[redacted]

From: [redacted]
Sent: Tuesday, January 11, 2011 3:43 PM
To: [redacted]
Subject: RE: Solyndra

I don't recall that this was the intent of the revisions to the Rule.

-----Original Message-----
From: Richardson, William
Sent: Tuesday, January 11, 2011 3:39 PM
To: [redacted]
Subject: RE: Solyndra

I spoke today to Susan Richardson and [redacted] 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 [redacted] questions in order to ensure that their analysis is reasonable, and their folks will be reaching out to her.