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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

MEMORANDUM
November 16, 2011

To: Democratic Members of the Subcommittee on Oversight and Investigations
Fr: Subcommittee on Oversight and Investigations Democratic Staff
Re: Hearing Titled "The Solyndra Failure: Views from DOE Secretary Chu"

On November 17, 2011, at 9:00 a.m., the Subcommittee on Oversight and Investigations will hold a hearing titled "The Solyndra Failure: Views from DOE Secretary Chu." The majority memorandum provided background on issues discussed in recent document productions and Committee staff interviews. This memorandum provides additional background for the hearing.

On Thursday, November 10, the Department of Energy produced an additional 105,000 pages of documents to the Committee, and on Friday, November 11, the White House produced documents responsive to subpoena issued by the Committee on November 3. In total, the Administration has produced over 186,000 pages of documents. In addition, Argonaut Ventures I, the firm that made the investments in Solyndra for the George Kaiser Family Foundation, produced 57,000 pages of documents to the Committee on September 30 and November 4; and Madrone Capital Partners, a firm associated with the family of Rob Walton that made investments in Solyndra, has produced 15,000 pages of documents to the Committee to date.

In addition to receiving and reviewing these documents, the Committee has conducted staff interviews of the following individuals: George Kaiser, whose family foundation invested in Solyndra and who was a fundraiser for the 2008 Obama presidential campaign; Steve Isakowitz, a former Chief Financial Officer of DOE; Susan Richardson, Chief Counsel of the DOE Loan Programs Office; Dave Frantz, Director of the DOE Loan Programs Office; Matt Rogers, former Senior Advisor to Secretary Chu for Recovery Act Implementation; Sally Ericsson, Program Associate Director, Natural Resources Division, Office of Management and Budget; and Courtney Timberlake, Assistant Director for Budget, Office of Management and Budget.

New information from the document productions and staff interviews on several important issues is summarized below.

I. VIEWS OF FORMER DOE CHIEF FINANCIAL OFFICER STEVE ISAKOWITZ

On October 31, 2011, Committee staff interviewed Steve Isakowitz, the former Chief Financial Officer at the Department of Energy, for over five hours.[1] President Bush appointed Mr. Isakowitz and he was confirmed by the Senate in July 2007, and he stayed in the position through July 2011. During the conditional commitment and approval of the Solyndra loan guarantee, the CFO's office had administrative responsibility for the loan guarantee program. The director of the loan program reported to Mr. Isakowitz during this period. After Jonathan Silver became executive director of the Loan Programs Office (LPO) in November 2009, the LPO was no longer housed in the office of the CFO and the director of the LPO reported instead to Mr. Silver.

Mr. Isakowitz's statements during the interview are particularly significant because he is a Bush appointee, he is no longer at DOE, and he was personally involved in the Solyndra loan guarantee. His statements cannot be discounted because he was appointed by President Obama or because he is currently employed at DOE.

According to Mr. Isakowitz, Secretary Chu had a meeting right after his appointment to discuss the loan program. In this initial meeting on the loan program, Secretary Chu was critical of the delays at the Department of Energy in reviewing loan applications. He asked Mr. Isakowitz if there was anything he could do or sign to remove any impediments to quick loan considerations. Mr. Isakowitz recommended several changes, including hiring more staff and appointing a chief counsel for the loan program. According to Mr. Isakowitz, Secretary Chu accepted most of his recommendations.

Mr. Isakowitz stated that Secretary Chu did not want the Department to cut corners in processing loan guarantees. He said while Secretary Chu wanted the applications processed expeditiously, Secretary Chu never pushed him to take shortcuts during the review process. Mr. Isakowitz also said that he never received any pressure to cut corners from the White House.

Mr. Isakowitz said that during his tenure as Chief Financial Officer, which included the period during which Solyndra received its conditional commitment and the final loan guarantee, the integrity of the review process was never compromised.

Mr. Isakowitz was asked whether Secretary Chu attempted to influence his decisions on Solyndra. He said did not recall Secretary Chu weighing in on Solyndra. Mr. Isakowitz said that early in 2009, Loan Programs Office Director Dave Frantz and Mr. Isakowitz briefed Secretary Chu on the eight most mature applications and their timelines, which included the Solyndra application. He did not recall an additional meeting with the Secretary to discuss Solyndra specifically.

[1] House Committee on Energy and Commerce, Interview of Steve Isakowitz (Oct. 31, 2011).

Mr. Isakowitz said that during his review of Solyndra's application, he was not concerned with Solyndra's ability to remain viable and support the project through completion. He said there was not an issue of working capital; instead the issue was whether Solyndra had enough "skin" in the game, which meant enough equity in the deal. Mr. Isakowitz stated he felt Solyndra had a robust technology because DOE's solar program embraced it. He said it was "pretty low risk from the technology perspective" because Solyndra had already built one manufacturing facility, called "Fab 1," and the company was able to produce and sell its product.

Mr. Isakowitz also said that he did not remember anyone raising cash flow as an issue, and he didn't recall any questioning of Solyndra's actual business model. He said he remembered the biggest issue with Solyndra was the equity split and there was the sense from the loan programs office that an equity raise was sensible. He said this was required as part of the approved loan guarantee.

While Mr. Isakowitz was involved in the conditional commitment and award of the loan guarantee to Solyndra, he told the Committee he was not involved in the restructuring. He said that he learned of the restructuring only after it was complete. He also said he questions whether DOE had the authority to subordinate the government's interest as part of the restructuring.[2] At the time of the restructuring in February 2011, the LPO was no longer part of the CFO's office. Mr. Isakowitz did sit on the Credit Review Board, but Susan Richardson, Chief Counsel for the Loan Programs Office, told the Committee in a staff interview that there was a policy decision made that restructuring did not need to go through the Credit Review Board.[3]

II. ALLEGATIONS OF IMPROPER INFLUENCE

Throughout the investigation, Republican members have repeatedly asserted that the Administration gave Solyndra special treatment as a favor to George Kaiser, whose foundation was the largest private investor in Solyndra and who was a campaign contributor to President Obama. Chairman Stearns has said that the Administration "give[s] some of this money out to people who are either contributors or strong supporters."[4] Chairman Stearns has also said the Committee's investigation "reveal[s] a startlingly cozy relationship between wealthy donors and the President's confidantes, especially in matters related to Solyndra."[5] Chairman Upton stated

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[2] *Id.*

[3] House Committee on Energy and Commerce, Interview of Susan Richardson (Oct. 7, 2011).

[4] *Obama fundraiser got clean energy aid, then perch to advise Energy Secretary,* The Center for Public Integrity iWatch News (Mar. 30, 2011) (online at www.iwatchnews.org/2011/03/30/3845/green-bundler-golden-touch).

[5] Congressman Cliff Stearns Press Release, *Stearns Expands Investigation into West Wing Involvement with Solyndra* (Oct. 5, 2011) (online at stearns.house.gov/index.cfm?sectionid=134&parentid=6&sectiontree=6,134&itemid=1910).

the investigation "portrays a disturbingly close relationship between President Obama's West Wing inner circle, campaign donors, and wealthy investors that spawned the Solyndra mess."[6]

During the Committee's staff interviews with Administration officials, the officials were asked whether they were pressured to provide assistance to Mr. Kaiser. Each official denied receiving any pressure to intervene on Mr. Kaiser's behalf. In fact, key officials stated they were unaware that Mr. Kaiser had an interest in Solyndra until they read about it in the paper. This is significant because it is unlikely that there could have been a concerted effort to intervene on behalf of Mr. Kaiser without the knowledge of these officials.

David Frantz is the Director of the Loan Guarantee Program. He held this position since 2007 and was the official responsible for supervising the negotiations and due diligence of the Solyndra loan and shepherding Solyndra's application through the DOE Credit Committee and Credit Review Board. He told the Committee that he had never heard of Mr. Kaiser until the press reports about the Solyndra loan guarantee.[7] He also said that Mr. Kaiser's donations to the President played no role in his decision making, that he was never instructed to take any action as a result of Mr. Kaiser's donations to the President, and that he had no reason to believe Mr. Kaiser's donations to the President played any role in the Solyndra loan guarantee. Mr. Frantz stated unequivocally that there was no undue pressure on him or his staff to expedite Solyndra's application or grant the company favorable terms.[8]

Matt Rogers was Senior Advisor to Secretary Chu for the Recovery Act and member of the DOE Credit Review Board that signs off on all loan guarantee decisions. He held this position from February 2009 to September 2010. He told Committee staff that he had no interaction with Mr. Kaiser during his tenure at DOE, didn't believe he had ever met Mr. Kaiser, and that Mr. Kaiser had not come up in a single meeting during Mr. Rogers' time at DOE.[9] He further said until recent press coverage he was unaware of Mr. Kaiser's political leanings or donation patterns. Like Mr. Frantz, he said that Mr. Kaiser's donations to the President played no role in his decision making, that he was never instructed to take any action as a result of Mr. Kaiser's donations to the President, and that he had no reason to believe Mr. Kaiser's donations to the President played any role in the Solyndra loan guarantee. Throughout his interview, Mr. Rogers was clear that the Solyndra loan guarantee was made on the merits and that he never felt undue pressure from the White House or senior leadership to close the deal. [10]

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[6] House Committee on Energy and Commerce, *Upton, Stearns Comment on Explosive White House Documents on Solyndra* (Oct. 7, 2011) (online at http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=9004).

[7] House Committee on Energy and Commerce, Interview of David Frantz (Nov. 10, 2011).

[8] *Id.*

[9] House Committee on Energy and Commerce, Interview of Matt Rogers (Nov. 9, 2011).

[10] *Id.*

Other officials who told the Committee in interviews and testimony that they had no reason to believe decisions regarding the Solyndra loan guarantee were based on political contributions by Mr. Kaiser include: Mr. Isakowitz; Jonathan Silver, former Executive Director of the DOE Loan Guarantee Program; Jeffery Zients, Deputy Director of the Office of Management and Budget; Sally Ericsson, Program Associate Director, Natural Resources Division, Office of Management and Budget; Courtney Timberlake, Assistant Director for Budget, Office of Management and Budget; Susan Richardson, Chief Counsel, DOE Loan Programs Office; Gary Grippo, Deputy Assistant Secretary for Fiscal Operations and Policy, Department of Treasury; and Gary Burner, Chief Financial Officer, Federal Financing Bank.

III. RESTRUCTURING LEGAL ANALYSIS

Several Republican members of the Committee have alleged that DOE acted illegally by agreeing to subordinate part of the government's interest in the Solyndra loan guarantee as part of the restructuring agreement approved in February 2011. At the Subcommittee's October 14 hearing, Chairman Stearns called subordination a "violation of the clear letter of the law."[11] Rep. Burgess said the legal memo written by Susan Richardson, Chief Counsel for the Loan Programs Office, approving subordination was "sanitized."[12] Rep. Griffith said: "They were trying to figure a way to cover up the fact … that they had made a bad loan. And they went and broke the law."[13] He also stated:

> 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.[14]

In an effort to understand whether experienced professionals in the field share these views on the reasoning contained in Ms. Richardson's memo, the Democratic staff contacted Mary Anne Sullivan, former DOE General Counsel, and asked whether she would undertake an independent analysis of statutory sections in question. Ms. Sullivan served as DOE General Counsel from 1998 through 2001 and as a Deputy General Counsel from 1994 through 1998. She currently serves as a partner at the law firm of Hogan and Lovells and has more than 25 years of experience as an energy lawyer.

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[11] House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Hearing on Continuing Developments Regarding the Solyndra Loan Guarantee,* 112th Cong. (Oct. 14, 2011) at 5.

[12] *Id.* at 50.

[13] *Id.* at 57.

[14] *Id.* at 55.

Ms. Sullivan's analysis finds that the Richardson memo "is supported both by the statute and by DOE's interpretation of Section 1702 as reflected in 10 CFR Part 609, the regulations governing the loan guarantee program, and the associated rulemakings."[15] Ms. Sullivan also concludes that the analysis in the Richardson memo is "supported by commercial practice with respect to the restructure of loans that are in default."[16] Ms. Sullivan's full analysis is attached to this memo.

The Committee interviewed Susan Richardson for five hours on November 7, 2011.[17] In this interview, Ms. Richardson told Committee staff that while she was responsible for taking the lead on the analysis of the subordination issue, she consulted a number of people on the legal analysis, including the General Counsel and Ms. Richardson's two deputies. According to Ms. Richardson, she wanted to have it fully vetted by people's whose opinions she valued. She said that during this vetting process she did not recall DOE officials voicing doubts about whether the Department had the ability to subordinate.[18]

At the Subcommittee hearing on October 14, several Republican members raised concerns that a draft version of Ms. Richardson's legal memorandum was addressed to Secretary Chu, while the final version was not. Mr. Richardson was asked about this discrepancy during her interview. In regards to Secretary Chu's name being removed from an earlier draft of the memo, she said the Committee members had been "giving it more weight than it's due." She explained that she had been more focused on substance of the memo than its form. She said she had initially set up the address line in a way that Scott Harris, the General Counsel, could put his name on it and transmit the memo to Secretary Chu. Ultimately, however, it was a different document – the final action memo – that carried Mr. Harris' name and went to the Secretary.[19]

IV. OTHER ISSUES

A. OMB's Role in the Solyndra Loan Guarantee

OMB's primary responsibility with respect to the DOE loan guarantee program was approving the credit subsidy score for Solyndra. In their interviews with Committee staff, the two key OMB officials responsible for OMB's review of the Solyndra loan application, Courtney Timberlake, OMB's Assistant Director for Budget, and Sally Ericsson OMB's Program Associate Director for Natural Resources, both confirmed that OMB received enough information and had enough time to do the necessary analyses on the credit subsidy score. They

[15] Letter from Mary Anne Sullivan, Partner, Hogan Lovells, to Rep. Henry A. Waxman, Ranking Member, House Committee on Energy and Commerce (Nov. 10, 2011).

[16] *Id.*

[17] House Committee on Energy and Commerce, Interview of Susan Richardson (Oct. 7, 2011).

[18] *Id.*

[19] *Id.*

stated that their staffs were "comfortable" with the credit subsidy review and that the analyses would not have changed if they were allotted more time.[20] Ms. Ericsson further stated that if she and her staff were not comfortable they had the option to delay the announcement of the loan closing in order to finish their analysis but that such a delay was not necessary.[21]

These official's statements corroborate the testimony of OMB Deputy Director Zients at the Committee's September 14, where he stated "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."[22]

OMB also had a role in the restructuring of the Solyndra loan guarantee. During this phase, OMB and DOE had a number of communications regarding whether the restructuring was more properly defined as a workout or a modification. The distinction originates in the Federal Credit Reform Act and OMB Circular A-11, which state that agencies are required to seek additional budget authority from OMB if they modify a loan "in a manner that increases its costs."[23] However, if a change to a government loan is shown to lower the overall cost of the loan to the government and if the loan recipient is in imminent default, the change to the loan is treated as a workout rather than a modification. In a workout scenario, the agency is not required to go through a new credit subsidy review and seek additional budget authority.

According to Committee staff's interviews with OMB officials as well as documents produced to the Committee, OMB was initially hesitant to term the restructuring a workout. Both Courtney Timberlake and Sally Ericsson stated that this hesitance was due to the fact that DOE had not asserted that the loan was in imminent default and had not yet provided the necessary cash flow analyses and updated estimates of Solyndra's liquidation value.[24] They said that these pieces of information were important for demonstrating whether restructuring the loan to keep the company in business would ultimately result in a lower cost to the government than simply forcing it into bankruptcy.

[20] House Committee on Energy and Commerce, Interview of Sally Ericsson (Nov. 8, 2011) and House Committee on Energy and Commerce, Interview of Courtney Timberlake (Nov. 3, 2011).

[21] House Committee on Energy and Commerce, Interview of Sally Ericsson (Nov. 8, 2011)

[22] 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).

[23] 2 U.S.C. 661(c).

[24] House Committee on Energy and Commerce, Interview of Sally Ericsson (Nov. 8, 2011) and House Committee on Energy and Commerce, Interview of Courtney Timberlake (Nov. 3, 2011).

When asked about an email in which an OMB employee said the employee was "not comfortable with calling DOE's analysis reasonable," Ms. Ericsson stated that it was her staff's role to "ask tough questions" and "be skeptical."[25] She said that by the end of the process, she believed staff felt comfortable with the analysis and the decision to go forward with the restructuring. On February 23, 2011, after previously making OMB's determination clear to DOE over the phone weeks earlier, Ms. Timberlake wrote to DOE officials that "OMB has determined that the restructuring constitutes a workout, rather than a modification."[26]

B. Compromise of Claim

At the Committee's October 14, 2011, hearing, Treasury official Gary Burner testified that he had raised with DOE whether DOJ needed to be consulted on the Solyndra restructuring.[27] He explained that he questioned whether subordination of government debt in the restructuring would constitute a "compromise of claim" of the U.S. government. Under 31 U.S.C. 3711 and 31 C.F.R. Part 902, any compromise of a government claim requires DOJ consultation and approval before it can be carried out. In the case of Solyndra, DOE did not seek DOJ's approval before carrying out the restructuring.

In her interview with Committee staff the DOE Loan ProgramsOffice Chief Counsel Susan Richardson said that she analyzed this issue and concluded DOJ consultation was not required. Ms. Richardson's view was that the restructuring did not constitute a compromise of claim because while it did change the terms of the loan guarantee, the government was not accepting a lesser amount of debt. She stated that while DOE extended the repayment period as part of the restructuring, DOE accounted for the time-value of money to ensure that Solyndra would remain responsible for the same amount of money as before the restructuring. Ms. Richardson stated that there was no forgiveness of interest and that she believed Mr. Burner's misunderstanding of that element of the restructuring agreement was the reason for the confusion.[28]

C. Letter Regarding Fraud Allegation

Documents produced by DOE to the Committee last week included a copy of a letter to a DOE loan program employee written by an individual who said he was the chief financial officer of a supplier for Solyndra. This letter stated that starting in November 2009, Solyndra had asked

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[25] House Committee on Energy and Commerce, Interview of Sally Ericsson (Nov. 8, 2011)

[26] Email from Staff, Office of Management and Budget, to Jonathan Silver et al. (Feb. 23, 2011).

[27] House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Gary Burner, *Hearing on Continuing Developments Regarding the Solyndra Loan Guarantee,*112th Cong. (Oct. 14, 2011).

[28] House Committee on Energy and Commerce, Interview of Susan Richardson (Oct. 7, 2011).

the supplier as well as other suppliers to postpone cash payments by more than 60 days beyond the contractually required payment term for the purpose of demonstrating a higher than actual cash position to the U.S. government. According to the individual, the reason given by Solyndra was that this would allow Solyndra to meet the DOE cash requirement and access the DOE loan.

Documents indicate that a DOE Loan Programs Office counsel investigated this allegation by making inquiries to the Solyndra deputy counsel. According to the DOE documents, Solyndra counsel reported back to the DOE Loan Programs Office that Solyndra had conducted an investigation and found it to be unsubstantiated. Solyndra counsel also asserted that the alleged actions would not constitute fraud. The counsel explained that under the terms of the loan, Solyndra did not pay the suppliers, the Federal Financing Bank did. According to the counsel, Solyndra would issue a request for funds after completion of vendor work and the Federal Financing Bank would distribute the funds out of previously committed funding directly to vendors, "so there is no reason or opportunity for the company to delay payment of any project funding." The Solyndra attorney also argued that the agreement with the government expressly contemplated that there could be delays in paying trade creditors.

Questions may be raised regarding whether the response of the DOE Loan Programs Office to the letter alleging fraud was sufficient. There is, however, no evidence in the documents that the allegations of the supplier were reported to any DOE officials outside of the loan program. There is also no evidence that Secretary Chu or any official in the White House had any knowledge of the allegation in the letter.[29]

V. WITNESSES

- **The Honorable Steven Chu**
  Secretary of the Department of Energy

[29] Email from Solyndra Counsel to Loan Programs Office Staff and Outside Counsel (Nov. 4, 2010); Email from Solyndra Counsel to Loan Programs Office Staff and Outside Counsel (Oct. 29, 2010).