s interest in Solyndra and the U.S. had the senior secured position. He continued: “[H]ere – and typically in the private sector, and in loans in other federal agencies, the prime trumps other subordinated capital all the way through. In the transaction we structured, we actually were able to ensure that it was only in the event of liquidation that that would be a senior position.”²⁸

II. WITNESSES

The following witnesses have been invited to testify:

- **W.G. Stover, Jr.**
Chief Financial Officer and Senior Vice President, Solyndra, LLC
- **Brian Harrison**
Chief Executive Officer and President, Solyndra. LLC

²⁴ *Id.*

²⁵ *Id.*

²⁶ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (2011).

²⁷ *Id.*

²⁸ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Jonathan Silver, *Solyndra and the DOE Loan Guarantee Program*, 112th Cong. (2011).