The Solyndra Failure

Majority Staff Report

Prepared for the Use of the
Committee on Energy and Commerce
Fred Upton, Chairman
Cliff Stearns, Chairman, Subcommittee on Oversight and Investigations

U.S. House of Representatives
112th Congress

August 2, 2012

TABLE OF CONTENTS

TABLE OF NAMES

Department of Energy

Steven Chu	Secretary of Energy
David Frantz	Director, Loan Programs Office (2007-2011); Acting Director (2011-present)
Daniel Poneman	Deputy Secretary (2009-present)
Jonathan Silver	Executive Director (2009-2011)
Matt Rogers	Senior Advisor to the Secretary of Energy for Recovery Act Implementation (2009-2011)
Rod O'Connor	Chief of Staff to Secretary Chu (2009-2011)
Brandon Hurlbut	Chief of Staff to Secretary Chu (2011-present); Deputy Chief of Staff to Secretary Chu (2009-2011)
Missy Owens	Deputy Chief of Staff to Secretary Chu (2009-present)
Scott Blake Harris	General Counsel (2009-2011)
Eric Fygi	Acting General Counsel (2011-present)
Steven Isakowitz	Chief Financial Officer (2007-2011)
Owen Barwell	Acting Chief Financial Officer (2011-2012); Deputy Chief Financial Officer (2007-2010); Chief Operating Officer, Loan Programs Office (2010-2011)
Steve Spinner	Small Business Loan Guarantee Program Advisor on the Recovery Act (2009-2011)
Susan Richardson	Chief Counsel, Loan Programs Office (2009-present)
Lachlan Seward	Director of the Advanced Technology Vehicles Manufacturing Program, Loan Programs Office (2008-2011)
Frances Nwachuku	Director of Portfolio Management, Loan Programs Office (2010-present)
Kelly Colyar	Director of Credit Policy, Loan Programs Office (2008-2010)

Office of Management and Budget

Peter Orszag	Director (2009-2010)
Jacob Lew	Director (2010-2012)
Jeffrey Zients	Acting Director (2012-present); Deputy Director (2009-2012)
Robert Nabors	Deputy Director (2009-2010)
Sally Ericsson	Program Associate Director, Natural Resources Programs (2009-present)
Courtney Timberlake	Assistant Director of the Budget Review Division (2010-present); Deputy Assistant Director for Budget (2007-2010)
William Richardson	Deputy General Counsel
Steven Aitken	Deputy General Counsel (2007-present)

Kevin Carroll	Chief, Energy Branch (2006-present)
Alex Mas	Director for Economic Policy and Chief Economist (2010-2011)
Kelly Colyar	Branch Chief (2011-present); Program Examiner, Energy Branch (2010-2011)
Fouad Saad	Program Examiner, Energy Branch (2009-2011)

Department of the Treasury

Mark Patterson	Chief of Staff to Secretary Timothy Geithner (2009-present)
Mary Miller	Under Secretary for Domestic Finance (2012-present); Assistant Secretary for Financial Markets (2010-2012)
Ken Carfine	Treasury Fiscal Assistant Secretary (2007-2010)
Karthik Ramanathan	Acting Assistant Secretary for Financial Markets (2008-2010)
Preston Atkins	Office of Small Business Development
Gary Grippo	Deputy Assistant Secretary for Fiscal Operations and Policy (2011-present)
Gary Burner	Chief Financial Officer, Federal Financing Bank
Paula Farrell	Director of the Office of Policy and Legislative Review (2002-present)

The White House

Rahm Emanuel	Chief of Staff to the President (2009-2010)
William Daley	Chief of Staff to the President (2011-2012)
Jacob Lew	Chief of Staff to the President (2012-present)
Peter Rouse	Counselor to the President (2011-2012); Acting Chief of Staff (2010-2011); Senior Advisor to the President (2009-2010)
Valerie Jarrett	Senior Advisor and Assistant to the President for Intergovernmental Relations and Public Liaison (2009-present)
Ronald Klain	Chief of Staff to the Vice President (2009-2011)
Dr. Lawrence Summers	Director, National Economic Council (2009-2010)
Gene Sperling	Director, National Economic Council (2011-present)
Carol Browner	Director, Office of Energy and Climate Change Policy (2009-2011)
Heather Zichal	Deputy Assistant to the President for Energy and Climate Change Policy (2011-2012); Deputy Director, Office of Energy and Climate Change Policy (2009-2011)
Brandon Hurlbut	Director of Cabinet Affairs (2009)
Alyssa Mastromonaco	Assistant to the President and Director of Scheduling & Advance (2009-2011)

Daniel Pfeiffer	Director of Communications (2009-present)
Aditya Kumar	Deputy Assistant to the Vice President and Senior Advisor to the Vice President's Chief of Staff, Ron Klain (2010-2012); Director of Special Projects in the office of Chief of Staff Rahm Emanuel (2009-2010)
Brian Deese	Special Assistant to the President for Economic Policy, NEC

Solyndra

Christian Gronet	Founder and Chief Executive Officer (2005-2010)
Brian Harrison	Chief Executive Officer (2010-2011)
W.G. Stover, Jr.	Chief Financial Officer (2008-2011)

Argonaut/George Kaiser Family Foundation (GKFF)

George Kaiser	Chairman, BOK Financial Corporation
Steven Mitchell	Managing Director, Argonaut Private Equity
Ken Levit	Executive Director, GKFF
Fred Dorwart	President and Trustee, GKFF

Madrone

Jamie McJunkin	General Partner

I. INTRODUCTION

In February 2011, the Committee on Energy and Commerce opened an investigation into the Department of Energy's (DOE) management of the Loan Guarantee Program. The investigation to date has primarily focused on DOE's decision-making process with regard to a $535 million loan guarantee issued to Solyndra, Inc. (Solyndra) in September 2009 and the restructuring of that guarantee in February 2011 due to the company's poor financial condition. Throughout this investigation, the Committee has been guided by a simple purpose: to determine whether DOE, and the other Executive Branch agencies who reviewed the Solyndra guarantee, conducted proper and adequate analyses prior to its approval and subsequent restructuring and took all steps necessary to protect the taxpayers' investment in this company. In short, was the loan properly made and could the loss of over half a billion dollars of taxpayer money have been prevented?

After an extensive investigation which included reviewing over 300,000 pages of documents, interviewing numerous individuals who played a role in the Solyndra loan guarantee, and holding five hearings before the Subcommittee on Oversight and Investigations, it is clear DOE should never have issued the loan guarantee to Solyndra and that DOE violated the plain language of the law when it restructured the terms of the loan guarantee and subordinated the taxpayers' interest to the interests of two private equity investors.

The Obama Administration and the Minority Members of this Committee have made contradictory statements regarding the Solyndra investigation. On one hand, the Administration and Minority Members have admitted repeatedly that Solyndra and the Loan Guarantee Program were worthy of investigation. On the other hand, they have questioned the value of the Majority's investigation of the Solyndra loan guarantee. Recently, some Minority Members on this Committee have stated that the Committee has nothing to show for its work, except for the fact that some of the loan guarantees issued by DOE were "risky."[1] It is important to note that the Minority failed to conduct any oversight of the DOE Loan Guarantee Program during the two years that those Members were in control of this Committee. Those two years, from 2009 through 2010, were a critical time for Solyndra and for the Loan Guarantee Program as a whole. During that period, the American Recovery and Reinvestment Act (Recovery Act or stimulus), injected a massive increase in funding into the program while simultaneously placing a tight deadline on closing the loan guarantees that were eligible for stimulus funding. And yet, the Minority did not ask a single question regarding Solyndra, the first recipient of a loan guarantee under that program, even after Solyndra's auditor issued a letter in March 2010 questioning the company's ability to continue operating or after Solyndra laid off over 150 employees and closed one of its manufacturing facilities in the fall of 2010.

Solyndra should stand as a cautionary tale of what happens when an Administration ties itself to a project so closely that it becomes the poster child of its

[1] Jim Snyder, *House Solyndra Probe Nears Completion*, BUSINESSWEEK (June 29, 2012), http://www.businessweek.com/news/2012-06-28/house-s-stearns-says-investigation-into-solyndra-nearing-end (quoting Rep. Diana DeGette).

signature economic policy: when that project fails, interests other than the taxpayers' come into play. In fact, throughout the Committee's investigation, Administration officials and representatives of Solyndra made public statements trumpeting the company right up until the time it filed for bankruptcy in September 2011. For example, just after the Committee's investigation began in February 2011, then-Loan Programs Office Executive Director Jonathan Silver briefed Committee staff. Mr. Silver explained that Solyndra's financial problems were not unusual and touted the company's improvements in panel efficiency and competitiveness.[2] Mr. Silver's briefing with Committee staff took place on March 1, 2011, just days after DOE had finalized its restructuring of the Solyndra loan guarantee and agreed to subordinate its interest to Solyndra's investors. Two days after Mr. Silver briefed Committee staff, DOE Secretary Steven Chu stated in an interview that DOE was "confident" Solyndra could "repay the loan," and that "'sales have been going up' in recent months."[3] One week after the Committee issued a subpoena to the Office of Management and Budget (OMB) on July 15, 2011, for its Solyndra-related documents, a DOE spokesperson stated that "DOE invested in Solyndra because it developed an innovative solar panel . . . . Innovative projects are, by definition, riskier than mature technologies. There are likely to be bumps in the road in the future. However, the Solyndra story is one of a company that continues to grow by bringing important new solar technology to the market."[4] Brian Harrison, the former Chief Executive Officer of Solyndra, met with many Committee members in July 2011 and told them that the company's revenues were improving and that the company was "on track to meet the job creation commitments agreed upon with DOE."[5] Just over one month later, Solyndra filed for bankruptcy and laid off its workforce.

The record the Committee has assembled throughout its investigation has shown that the Majority Members' concerns about the Solyndra loan guarantee were well-founded. During the hearings before the Subcommittee on Oversight and Investigations in the fall of 2011, the Committee raised a number of questions about the manner in which the review of the Solyndra loan guarantee application, and the restructuring of that guarantee, took place. Specifically, the Committee established that DOE ignored a number of red flags about Solyndra's financial condition before it decided to award a conditional commitment to the company in March 2009 and before it closed the loan guarantee in September 2009.

The Committee also demonstrated that DOE's and OMB's reviews of the Solyndra application were rushed and the quality of those reviews was negatively affected by political considerations – namely, the Administration's desire to make public

---

[2] Jonathan Silver, Executive Dir., U.S. Dep't of Energy Loan Programs Office, *The Solyndra Project: A Closer Look*, Presentation to Energy and Commerce Comm. Staff (Mar. 1, 2011) [hereinafter, "Silver Presentation"].

[3] Brian Hansen, *DOE 'confident' as it gives Solyndra more time to repay loan; 'sales have been going up'*, ELEC. UTIL. WEEK (Mar. 7, 2011), http://www.platts.com/Products/electricutilityweek.

[4] Herman Wang, *Solyndra Defends Finances as GOP Subpoenas Records*, INSIDE ENERGY/WITH FEDERAL LANDS (July 18, 2011), http://www.platts.com/Products/insideenergy.

[5] Letter from Brian Harrison, CEO, Solyndra, Inc., to Cliff Stearns, Chairman, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce & Diana DeGette, Ranking Member, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce (July 13, 2011).

announcements of these events. This was most apparent during OMB's review of the Solyndra loan guarantee prior to its closing. DOE and the White House had already scheduled an announcement event to mark the closing, featuring an appearance by DOE Secretary Chu and remarks delivered by Vice President Joe Biden via satellite, before OMB had even had the opportunity to begin its analysis. Documents produced to the Committee show that OMB staff was keenly aware of the closing event and felt pressured to complete their work and approve the application so that the Administration's announcement of the Solyndra closing could go forward as scheduled.

The Committee also raised questions about DOE's monitoring of the loan guarantee during 2010, when Solyndra's financial condition deteriorated rapidly. With respect to the restructuring of the loan guarantee, the Committee discovered that the Department of the Treasury and OMB staff had raised numerous questions about DOE's decision to restructure the loan guarantee. Documents produced to the Committee showed that these agencies had serious doubts regarding DOE's analysis that the restructuring would improve the government's recovery of the funds it had distributed to Solyndra. The Committee also learned that Treasury and OMB staff believed that DOE's decision to subordinate the government's interest to two Solyndra investors was not proper and questioned whether this decision was consistent with a provision in the Energy Policy Act of 2005 that expressly prohibited subordination.

Now, after a thorough review of the record, the Committee is able to present a complete picture of the facts and circumstances surrounding DOE's decision to award a loan guarantee to Solyndra, and the roles various Executive Branch agencies, including the White House, played in these events. Since the hearings last fall, Committee staff has reviewed additional documents produced to the Committee and conducted interviews of Executive Branch staff and officials who played an important role in the review of Solyndra, including OMB and White House staff. The Committee has also obtained documents from the White House produced pursuant to subpoenas served on President Obama's then-Chief of Staff William Daley and Vice President Biden's Chief of Staff Bruce Reed on November 3, 2011.

The evidence gathered during the course of the Committee's investigation conclusively demonstrates that:

- DOE ignored numerous warning signs regarding Solyndra's finances. This report shows that the financial information Solyndra submitted in its application to DOE was based on faulty assumptions that, had they been identified by DOE, should have raised alarms about the company's viability.

- The White House scheduled the Solyndra closing event, which featured an appearance by DOE Secretary Chu and remarks delivered via satellite by Vice President Biden, before OMB even began its review of the loan guarantee. OMB's review was therefore rushed, taking only nine days when OMB usually took an average of 28 days to review the credit subsidy costs of loan guarantees.

- Solyndra's financial condition continued to weaken after it received the DOE loan guarantee. The company's financial condition and plans to move forward with an Initial Public Offering (IPO) hinged on whether Solyndra would receive a second DOE loan guarantee. DOE failed to adequately monitor the loan after it was issued and continued to approve the distribution of more taxpayer funds to Solyndra even as its financial condition grew increasingly untenable.

- In an attempt to keep its business afloat, Solyndra engaged in extensive efforts, aided by its investors and lobbyists, to seek further Federal funding and government contracts in 2010, including from the Department of Defense (DoD) and the General Services Administration (GSA). DOE officials supported these attempts to help Solyndra win further government support.

- DOE's financial analysis in support of its decision to restructure the loan guarantee was flawed. DOE's models failed to show that the restructuring and subordination of the taxpayers' interest in the loan guarantee to that of Solyndra's investors would result in better recoveries for the government than an immediate liquidation of the company. This report — which examines the financial models and other data submitted to OMB by DOE during the restructuring — substantiates the accuracy of the questions and concerns raised by OMB staff during its review of the restructuring and shows that the restructuring plan was not a viable option.

- DOE approved the conditional commitment for Project Amp in June 2011 while knowing that Solyndra — the sole supplier for the project's first phase — was in desperate financial condition. The White House understood the importance of the relationship between Solyndra and Project Amp, which became a critical bargaining piece in the second restructuring negotiations with Solyndra and its investors in August 2011.

- The White House led the discussions about a second Solyndra restructuring in August 2011, just prior to Solyndra's bankruptcy. In another desperate bid to keep the company afloat, the Administration considered a plan that would have subordinated the taxpayers' interest in the loan guarantee for a second time.

- Until the moment Solyndra announced its bankruptcy on August 31, 2011, certain individuals within DOE were willing to take extraordinary measures in order to keep the company afloat and ensure that the first loan guarantee recipient was not a failure. These measures included further subordination of the taxpayers' interest in the loan guarantee, intervening in the negotiations between Solyndra and Prologis regarding the first phase of Project Amp, and contacting the GSA and venture capital firms on behalf of Solyndra.

- Individuals connected to the George Kaiser Family Foundation (GKFF) — whose primary investment arm, Argonaut, was Solyndra's largest shareholder —

played important roles in a series of critical discussions and negotiations with DOE. George Kaiser, whose fortune funds the GKFF, was closely involved in financial decisions related to Solyndra, often authorizing key disbursements and restructuring proposals, as well as in Solyndra's lobbying, public relations, and government procurement strategies in Washington. Key decision-makers at DOE knew of his influence over Argonaut's decisions, yet primarily followed established "communication channels" when discussing issues related to the loan guarantee. In addition, the White House Chief of Staff's office and others in the White House were aware that Mr. Kaiser, a bundler for President Obama's 2008 campaign, was the primary investor in Solyndra.

Part II of this report sets forth the history of the Committee's investigation and contains a statement of the Committee's jurisdiction over the DOE Loan Guarantee Program. Parts III through X of this report present a chronology of the Solyndra loan guarantee. Part III addresses the review of Solyndra's loan guarantee application by DOE and important factors that impacted the review, particularly the passage of the stimulus. Part IV discusses the closing of the loan guarantee, in particular, OMB's review of the Solyndra application and credit subsidy cost in August 2009, and the impact of the decision by DOE and the White House to schedule a public closing event before OMB could begin its review. Part V addresses Solyndra's deteriorating financial condition in 2010, DOE's failure to adequately monitor or remedy this situation, President Obama's visit to Solyndra in May 2010, and the company's efforts to raise additional capital and obtain additional government contracts and support in order to remedy its financial problems. Part VI details DOE's decision to restructure the Solyndra loan guarantee, the negotiations with Solyndra's investors, and the terms of the guarantee. Part VII describes OMB's review of DOE's decision to restructure the loan guarantee and DOE's financial analysis of the restructuring. Part VIII addresses the Department of the Treasury's involvement in the Solyndra restructuring, and Treasury's recommendation that DOE seek the opinion of the Department of Justice. Part IX discusses the role of the White House in the restructuring of the Solyndra loan guarantee. Part X details Solyndra's continued financial problems after the restructuring and the discussions between DOE, OMB, Treasury, and the White House in August 2011 regarding a second restructuring of the loan guarantee. Part XI sets forth the findings of the Solyndra loan guarantee investigation.

II. HISTORY OF THE COMMITTEE'S INVESTIGATION

The Committee had a simple goal when it opened its investigation of the DOE Loan Guarantee Program: to determine whether the program was being run efficiently and whether the taxpayers' interest was being properly protected. The Committee had not previously conducted any oversight over the DOE Loan Guarantee Program — a program that falls squarely within the Committee's jurisdiction, pursuant to the Rules of

the U.S. House of Representatives.[6] Further, the Committee drafted the Energy Policy Act of 2005,[7] which authorized the creation of the DOE Loan Guarantee Program. Solyndra was part of the Section 1705 loan guarantee program, which was funded in part by the Recovery Act. This Committee adopted the energy-related provisions of the Recovery Act, including the Section 1705 program, in a markup on January 22, 2009.

Together with the Committee's responsibility to conduct oversight of programs within its jurisdiction, media reports in late 2010 and early 2011 regarding Solyndra's troubled financial condition prompted the Committee to open its investigation of the Solyndra loan guarantee in February 2011. Solyndra was the first recipient of a DOE loan guarantee in September 2009. Within one year of receiving the loan guarantee, the company experienced significant financial problems that resulted in the layoff in November 2010 of approximately 135 temporary and 40 full-time employees. Less than one year later, the company filed for Chapter 11 bankruptcy and laid off its remaining workforce of approximately 1,800 individuals. Solyndra is not the only portion of the DOE loan portfolio to attract significant concern; the Government Accountability Office (GAO) has issued two reports criticizing the DOE Loan Programs Office's review and approval process for applications for the Section 1705 loan guarantee program. At the time of this report's release, three of the first five companies that received a loan guarantee under Section 1705 have filed for bankruptcy.

The Committee has conducted an extensive inquiry into the Solyndra loan guarantee in order to determine what went wrong and to ensure that these mistakes and improper decision-making processes are not repeated. In order to fully understand the facts and circumstances that resulted in the company's likely default on the entire $527 million that was disbursed to Solyndra under the loan guarantee, the Committee has issued a number of document requests to the Executive Branch agencies and other entities that were involved in events relating to Solyndra, including the Department of Energy (February 17, 2011, September 21, 2011, and October 6, 2011); the Office of Management and Budget (March 14, 2011); Solyndra's two largest investors, Argonaut Ventures, Inc., and Madrone Capital Partners (April 29, 2011, and September 21, 2011); the Department of the Treasury (October 7, 2011); the White House (September 1, 2011, and October 5, 2011); the General Services Administration (December 20, 2011); the Department of Defense (January 26, 2012); SAIC, Inc., the parent company of R.W. Beck, the independent consultant to DOE on the review of the Solyndra application (December 20, 2011); DOE's outside counsel on Solyndra, the Morrison & Foerster law firm (January 12, 2012); and Solyndra's counsel, Wilson Sonsini Goodrich and Rosati

---

[6] *See* Rules of the House of Representatives, 112th Cong., Rule X (2011), *available at* http://clerk.house.gov/legislative/house-rules.pdf. Under the House rules, matters relating to "[e]xploration, production, storage, supply, marketing, pricing, and regulation of energy resources, including all fossil fuels, solar energy, and other unconventional or renewable energy resources" and the "[g]eneral management of the Department of Energy" are within the jurisdiction of the Committee on Energy and Commerce. *Id.* at Rule X(f)(6)-(10).

[7] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 42 U.S.C. §§ 16511-14, 16516).

(January 12, 2012).[8] In total, over 300,000 pages of documents have been produced to the Committee relating to the Solyndra loan guarantee.

The Committee was forced to issue three subpoenas in order to obtain documents relating to the Solyndra loan guarantee. The first subpoena was issued on July 15, 2011, to the Office of Management and Budget, following months of delay and OMB's refusal to produce either its internal communications and documents or its communications with DOE relating to the review of the Solyndra loan guarantee. Although the subpoena set a deadline of July 22, 2011, OMB did not finish its production of responsive documents until October 2011. The second and third subpoenas were issued to the Chiefs of Staff to President Obama and Vice President Biden, William Daley and Bruce Reed, for documents relating to the White House's involvement in the loan guarantee. The subpoenas requested that all responsive documents be produced no later than November 10, 2011. After almost eight months of extensive negotiations between White House and Committee staff, and numerous accommodations made by the Committee to address the White House's claims that the production of certain documents would implicate Executive Branch institutional concerns, the Committee was able to obtain production or review of the White House documents and communications that were responsive to the subpoenas, including excerpts from Memoranda to the President and Vice President and communications among senior White House aides.

In addition to gathering documents relating to the DOE loan guarantee to Solyndra, the Committee has received briefings from the various Executive Branch agencies that played a role in the review of the Solyndra loan guarantee application, the monitoring of the guarantee, and its restructuring. Mr. Jonathan Silver, then-Executive Director of the DOE Loan Programs Office, briefed Committee staff on March 1, 2011, at the outset of the Committee's investigation on DOE's review of Solyndra and about the Loan Programs Office generally. The Committee also received briefings from DOE staff about the details of the restructuring of the Solyndra loan guarantee and the bankruptcy, the Section 1705 loan guarantee program generally, and the financial condition of the Section 1705 portfolio. Further, the DOE Office of Inspector General briefed Committee staff on its oversight work with respect to the Loan Guarantee Program generally and with regard to its investigation of the Solyndra loan guarantee in particular. In addition, OMB provided a briefing to Committee staff on April 11, 2011, regarding OMB's role in reviewing the credit subsidy costs of loan guarantees. The Committee also received three briefings from the Department of the Treasury on Solyndra: a September 22, 2011, briefing on how Treasury sets interest rates for Federal loan guarantees; an October 13, 2011 briefing, relating to Treasury's involvement in the review of the Solyndra loan application prior to DOE's conditional commitment and during the restructuring; and a briefing from the Treasury Office of Inspector General on April 10, 2012, regarding the Inspector General's report on DOE's consultation with Treasury on Solyndra.

Committee staff has also conducted interviews of a number of individuals who were involved with the Solyndra loan guarantee. For DOE, the Committee interviewed

[8] Copies of these letters are included in the supporting materials as Footnote 8.

David Frantz, then-Director of the Loan Programs Office in 2009 and now Acting Executive Director of that office; Susan Richardson, Chief Counsel of the Loan Programs Office; Kelly Colyar, then-Director of Credit Policy at the Loan Programs Office; and Steve Isakowitz, then-Chief Financial Officer of DOE. With regard to OMB, the Committee interviewed Sally Ericsson, Program Associate Director; Courtney Timberlake, Assistant Director of the Budget Review Division; J. Kevin Carroll, Energy Branch Chief; Kelly Colyar, Program Examiner in the Energy Branch, and Fouad Saad, Program Examiner in the Energy Branch. Committee staff also interviewed two of the individuals who worked for Solyndra's two largest investors, Argonaut and Madrone, Steven Mitchell and Jamie McJunkin. In addition, Committee staff interviewed George Kaiser, whose fortune funds the George Kaiser Family Foundation, the primary investment arm of which, Argonaut, was Solyndra's largest investor. Finally, the Committee interviewed Jonathan Plowe, Managing Director of Bank of America Merrill Lynch, which submitted the Project Amp loan guarantee application. The Committee has also interviewed Heather Zichal, Deputy Assistant to the President for Energy and Climate Change, and Aditya Kumar, former Director of Special Projects in the office of Chief of Staff Rahm Emanuel and Deputy Assistant to the Vice President and Senior Advisor to the Vice President's Chief of Staff, Ron Klain. The Committee also contacted Christian Gronet, the former Chief Executive Officer of Solyndra, and requested to interview him. Mr. Gronet's counsel declined the Committee's request on behalf of Mr. Gronet, explaining that Mr. Gronet would assert his rights under the Fifth Amendment in response to any questions from the Committee.

The Committee's investigation resulted in five hearings on the Solyndra loan guarantee. The first hearing took place on June 24, 2011, and was entitled "OMB's Role in the Loan Guarantee Process." OMB Deputy Director Jeffrey Zients was invited to testify but failed to appear for the hearing. The second hearing took place on September 14, 2011, and was entitled "Solyndra and the DOE Loan Guarantee Program." Two witnesses testified at this hearing, Mr. Jonathan Silver and OMB Deputy Director Zients. The following week, the Committee held a second hearing on September 23, 2011, entitled, "From DOE Loan Guarantee to Bankruptcy to FBI Raid: What Solyndra's Executives Knew." The Committee invited Solyndra's two top executives to testify, Chief Executive Officer Brian Harrison and Chief Financial Officer and W.G. Stover, Jr. Both Mr. Harrison and Mr. Stover appeared voluntarily before the Committee but invoked their rights under the Fifth Amendment in response to the Committee's questions. The third hearing, entitled "Continuing Developments Regarding the Solyndra Loan Guarantee," took place October 14, 2011, and addressed the role of Treasury in the review of the Solyndra loan guarantee. Two witnesses testified at this hearing: Gary Grippo, Deputy Assistant Secretary for Fiscal Operations and Policy, and Gary Burner, Chief Financial Officer of the Federal Financing Bank. The final hearing before the Subcommittee on Oversight and Investigations took place on November 17, 2011, and was entitled "The Solyndra Failure: Views from Department of Energy Secretary Chu." Secretary Chu was the only witness at the hearing.

III. DOE'S REVIEW OF THE SOLYNDRA LOAN APPLICATION AND CONDITIONAL COMMITMENT

A. The Energy Policy Act of 2005 and The Establishment of the Loan Guarantee Program at DOE

The Energy Policy Act of 2005 (the Act) was passed by Congress on July 29, 2005, and signed into law on August 8, 2005. Section 1703 of the Act authorizes the Secretary of the Department of Energy to issue loan guarantees to projects investing in either innovative clean technologies or commercial-scale renewable energy that meet the following two criteria: (1) the projects "avoid, reduce, or sequester air pollutants" and (2) "employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued."[9] The Act listed ten different types of project categories that were eligible for funding, including renewable energy systems, advanced fossil energy technology, hydrogen fuel cell technology, advanced nuclear facilities, and efficient electrical generation and transmission.[10]

The DOE experienced a number of difficulties in establishing the Loan Programs Office (LPO). As the agency did not have an existing office or program for issuing loan guarantees, DOE had to start from scratch. Although the program was authorized in 2005, it did not receive funding until April 2007.[11] The program director was not hired until August 2007.[12] The office continued to grow slowly; DOE informed the Committee that in early 2008 the office employed just four Federal employees. Despite this, DOE was required to issue a Notice of Proposed Rulemaking and then to draft the regulations and guidance to implement the program before the Secretary could issue a loan guarantee. The Notice of Proposed Rulemaking was announced in May 2007 and the final regulations were issued in October 2007.

In order to receive applications for loan guarantees, the Energy Policy Act required that DOE issue solicitations for loan guarantee applicants. Solyndra's application was submitted in December 2006 in response to the first solicitation, which DOE issued in August 2006 in order to determine market interest in the program.[13] DOE received 143 pre-applications in response to this solicitation. According to David Frantz, then-Director of the LPO and now Acting Executive Director, the quality of the applications received varied greatly. Mr. Frantz stated that DOE narrowed the pool of 143 pre-applications to 16 projects that were deemed ready to submit full applications.[14]

---

[9] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1703(a)(1) and (2) (2005).
[10] *See id.* at § 1703(b).
[11] *See* Revised Continuing Appropriations Resolution for Fiscal Year 2007, Pub. L. No. 110-5, § 20315 (2007).
[12] Interview with David G. Frantz, Dir., U.S. Dep't of Energy Loan Programs Office, in Washington, D.C. (Nov. 8, 2011) (notes on file with author) [hereinafter, "Frantz Interview"].
[13] *See* Silver Presentation, *supra* note 2.
[14] Frantz Interview, *supra* note 12.

Once Solyndra's full application was submitted in May 2008, DOE began to conduct due diligence on the project. Solyndra's application was deemed complete in August 2008.[15]

The LPO's review of Solyndra's full application began at a time when the program was facing intense scrutiny. The delay in establishing the program and processing applications was the subject of criticism, including from Members of Congress during both House and Senate hearings on the Fiscal Year 2008 budget.[16] The Government Accountability Office (GAO) also provided testimony in 2007 and issued a report in 2008 criticizing DOE's management of the program.[17] GAO also issued reports in 2010 and 2012 criticizing the management of the program, in particular, DOE's inconsistent treatment of loan guarantee applicants in the due diligence process.[18] The 2010 GAO report listed five companies that had received conditional commitments even though DOE had yet to receive one or more independent consultants' reports. Solyndra was one of those companies.[19]

B. Solyndra's Application

Solyndra's full application contained multiple parts, including information about Solyndra's financial condition and its audited financial statements for the years 2005-2007, the company's business plan, and reports detailing the market for Solyndra's products.

The company, located in Fremont, CA, proposed to manufacture thin film solar modules for flat, commercial rooftops, or flat rooftops. Solyndra used a unique cylindrical design for the panels based on Copper Indium Gallium Selenide, or "CIGS," technology. Solyndra claimed that its product had an advantage over other solar panels because its panels were easier to install, lighter, had cheaper rooftop installation costs, and potentially higher efficiencies due to better wind performance and design. Solyndra planned to use the DOE loan guarantee to build a full-scale production facility (referred to as "Fab 2") capable of building solar panels that would produce 210 megawatts of

---

[15] From 2006 to 2010, DOE issued nine solicitations for loan guarantee applications.

[16] *See* FRED SISSINE, CONG. RESEARCH SERV., RL34162, RENEWABLE ENERGY: BACKGROUND AND ISSUES FOR THE 110TH CONGRESS, at 6 (Dec. 10, 2008), *available at* http://www.crs.gov/Products//rl/pdf/RL34162.pdf.

[17] *See Implementation of EPACT 2005 Loan Guarantee Programs by the Department of Energy: Hearing Before the Subcomm. on Energy & Air Quality of the H. Comm. on Energy & Commerce*, 110th Cong. (2007) (statement of James C. Cosgrove, Acting Dir. for Natural Res. & Env't, U.S. Gov't Accountability Office), *available at* http://www.gao.gov/assets/120/116357.pdf. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-750, DEPARTMENT OF ENERGY: NEW LOAN GUARANTEE PROGRAM SHOULD COMPLETE ACTIVITIES NECESSARY FOR EFFECTIVE AND ACCOUNTABLE MANAGEMENT (July 2008), *available at* http://www.gao.gov/assets/280/277972.pdf [hereinafter, "July 2008 GAO Report"].

[18] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-627, DEPARTMENT OF ENERGY: FURTHER ACTIONS ARE NEEDED TO IMPROVE DOE'S ABILITY TO EVALUATE AND IMPLEMENT THE LOAN GUARANTEE PROGRAM (July 2010), *available at* http://www.gao.gov/new.items/d10627.pdf; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-157, DOE LOAN GUARANTEES: FURTHER ACTIONS ARE NEEDED TO IMPROVE TRACKING AND REVIEW OF APPLICATIONS (Mar. 2012), *available at* http://www.gao.gov/assets/590/589210.pdf .

[19] *See* July 2008 GAO report, *supra* note 17. *See also* E-mail from Dir. Energy & Science Issues, U.S. Gov't Accountability Office, to Energy & Commerce Comm. Staff (May 11, 2011, 11:42 AM).

electricity a year. The application listed a total project cost of $713 million for the manufacturing facility, $535 million of which would be provided by the loan guarantee. Solyndra, Inc., was the parent company or "sponsor" of the loan guarantee application project; the borrower was "Solyndra Fab 2 LLC," or the project company, which was a separate, wholly owned subsidiary of the parent company.

Solyndra's application also addressed the market for its products. Included within the application were two reports on "Solar PV [photovoltaic] Development Strategies," one for the United States and one for Europe for the years 2008-2020. The reports were produced by Emerging Energy Research, and were not specifically focused on Solyndra, but, rather, were comprehensive reviews of the solar market. In its "Business Plan" submitted with the DOE Loan Guarantee application, Solyndra noted the "tremendous growth" in the solar electricity market.[20] Solyndra noted that its chief competitors in the growing solar market were the manufacturers of polycrystalline silicon panels.[21] Solyndra contended in the "Project Description" section of its application that its CIGS technology and panel design were superior to conventional PV panels using polysilicon because of Solyndra's lower installation costs and the high price of polysilicon resulting from a global shortage. Solyndra claimed that these efficiencies gave the company a "pricing advantage versus conventional silicon panels,"[22] and estimated that the average selling price of its panel with mounts would be $3.01/Wp in 2010, dropping to $2.79/Wp in 2011, and $2.52/Wp in 2015.[23]

Solyndra acknowledged that certain weaknesses existed in its business strategy. Solyndra stated in its application that it could not demonstrate the efficiencies from the CIGS technology until production reached commercial levels. The company also noted that its "panels currently rely upon various governmental tax incentives, rebates and other economic incentives to achieve cost parity with retail utility rates for installations in most locations."[24] Solyndra admitted that the reduction of these incentives would impact its sales projections, but that the company planned to "embark[] upon a strategy of cost management through product design and manufacturing process improvement" to mitigate this concern.[25]

Solyndra's application also included certain financial information and projections. During the application process, DOE requested several revisions to Solyndra's financial model before Solyndra's application was deemed complete in August 2008.[26] Those

---

[20] Solyndra, Inc., DOE Loan Guarantee Application, Section D: Business Plan, at 3.
[21] *Id.* at 10.
[22] *Id.* at 11.
[23] *Id.* at 15.
[24] Solyndra, Inc., DOE Loan Guarantee Application, Section D6: Operational Risks & Mitigation Strategies, at 4.
[25] *Id.*
[26] *See* Letter from Eric Fygi, Deputy Gen. Counsel, U.S. Dep't of Energy, to Fred Upton, Chairman, Comm. on Energy & Commerce & Cliff Stearns Chairman, Subcomm. on Oversight & Investigations, Comm. on Energy & Commerce (June 15, 2012) [hereinafter, "June 15, 2012 Letter from DOE Deputy General Counsel"].

versions included a seven-year projection dated October 6, 2008, and a ten-year projection dated October 6, 2008.

At the time DOE began its due diligence of the Solyndra application in 2008, the solar market was a much different place than it is today. At the time Solyndra was formed in 2005, the price of polysilicon had increased rapidly. According to a report issued by the Congressional Research Service, this "created a strong economic value proposition" for alternative technologies, like Solyndra's.[27] Prices for polysilicon peaked in late 2007 and early 2008. In 2008, the prices began to decrease as additional production capacity "came on line."[28] By the time DOE decided to award a conditional commitment to Solyndra in March 2009, the price for polysilicon was dropping sharply, dramatically affecting the viability of Solyndra's business model.

C. Solyndra Loan Application Begins Due Diligence and Is Remanded by the First DOE Credit Committee (2008 and 2009)

After DOE deemed Solyndra's application to be complete in August 2008, the application proceeded to the due diligence phase.

Officials with the DOE Loan Programs Office told Committee staff that, over time, the agency developed and streamlined procedures for processing loan guarantee applications. When Solyndra's application entered the due diligence phase in the fall of 2008, however, two important pieces of the review of the loan guarantee applications had yet to be finalized: (1) the Credit Subsidy Model for calculating the credit subsidy cost of the guarantee and (2) the retention of third-party consultants to assist in conducting the due diligence. An email dated October 24, 2008, from the LPO staff member who was primarily responsible for reviewing the Solyndra application, states that "Solyndra remains concerned over delays in the retention of LGPO [Loan Programs Office] third-party advisors and outside legal counsel, as well as the lack of an agreed subsidy model."[29]

Approval of the Credit Subsidy Model by OMB and retention of third-party consultants were the two key factors impacting the schedule of the Solyndra review. Documents produced to the Committee show that, through the fall of 2008, LPO staff was working through the administrative and procurement requirements for retaining third-party legal, engineering, and marketing consultants. The independent engineer for the Solyndra application, R.W. Beck, was not selected until early December 2008.

Even though DOE did not have an approved Credit Subsidy Model or third-party consultants on board, LPO staff members were aiming to present the Solyndra

---

[27] *See* PHILLIP BROWN, CONG. RESEARCH SERV., R42058, MARKET DYNAMICS THAT MAY HAVE CONTRIBUTED TO SOLYNDRA'S BANKRUPTCY, at 1 (Oct. 25, 2011), *available at* http://www.crs.gov/Products/R/PDF/R42058.pdf.

[28] *Id.* at 3.

[29] E-mail from Program Manager, U.S. Dep't of Energy Loan Programs Office, to Senior Admin. Assistant, U.S. Dep't of Energy Loan Programs Office et al. (Oct. 24, 2008, 9:45 AM).

application to the DOE Credit Committee and Credit Review Board (CRB) by January 15, 2009. LPO staff seemed to recognize, however, that this schedule might not be attainable. On November 19, 2008, one LPO staff member stated that "[w]e're are [*sic*] still shooting for taking the Solyndra and Beacon projects to the CRB in January but many factors lie outside our control so I cannot give a percentage regatrding [*sic*] the likelihood of achieving that target."[30]

Two weeks later, in early December 2008, then-Director of the LPO, David Frantz, confirmed that Solyndra was still on schedule to present to a DOE Credit Review Board by January 15, 2009, but noted that a number of items influencing Solyndra's due diligence were still outstanding.[31] In an email dated December 4, 2008, Mr. Frantz explained that a draft of the independent engineer's report would not be ready until January 5.[32] In addition, it would not be possible to obtain an independent marketing report in time for the planned January CRB meeting to review Solyndra. Instead, Mr. Frantz said that the LPO planned to use "two 'off the shelf' studies[,]"[33] which he believed would be sufficient for the CRB's purposes. Finally, Mr. Frantz indicated that the DOE General Counsel had not agreed to the "term sheet template," which Frantz stated was an "integral part of the approval documentation and forms the basis of the final negotiations with the client."[34]

In addition to the outstanding items, a credit analysis of Solyndra conducted in December 2008 identified a number of potential issues with its application, chief among them the financial condition of the parent company, Solyndra, Inc., and its relationship to the DOE project company, Solyndra Fab 2, LLC. In an email dated December 15, 2008, then-Director of the LPO's Credit Policy Group, Kelly Colyar, indicated that DOE might have an "incomplete picture of the overall creditworthiness of the guaranteed obligation" to Solyndra because DOE had only evaluated and modeled the financial condition of the project company.[35] According to Ms. Colyar, the financial condition of the parent company and the DOE project company were interdependent, making them "affiliate entities within a single business enterprise[,]" so that a "disruption at the parent level could directly affect the project's receipt of revenues on a timely basis and the ability of the project to maintain uninterrupted operations."[36] Ms. Colyar recommended that the parent and project companies be modeled together as a "combined integrated enterprise[,]" so that the DOE LPO could have a better understanding of certain financial

---

[30] E-mail from Dir., U.S. Dep't of Energy Loan Programs Office, to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Nov. 19, 2008, 2:08 PM).
[31] *See* E-mail from David Frantz to Steve Isakowitz, CFO, U.S. Dep't of Energy et al. (Dec. 4, 2008, 1:59 PM) (listing the "Three Highest Priorities" for the Loan Guarantee Programs Office).
[32] *Id.*
[33] *Id. See also* E-mail from Vice President of Bus. Dev., Solyndra, Inc., to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Dec. 10, 2008, 7:23 PM)(indicating that the two "off the shelf" reports were entitled "Photovoltaic Manufacturer Shipment & Competitive Analysis 2007/2008" and "Analysis of Worldwide Markets for Photovoltaic Products and Five-Year Application Forecast 2007/2008" and dated April 2008 and July 2008, respectively).
[34] E-mail from David Frantz to Steve Isakowitz et al. (Dec. 4, 2008, 1:59 PM).
[35] E-mail from Kelly Colyar, Dir. of Credit Policy, U.S. Dep't of Energy Loan Programs Office, to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Dec. 15, 2008, 11:38 AM).
[36] *Id.*

factors, including working capital.[37] When asked to comment on Ms. Colyar's email during an interview with Committee staff, Mr. Frantz stated that the issues she had identified "raised concerns" for him.[38]

In defending its decision to award a conditional commitment to Solyndra and close the guarantee, the DOE under the Obama Administration has been quick to argue that the Bush Administration DOE conducted the due diligence and was prepared to go forward with Credit Committee and Credit Review Board meetings on Solyndra in January 2009.[39] Indeed, in his prepared testimony submitted for the September 14, 2011 hearing before the Subcommittee on Oversight and Investigations, Jonathan Silver, then-Executive Director of the LPO, stated that "much of the extensive due diligence on the transaction was conducted between 2006 and the end of 2008."[40] In an interview with Committee staff, former DOE CFO Steve Isakowitz explained that there was a "general desire to do something" before the end of the Bush Administration with regard to loan guarantees, and that the LPO had made the decision to proceed with Solyndra because it was "the furthest along" compared to the other applicants.[41] Mr. Isakowitz further explained that when no independent consultant reports had been drafted for Solyndra by early December 2008, he had the "sense" that the Solyndra loan guarantee was "not ready for primetime."[42] In fact, Mr. Isakowitz told Committee staff that he informed the Acting Chair of the CRB in the weeks leading up to January 15, 2009, that the Solyndra loan guarantee "simply was not going to be ready."[43]

---

[37] *Id.* In addition to recommending that DOE evaluate the parent company's health, Colyar also listed other concerns that needed to be addressed in order to complete Solyndra's credit analysis, such as the calculation of the debt service coverage, the terms of the interest capitalization period, the nature of the company's commitment to complete construction, and the need for a debt service reserve fund. *Id*.

[38] Frantz Interview, *supra* note 12.

[39] The Credit Committee is comprised of Loan Programs Office staff. The DOE Credit Review Board was chartered in 2007. The Credit Review Board is chaired by the Deputy Secretary of Energy and its members include senior DOE officials, including the Chief Financial Officer and General Counsel. According to a June 20, 2007 DOE press release, the "Board will establish the overall policies and procedures for DOE's Title XVII Loan Guarantee Program; coordinate credit management and debt collection activities for the program; determine which preapplicants will be invited to submit full applications; and ultimately make recommendations to the Secretary of Energy prior to the Secretary granting final approval for any Title XVII Loan Guarantee." Press Release, U.S. Dep't of Energy, DOE Reports Progress on Loan Guarantee Program (June 20, 2007), *available at* https://lpo.energy.gov/wp-content/uploads/2010/09/062007.pdf.

[40] *Solyndra and the DOE Loan Guarantee Program: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. 2 (2011) (prepared statement of Jonathan Silver, then-Executive Dir. of the U.S. Dep't of Energy Loan Programs Office), *available at* http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8897 [hereinafter, "Silver Statement" or "Silver Testimony"].

[41] Interview with Steve Isakowitz, CFO, U.S. Dep't of Energy, in Washington, D.C. (Oct. 31, 2011). *See also* E-mail from David Frantz to Steve Isakowitz et al. (Dec. 4, 2008, 1:59 PM) [hereinafter, "Isakowitz Interview"]. In addition to Solyndra, LPO staff identified two other priority issues for presentation to a Credit Review Board (CRB) by January 15, 2009: a recommendation regarding the Front End Nuclear loan guarantee applicants and a request to proceed with due diligence on the Nuclear Power Facilities applications. *Id.*

[42] Isakowitz Interview, *supra* note 41.

[43] *Id.*

When interviewed by Committee staff, David Frantz confirmed that, by late December 2008 and early January 2009, it was apparent to DOE that the Solyndra application was not ready to proceed to a Credit Review Board and conditional commitment. While Mr. Frantz stated that he was responsible for setting the original schedule for a January 15, 2009 CRB meeting, he came to conclude that a January 2009 CRB approval of a conditional commitment to Solyndra was "too premature."[44] Further, with regard to the concerns raised by Ms. Colyar about the Solyndra loan guarantee, Mr. Frantz indicated that it was "not common" for those types of issues to be unresolved at the time of a Credit Committee meeting or conditional commitment.[45]

Instead, according to Mr. Frantz, the LPO submitted the Solyndra application to the Credit Committee in order to "test out the process" rather than seek "ultimate approval."[46] Like Mr. Frantz and Mr. Isakowitz, the Credit Committee that ultimately convened on January 9, 2009, concluded that a "recommendation for approval" of the Solyndra application was "premature at this time" due to the "number of issues unresolved."[47] The unresolved issues identified by the Credit Committee were similar to some of the issues identified by Ms. Colyar and Mr. Frantz in December 2008. For example, the Credit Committee noted the lack of an independent market analysis and stated that "[s]ince the independent credit assessment raised the issue of obsolescence in marketing this project it is important to have an independent analysis of that issue as well as the current state of the competitive market."[48] The Credit Committee also echoed Ms. Colyar's concerns about "the nature and strength of the parent guarantee for the completion of the project."[49] For those reasons, the Credit Committee remanded the project to the Loan Guarantee Program Office, within the LPO.[50]

Just days after the Credit Committee meeting, then-Chairman of the Credit Committee, Lachlan Seward, sent an email to the other committee members as well as DOE staff, stating that "[a]fter canvassing the committee it was the unanimous decision not to engage in further discussions with Solyndra at this time."[51] In his interview, Mr. Isakowitz confirmed the decision of the Credit Committee not to engage in further discussions with Solyndra at that time.[52]

---

[44] Frantz Interview, *supra* note 12.
[45] *Id.*
[46] *Id.*
[47] Memorandum from Chairman of the Loan Guarantee Credit Comm. to Dir. of the Loan Guarantee Program Office, *Credit Committee Recommendation re: Solyndra Fab 2 LLC, solar photovoltaic power panel project for a loan guarantee of $535,000,000* (n.d.) (discussing recommendations made during the January 9, 2009 meeting of the Credit Committee).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] E-mail from Lachlan Seward, Chairman, Loan Guarantee Credit Comm., U.S. Dep't of Energy, to David Frantz et al. (Jan. 13, 2009, 12:30 PM).
[52] Isakowitz Interview, *supra* note 41.

D. The Stimulus and Other Changes to the DOE Loan Guarantee Program Under the Obama Administration

Two factors played a significant role in the operation of the Loan Programs Office from 2009 forward: a directive from DOE Secretary Chu to the LPO to take measures to accelerate the review and issuance of loan guarantees and the passage of the stimulus.

In an interview with Committee staff, Mr. Isakowitz said that in the "first days" of the Administration, Secretary Chu met with Mr. Isakowitz and Mr. Frantz and asked them about the status of the Loan Guarantee Program. Mr. Isakowitz explained that this was due, in part, to the fact that Secretary Chu had been asked during his confirmation hearings in January 2009 about the program's failure to issue any loan guarantees in the four years since it had been authorized. Mr. Isakowitz stated that he spent a great deal of time with Secretary Chu in the early days of the Administration explaining the LPO processes and discussing with him what changes could be made to accelerate them. According to Mr. Isakowitz, Secretary Chu did not set deadlines for specific loans, but the Secretary did press for the LPO to "move much faster."[53] Secretary Chu also asked what actions needed to be taken in order to accelerate the pace of review and issuance of loan guarantees, including increased staffing in the LPO.[54] Matt Rogers, Senior Advisor to the Secretary of Energy for Recovery Act Implementation (ARRA Advisor), confirmed the Secretary's interest in accelerating the processes of the LPO, stating in testimony before the House Committee on Science and Technology in March 2009 that "Secretary Chu has directed us to accelerate the process significantly and deliver the first loans in a matter of months, while maintaining appropriate oversight and due diligence to protect taxpayers' interests."[55]

The enactment of the stimulus and the related political pressure also contributed to Secretary Chu's directive to accelerate the Loan Guarantee Program. The stimulus made significant changes to the DOE Loan Guarantee Program. For certain kinds of "clean energy" loan guarantee projects[56] (referred to as "Section 1705" loan guarantees), the stimulus appropriated approximately $6 billion in funding to pay for the credit subsidy costs of these projects.[57] In order to be eligible for this funding, the stimulus required that the projects begin construction no later than September 30, 2011. In an interview with Committee staff, Matt Rogers explained that the September 30, 2011, deadline necessarily forced DOE to "reduce the cycle time" for the reviews of loan

---

[53] *Id.*
[54] *Id.*
[55] *Processes for Management and Oversight of ARRA Activities: Hearing Before the Subcomm. on Investigations & Oversight of the H. Comm. on Science & Technology*, 111th Cong. 7 (2009) (statement of Matthew Rogers, then-Senior Advisor to the Sec'y of Energy for Recovery Act Implementation, U.S. Dep't of Energy), *available at* http://energy.gov/sites/prod/files/ciprod/documents/3-19-09_Final_Matt_Rogers_Testimony.pdf.
[56] Only certain renewable energy, electric transmission, and leading edge biofuels systems loan guarantee projects are eligible for funding under the stimulus. Nuclear projects were not eligible.
[57] Ultimately, Congress transferred $3.6 billion of this funding to other programs, leaving DOE with $2.4 billion for the credit subsidy costs.

guarantee applications.[58] Mr. Rogers explained that his job was to ensure that all DOE Recovery Act programs had clear decision-making timelines so that the stimulus funds were spent by the deadlines set forth in the law.[59]

The appropriation in the stimulus for credit subsidy costs was critical to the ability of DOE to issue loan guarantees for clean energy projects because many of the applicants had been unable to come up with the funding themselves. However, this appropriation had a foreseeably adverse effect with respect to the risks associated with the projects. As Mr. Isakowitz stated in an interview with Committee staff, under the original Section 1703 program, borrowers were required to pay the credit subsidy costs themselves, and were thus incentivized to carefully review their projects and minimize any potential risks because these risks would result in higher credit subsidy costs. Under the stimulus, with the government instead paying the subsidy on behalf of the borrowers, the incentive for the borrowers to minimize risks in the project was largely eliminated as the borrowers now had much less "skin in the game."[60] The stimulus allowed Solyndra, and other applicants under Section 1705, to use taxpayer money to pay the credit subsidy costs of the loan guarantees.

E. Review of the Solyndra Application Leading to the March 2009 Conditional Commitment

With the enactment of the stimulus, DOE's review of the Solyndra application became a top Obama Administration priority.

On January 26, 2009, just days after President Obama was inaugurated, Ms. Colyar sent an email to her fellow LPO staff members who were reviewing the Solyndra application stating that "[a]s we are approaching the beginning of the approval process for Solyndra again, I wanted to highlight the questions . . . that remain outstanding."[61] Ms. Colyar forwarded to the Solyndra review team in the LPO the same list of issues she had identified in December 2008.[62] Four days later, DOE selected R.W. Beck, Inc. to conduct the market analysis for the Solyndra application.[63]

During the month of February, DOE and Solyndra continued to negotiate the outstanding items on the term sheet. The primary outstanding issue between the two parties appeared to be the debt-to-equity ratio of the loan guarantee. Solyndra pushed for

---

[58] Interview with Matt Rogers, Former Senior Advisor to the Sec'y of Energy for Stimulus Implementation, U.S. Dep't of Energy, in Washington, D.C. (Nov. 9, 2011) (notes on file with author) [hereinafter, "Rogers Interview"].
[59] *Id.*
[60] Isakowitz Interview, *supra* note 41.
[61] E-mail from Kelly Colyar to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Jan. 26, 2009, 5:15 PM).
[62] E-mail from Kelly Colyar to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Jan. 26, 2009, 5:12 PM).
[63] *See* E-mail from Contracting Officer, U.S. Dep't of Energy, to Vice President, R.W. Beck, Inc. et al. (Jan. 30, 2009, 4:16 AM) (stating that R.W. Beck's Statement of Capability, Availability and Price "has been selected as the best value to DOE."). R.W. Beck also authored the independent engineering report for Solyndra.

an 80 to 20 percent debt-to-equity split, while DOE argued that Solyndra should raise more equity for the deal.[64] Mr. Rogers confirmed to Committee staff that Solyndra's equity participation was a key outstanding issue, because the company was concerned about its ability to raise equity in the market environment that existed at that time.[65] Mr. Isakowitz explained that the debt-to-equity split was an important issue to DOE due to the fact that the stimulus had provided funding for the credit subsidy costs of the Section 1705 loan guarantees; the equity contribution, therefore, was the only way for DOE to force the applicants to have some "skin in the game."[66] Another key issue, and one identified by the first Credit Committee, was the submission of the market analysis, because it would test whether DOE's assumptions about the strength of Solyndra's market were correct.[67] Other outstanding deal terms included the interest rate, Solyndra's commitment to fund a cost overrun account, and whether that account must be pre-funded.

As the LPO review team on Solyndra continued to negotiate these terms with the company, Mr. Rogers was pushing the LPO to complete their deals so that conditional commitments could be finalized. In an email from Mr. Rogers to Mr. Isakowitz on February 21, 2009, Mr. Rogers asked if they could meet to "discuss how we mght [*sic*] put swat teams together to complete [Credit Review Board] review for the top three deals in three.weeks [*sic*]."[68] He also noted that the LPO could "benefit from some more resources" in order to meet that timetable.[69] According to Mr. Rogers, a three week schedule for completing a deal was consistent with staff's timetable for Solyndra.[70]

Two weeks later, on March 5, 2009, the Credit Committee and Credit Review Board meetings were scheduled. Documents produced to the Committee, as well as interviews conducted with DOE staff, demonstrate that these meetings were scheduled in coordination with the White House. On March 5, 2009, one LPO staff member sent an email to colleagues in the LPO stating, "Hot off the press. Dates were reviewed with Matt Rogers. The wish is to have Solyndra through the CRB in time for the President's speech in California on the 18th."[71] Further, on March 5, 2009, Mr. Isakowitz sent an email to Mr. Frantz asking how the negotiations with Solyndra ended, and stating that

---

[64] *See* E-mail from Chris Gronet, CEO, Solyndra, Inc., to Steve Isakowitz (Feb. 20, 2009, 1:56 PM). *See also* E-mail from Program Manager, U.S. Dep't of Energy Loan Programs Office, to Dir., U.S. Dep't of Energy Loan Programs Office at al. (Feb. 27, 2009, 9:43 AM)(describing the debt-to-equity issue as a "fundamental difference" between DOE and Solyndra in their negotiations) *and* E-mail from Vice President & Gen. Counsel, Solyndra, Inc., to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Feb. 26, 2009, 11:07 PM) (stating that Solyndra was willing to make certain concessions in order to obtain the "80/20 debt/equity split").

[65] Rogers Interview, *supra* note 58.

[66] Isakowitz Interview, *supra* note 41.

[67] *Id.*

[68] E-mail from Matt Rogers to Steve Isakowitz & David Frantz (Feb. 21, 2009, 2:07 AM) (discussing "Swat teans [*sic*] on solyndra, beacon. And [*Redacted*].").

[69] *Id.*

[70] Rogers Interview, *supra* note 58.

[71] E-mail from Dir., U.S. Dep't of Energy Loan Programs Office, to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Mar. 5, 2009, 5:10 PM) (discussing "Project Processing Timelines" and attaching an excel spreadsheet entitled "Project Processing_Accelerated Timelines-Shaded.").

"[a]ssuming we can get to a handshake, I need to send to Rod O'Connor the significance of the event so he can send to the WH."[72]

The next day, on March 6, 2009, Mr. Rogers emailed Ronald Klain, Vice President Biden's Chief of Staff, and Rod O'Connor, Chief of Staff to Secretary Chu, regarding the timetable for Solyndra's application. In that email, Mr. Rogers stated "we are on track to have potus announce the first doe loan to solyndra a thin film solar mfg in la on march 19, assuming their board approves the terms this monday. We will then need credit committee and credit [review] board meetings on our side next week to confirm the conditional commitment . . . . So, we are working the weekend to make both go. Your call on next steps."[73] That same day, David Frantz sent an email to Mr. Isakowitz noting that the Credit Committee and Credit Review Board meetings for Solyndra had been scheduled for March 12 and March 17, respectively.[74]

In an interview with Committee staff, Mr. Rogers claimed that the scheduling of the Solyndra Credit Committee and Credit Review Board meetings was not related to the scheduling of the President's speech. According to Mr. Rogers, Mr. O'Connor was aware of the processing timelines for the loan guarantees developed by LPO staff and he would communicate with "other folks" about their schedules for events; the Solyndra schedule and the White House events schedule, therefore, were "two different decisions."[75]

Documents indicate, however, that the scheduling of President Obama's speech on March 19 set the timetable for the Credit Committee and Credit Review Board meetings for Solyndra. At the time those meetings were scheduled, the DOE LPO review team had yet to resolve significant matters in the Solyndra deal. For example, when the March 5, 2009, email announced the scheduling of the Solyndra Credit Committee and Credit Review Board meetings, DOE had not received a draft of the independent market report from consultant R.W. Beck. That report arrived the following day, March 6.[76] Further, Solyndra and DOE had not yet reached a final agreement on the debt-to-equity split for the loan guarantee. An email from Christian Gronet, then-CEO of Solyndra, to Mr. Isakowitz on March 7, 2009, confirms that significant deal terms, in particular, the finance structure and debt-to-equity ratio, were still unresolved at the time the CRB meeting was scheduled. In that email, Mr. Gronet explained that Solyndra would not agree to a corporate finance structure and that the company had agreed to certain fees and

[72] E-mail from Steve Isakowitz to David Frantz (Mar. 5, 2009, 7:04 PM) (including the subject line "CALL ME PLEASE.").
[73] E-mail from Matt Rogers to Ron Klain, Chief of Staff, Office of the Vice President & Rod O'Connor, Chief of Staff to U.S. Dep't of Energy Sec'y Steven Chu (Mar. 6, 2009, 6:03 PM) (discussing "White house energy events next two weeks.").
[74] *See* E-mail from David Frantz to Steve Isakowitz (Mar. 6, 2009, 9:32 AM).
[75] Rogers Interview, *supra* note 58.
[76] *See* E-mail from Principal, R.W. Beck, to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Mar. 6, 2009, 3:35 PM) (transmitting R.W. Beck's "first draft of [its] Independent Market Consultant's Report with respect to the Solyndra Fab 2 manufacturing Facility.") [R.W. Beck Production at RWB0018613].

a cost overrun guarantee in order to achieve the 80 to 20 percent debt-to-equity split.[77] Mr. Isakowitz stated to Committee staff that the corporate finance structure, as opposed to a project finance arrangement, was preferable, but not a "make or break" issue; in contrast, the debt-to-equity issue was a critical one for DOE, because it was the "only way to get skin in the game."[78]

DOE and Solyndra finally reached an agreement on a proposed term sheet shortly after midnight on Tuesday, March 10, 2009. In an email to Mr. Frantz, Mr. Rogers, and other DOE staff on March 10, Mr. Isakowitz noted that Solyndra had "blinked."[79] Confirming that the possibility of a White House speech was a factor influencing the Solyndra review schedule, Mr. Rogers responded, asking two LPO staff members to "prepare a short memo for the whitehouse folks on what an announcement could look like on the 19th. We will want to try to get to [the Credit Review Board] on friday to make sure we have enough time for the wh folks. Solyndra will be happy they blinked when potus arrives."[80] [*sic*] Shortly after receiving this email, Mr. Isakowitz emailed Mr. O'Connor to gauge White House interest in a Solyndra announcement. He asked if there was "still an interest in a loan announcement on March 19th? I ask because we successfully wrapped up intense negotiations yesterday for a conditional commitment with Solyndra. There's still much paperwork to complete and wanted to check how hard we need to press."[81] Mr. O'Connor replied, stating that "[t]here is still strong interest . . . that is great news and great work. When does the CRB meet?"[82] Mr. Isakowitz explained that the Credit Review Board meeting was originally planned for March 17, but "we will move it up to this Friday [March 13] now that I know there is still great interest."[83]

Although DOE had planned to accelerate the CRB process in order to accommodate the President's speech on March 19, 2009, it was ultimately not necessary. When Mr. Rogers informed Ronald Klain, Vice President Biden's then-Chief of Staff, on March 10, 2009, that Solyndra had approved the proposed term sheet "setting us up for the first loan guarantee conditional commitment for the president's visit to california on the 19th,"[84] Mr. Klain asked Mr. Rogers to confirm that Solyndra was located in Los Angeles, rather than Northern California.[85] After Mr. Rogers noted that Solyndra's facilities were in Northern California, Mr. Klain explained that "[t]he President is not traveling to Fremont. He is going to So Cal."[86] Mr. Rogers then floated the option of featuring a DOE loan to Tesla, under the ATVM program, but noted that the LPO staff did not think they could complete the work in time.[87] Mr. Klain replied that "we have no

[77] *See* E-mail from Chris Gronet to Steve Isakowitz (Mar. 7, 2009, 10:07 PM).
[78] Isakowitz Interview, *supra* note 41.
[79] E-mail from Steve Isakowitz to David Frantz et al. (Mar. 10, 2009, 12:28 AM).
[80] E-mail from Matt Rogers to Steve Isakowitz et al. (Mar. 10, 2009, 5:41 AM).
[81] E-mail from Steve Isakowitz to Rod O'Connor & Matt Rogers (Mar. 10, 2009, 8:38 AM).
[82] E-mail from Rod O'Connor to Steve Isakowitz (Mar. 10, 2009, 9:15 AM).
[83] E-mail from Steve Isakowitz to Rod O'Connor (Mar. 10, 2009, 10:14 AM).
[84] E-mail from Matt Rogers to Ron Klain & Rod O'Connor (Mar. 10, 2009, 10:04 AM).
[85] *See* E-mail from Ron Klain to Matt Rogers & Rod O'Connor (Mar. 10, 2009, 10:06 AM).
[86] E-mail from Ron Klain to Matt Rogers & Rod O'Connor (Mar. 10, 2009, 10:30 AM).
[87] *See* E-mail from Matt Rogers to Ron Klain & Rod O'Connor (Mar. 10, 2009, 10:33 AM).

energy events for this trip,"[88] and then advised that they "work backwards" to figure out a possible event for March 19.[89] According to Mr. Klain, "[t]he President wants do to an event in LA on 3/19 that relates to Recovery Act, and our clean energy future. It can be about electric cars generally — or smart grid — or solar. We just need to link clean energy future, jobs, and Recovery Act."[90] Mr. Rogers wrote back to Mr. Klain and proposed three options, one of which was to have Solyndra officials come to Southern California to sign the conditional commitment at the speech.[91] Mr. Rogers explained in an interview with Committee staff that the White House eventually opted to highlight a different project.[92] With that decision, DOE decided to keep the CRB meeting on March 17, instead of advancing the date to March 13, "since any need to accelerate has been removed."[93]

These emails, and the fact that several significant terms were still unresolved at the time the Solyndra Credit Review Schedule was set, establish that the White House's desire to highlight Recovery Act-related programs was a determining factor in the timing of the Solyndra loan guarantee application review.

F. March 2009 DOE Credit Committee and Credit Review Board Meetings

On March 12, 2009, a DOE LPO Credit Committee met for a second time to consider the Solyndra loan guarantee application. The membership of the March 2009 Credit Committee was the same as the January 2009 Credit Committee, with the same Chairman, Lachlan Seward.

Less than two months after it had remanded the Solyndra application during the Bush Administration, the March 12, 2009, Credit Committee unanimously approved the Solyndra loan guarantee application. That approval, however, was subject to the condition that the LPO provide responses to certain "follow-up concerns."[94] Specifically, the Credit Committee noted that the R.W. Beck Independent Engineer's Report had indicated that there "may be problems with several manufacturing processes ramping up to full production."[95] The Credit Committee recommended that this issue be monitored throughout project development. In addition, the Credit Committee found that "[a]dditional analysis is needed to track market revenue information to per unit revenues and costs[.]"[96]

---

[88] E-mail from Ron Klain to Matt Rogers & Rod O'Connor (Mar. 10, 2009, 10:34 AM).
[89] E-mail from Ron Klain to Matt Rogers & Rod O'Connor (Mar. 10, 2009, 10:42 AM).
[90] *Id.*
[91] *See* E-mail from Matt Rogers to Ron Klain & Rod O'Connor (Mar. 10, 2009, 1:02 PM).
[92] Rogers Interview, *supra* note 58.
[93] E-mail from David Frantz to Steve Isakowitz (Mar. 10, 2009, 1:04 PM). *See also* E-mail from David Frantz to Rod O'Connor, Matt Rogers & Steve Isakowitz (Mar. 10, 2009, 4:23 PM) ("Presume this should work since there is no pressure now with no Solyndra activity in Socal.").
[94] *See* Memorandum from Lachlan W. Seward, Chairman, Loan Guarantee Program Credit Comm., U.S. Dep't of Energy, to David Frantz, Dir., U.S. Dep't of Energy Loan Programs Office, *Review of the Solyndra Fab 2 Credit Paper for $535 million in Title XVII Loan Guarantees* (Apr. 2, 2009) [hereinafter, "Mar. 12, 2009 Credit Committee Memorandum"].
[95] *Id.*
[96] *Id.*

Most importantly, the March 12, 2009, Credit Committee listed eleven questions related to the Solyndra application that the members believed needed clarification or resolution. Some of these follow-up questions are similar in nature to the concerns identified by the January 2009 Credit Committee. For example, the March 2009 Credit Committee asked the LPO to instruct R.W. Beck, the independent consultant who conducted the market analysis, to provide an additional analysis of competitors.[97] The Credit Committee observed that the first draft of the market report stated that this analysis would be submitted, "but very little competitor information is provided" in the report.[98] The Credit Committee recommended that the market analysis address certain factors, including "working capital assumptions," a concern previously identified by the DOE LPO Credit Policy Group as early as December 2008.[99] Similarly, the Credit Committee also asked the LPO to provide an "analysis of the parent company's financials and comment on the lack of alignment between the parent company financials and those of Solyndra Fab 2, LLC. In particular, we note that the working capital assumptions . . . do not align . . . ."[100] In addition, the Credit Committee noted in its issues for follow-up that the DOE LPO had "indicated that there is a separate form of parent guarantee agreement to be developed." The Credit Committee asked the LPO staff to identify "where in the term sheet this is discussed."[101]

During interviews, Committee staff asked Ms. Colyar, Mr. Frantz, Mr. Rogers, and current and former DOE LPO staff who participated in the review of the Solyndra application, to explain the significance of the follow-up questions identified by the Credit Committee. While Ms. Colyar and Mr. Frantz stated that it was not unusual for DOE Credit Committees to list follow-up questions, Mr. Frantz acknowledged that the eleven questions identified by the March 2009 Credit Committee were more than the usual number of questions for applications reviewed by the Credit Committee.[102] Mr. Frantz, the then-Director of the LPO, explained that the LPO typically provided answers to the follow-up questions before the CRB meeting. Ms. Colyar, however, had a different view, stating during her interview by Committee staff that it was not unusual for the LPO to move forward with the CRB meeting with certain issues still unresolved.[103]

In any event, information submitted by DOE to Committee staff demonstrates that the LPO resolved only one of the eleven questions identified by the March 2009 Credit Committee prior to the approval of the Solyndra conditional commitment by the CRB: the question regarding the parent guarantee for the project.[104] DOE explained that the

---

[97] *See id.* at "Questions/Issues for Clarification and Resolution" Question 4.
[98] *Id.*
[99] *Id.*
[100] *Id* at Question 8.
[101] *Id.*at Question 1.
[102] Frantz Interview, *supra* note 12.
[103] Interview with Kelly Colyar, Former Dir. of Credit Policy, U.S. Dep't of Energy Loan Programs Office, in Washington, D.C. (Feb. 29, 2012) [hereinafter, "Colyar Interview"].
[104] *See* E-mail from Christopher Davis, Deputy Assistant Sec'y for Congressional Affairs, U.S. Dep't of Energy, to Energy & Commerce Comm. Staff (Nov. 16, 2011, 10:08 PM) [hereinafter, "Nov. 16, 2011 E-mail to Committee Staff"].

parent guarantee by Solyndra, Inc., was resolved in the term sheet, which was executed at the time of conditional commitment.[105] The remaining ten questions, however, were not addressed until well after the conditional commitment. For example, the March Credit Committee's request for additional information about Solyndra's market competitors — the absence of which was a cause for remand by the first Credit Committee in January — was not provided until a month after the conditional commitment, in the form of a new draft of the Independent Market Report. Even then, R.W. Beck was not able to provide all the market information requested by the DOE Credit Committee. According to emails provided to the Committee by R.W. Beck, DOE asked R.W. Beck to provide information about Solyndra's competitors and their market share.[106] R.W. Beck concluded that it would be "difficult" to determine the "number of white roofs in any given location" in order to calculate Solyndra's market,[107] and that existing market studies did not contain information about competitors' market share.[108] The other nine follow-up questions identified by the March 2009 Credit Committee were not addressed until the month before the loan guarantee closed in September 2009.[109] DOE claims that these nine items were addressed either in the terms of the Common Agreement executed by Solyndra and DOE at closing or in discussions and information exchanged among and between DOE staff and Solyndra in August 2009.[110]

Even though the vast majority of the Credit Committee's questions had not been addressed, the CRB meeting went forward on March 17, 2009. The CRB members were Mr. O'Connor, Mr. Rogers, Mr. Isakowitz, and Eric Fygi, then-Acting General Counsel of DOE.[111] A number of the LPO staff made presentations about the various components of the Solyndra application, including the Credit Policy review and the National Environmental Policy Act (NEPA) assessment. LPO staff also fielded questions from the CRB members about the Solyndra application. After just over one hour of discussion, the CRB unanimously approved the offer to Solyndra of a $535 million loan guarantee.[112]

G. DOE's Consultation With the Department of the Treasury Pursuant to Title XVII of the Energy Policy Act of 2005

Pursuant to Title XVII of the Energy Policy Act of 2005, and its implementing regulations, the Secretary of Energy must consult with the Secretary of the Treasury prior to making loan guarantees. Specifically, Section 1702(a) of Title XVII provides that the "Secretary shall make guarantees . . . for projects on such terms and conditions as the

---

[105] *See id.*
[106] *See* E-mail from Principal, R.W. Beck, Inc., to Senior Vice President, R.W. Beck, Inc. et al. (Apr. 7, 2009, 6:21 PM) [R.W. Beck Production at RWB0018610].
[107] *Id.*
[108] *See* E-mail from Principal, R.W. Beck, Inc., to Employee, R.W. Beck, Inc. (Apr. 15, 2009, 11:31 PM) (stating that DOE had not "expected much" with regard to its request for additional market competitor information) [R.W. Beck Production at RWB0018614-15].
[109] *See* Nov. 16, 2011 E-mail to Committee Staff, *supra* note 104.
[110] *See id.*
[111] *See* Minutes of the Meeting of the Dep't of Energy Credit Review Bd. (Mar. 17, 2009), as approved at the Meeting of the Dep't of Energy Credit Review Bd. (Apr. 28, 2009).
[112] *See id.*

Secretary determines, after consultation with the Secretary of the Treasury . . . ."[113] The implementing regulations state that DOE "will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee," and that this consultation must take place "[c]oncurrent with [DOE's] review process."[114]

A report issued by the Inspector General of the U.S. Department of the Treasury (Treasury IG) on April 3, 2012, found that the DOE did not consult with Treasury on the terms and conditions of the Solyndra loan guarantee "prior to or concurrent with DOE's review process," as required by the statute and the regulations.[115] Further, the report noted that the consultation that did occur between DOE and Treasury took "about 1 day," so that DOE could issue a press release announcing the Solyndra conditional commitment.[116] Although Treasury officials told the Treasury IG that there was "enough time" to review the terms and conditions of the Solyndra guarantee, the Treasury IG nonetheless concluded that the consultation was "rushed."[117]

Treasury's documents and emails produced to the Committee confirm the Treasury IG's finding that the Solyndra consultation in March 2009 was rushed. These documents show that Treasury first provided some comments on a version of the Solyndra term sheet that was circulated in January 2009, just after the first Solyndra Credit Committee meeting. At that time, Treasury provided comments on three sections of the term sheet: two sections that dealt with the requirements of the Federal Financing Bank (FFB) relating to disbursements of the loan guarantee and one section that addressed the interest rate calculation.[118] One FFB staff member then forwarded her comments on the proposed term sheet to Gary Burner, Chief Financial Officer of the FFB, and two other Treasury staff members.[119]

Following the decision of the first DOE Credit Committee to remand the Solyndra application for further due diligence, Treasury was not asked to consult on the final Solyndra term sheet until just two days before the DOE Credit Committee meeting and one week before the scheduled Credit Review Board meeting. On March 10, 2009, one FFB staff member emailed Mr. Burner to inform him that DOE "apparently negotiated a deal with Solyndra last night."[120] Consistent with the Treasury IG's analysis that Treasury had not been consulted about the terms and conditions of the Solyndra loan guarantee concurrent with DOE's review, the FFB staff member told Mr. Burner that "I

---

[113] 42 U.S.C. § 16512(a).
[114] 10 C.F.R. § 609.7(a).
[115] OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF TREASURY, AUDIT REPORT: CONSULTATION ON SOLYNDRA LOAN GUARANTEE WAS RUSHED, OIG-12-048, at 5 (Apr. 3, 2012) [hereinafter, "OFFICE OF INSPECTOR GENERAL SOLYNDRA AUDIT REPORT"].
[116] *Id.* at 9.
[117] *Id.* at 7.
[118] *See* E-mail from Assistant to the CFO of the Fed. Fin. Bank, to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Jan. 12, 2009, 11:21 PM) [Treasury Production at 002253-54].
[119] *See* E-mail from Assistant to the CFO of the Fed. Fin. Bank, to Gary Burner, CFO, Fed. Fin. Bank, U.S. Dep't of Treasury et al. (Jan. 12, 2009, 11:27 PM) [Treasury Production at 002300-02].
[120] E-mail from Assistant to the CFO of the Fed. Fin. Bank, to Gary Burner (Mar. 10, 2009, 9:22 AM) [Treasury Production at 002436].

have not seen the deal at all."[121] She noted that the "[r]umor is that POTUS is going to california next week."[122] Later, she notified Mr. Burner that the Credit Committee would meet shortly and that the Credit Review Board would meet "no later" than March 17. She further stated that talking points on the deal were being prepared for the President.[123] Mr. Burner then forwarded the FFB staff member's update on an impending Solyndra conditional commitment to the Treasury Office of General Counsel, noting that "[t]here was supposed to be some form of Treasury consultation too."[124] Mr. Frantz forwarded the final draft of the Solyndra term sheet to Mr. Burner on March 10.[125] Three days later, on March 13, Ms. Colyar forwarded to Treasury the draft market analysis conducted by R.W. Beck.[126]

The testimony of Gary Grippo, the Treasury Deputy Assistant Secretary for Government Financial Policy, during an October 14, 2011, hearing before the Subcommittee on Oversight and Investigations further supports the Treasury IG's finding that DOE did not consult with Treasury concurrent with its review of the Solyndra application. During the hearing, Mr. Grippo testified that it was "around this time of March 10th" that Treasury was "provided information on the terms and conditions of the loan."[127] When asked about an email between OMB staff that stated that DOE "sprung" Solyndra on Treasury, Mr. Grippo testified that "[w]e were not aware they were going to come to us with a term sheet for the Solyndra loan at that time."[128]

On March 17, 2009 – the same day as the Solyndra CRB meeting – Paula Farrell, Director of the Office of Policy and Legislative Review at Treasury, sent an email to several OMB and Treasury staff, including Ken Carfine, Treasury Fiscal Assistant Secretary, Karthik Ramanathan, then-Acting Assistant Secretary for Financial Markets, and Preston Atkins of the Office of Small Business Development.[129] In that email, Ms. Farrell complained that Treasury had not had the opportunity to consult on the Solyndra

---

[121] *Id.*
[122] *Id.*
[123] E-mail from Assistant to the CFO of the Fed. Fin. Bank, to Gary Burner (Mar. 10, 2009, 10:04 AM) [Treasury Production at 002436].
[124] E-mail from Gary Burner to Deputy Assistant Gen. Counsel, U.S. Dep't of Treasury (Mar. 10, 2009, 11:22 AM) [Treasury Production at 002451].
[125] *See* E-mail from David Frantz to Gary Burner (Mar. 10, 2009, 1:13 PM) (forwarding the final draft of the Solyndra term sheet) [Treasury Production at 002457].
[126] *See* E-mail from Kelly Colyar to Assistant to the CFO of the Fed. Fin. Bank (Mar. 13, 2009, 11:21 AM) [Treasury Production at 002496].
[127] *Continuing Developments Regarding the Solyndra Loan Guarantee: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. 25 (2011) (statement of Gary Grippo, Deputy Assistant Sec'y for Gov. Fin. Policy, Dep't of Treasury) [hereinafter, "Statement of Gary Grippo"].
[128] *Id.* at 25. *See also* E-mail from Program Analyst, OMB, to Richard Mertens, Deputy Associate Dir., OMB et al. (Mar. 10, 2009, 3:43 PM) ("Treasury was apparently not very pleased to have Solyndra sprung on them today (consultation on terms and condition[s] required by Title XVII) and let Matt Rogers know about it in no uncertain terms.").
[129] *See* E-mail from Paula Farrell, Dir., U.S. Dep't of Treasury Office of Policy & Legislative Review, to Ken Carfine, Fiscal Assistant Sec'y, U.S. Dep't of Treasury et al. (Mar. 17, 2009, 4:27 PM) [Treasury Production at 002547-48].

terms and conditions ahead of the conditional commitment.[130] Ms. Farrell also noted that the Energy Policy Act required that the DOE Secretary consult with Treasury. According to Ms. Farrell, Treasury had made "very clear" to DOE during the drafting of the Energy Policy Act regulations that Treasury "wanted to be involved in the development of the terms and conditions of any guarantee and not be brought in at the tail end when the terms of the deal had already been negotiated."[131] She noted that, unfortunately, Treasury was being brought in "at the tail end" and asked OMB to "call for a meeting with Energy" to make sure that "Treasury has a real opportunity to review and evaluate the proposed deal and seek any needed changes."[132] Ms. Farrell concluded her email by stating, "We believe OMB will have concerns with the proposed terms and conditions as do we."[133]

One of the OMB employees who received Ms. Farrell's email responded on the same day and informed Treasury staff that the DOE Credit Review Board was moving forward. As this meant that DOE could sign the term sheet at any time, the OMB employee "strongly urge[d] Treasury to contact Secretary Chu's office if Treasury wants to weigh in on the Terms and Conditions."[134] Assistant Secretary Carfine contacted the DOE ARRA advisor, Mr. Rogers, on March 17, 2009, and informed him that the "folks in our Government Financial Policy area mentioned that there were suppose [*sic*] to be consultations with Treasury before the agreements are signed."[135] Mr. Carfine asked Mr. Rogers if there would be an "opportunity for Treasury to provide input or is the current version a done deal."[136] Mr. Rogers responded, explaining that the DOE Credit Review Board had, in fact, approved the Solyndra terms that day and was preparing to issue a press release on March 18, 2009, to announce the deal.[137] He stated that it was his understanding that the "FFB team" had reviewed and approved the transaction the previous day and that DOE was "just waiting for [a] formal letter from treasury confirming that support in writing."[138] Mr. Rogers noted that they should talk immediately if his understanding was not correct.

After receiving Mr. Rogers' email explaining that DOE was planning to move forward with a press release on March 18, 2009, to announce the Solyndra conditional commitment, Mr. Carfine forwarded it to Ms. Farrell, noting that he believed "this train is pulling out of the station."[139] Mr. Carfine asked Ms. Farrell whether "[g]iven the sensitivity around auto issues do we really want to try to slow this down? Do we have any issues with the term sheet?"[140] She responded by informing him that "Energy staff

---

[130] *See id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] E-mail from Program Analyst, OMB, to Paula Farrell et al. (Mar. 17, 2009, 5:57 PM) [Treasury Production at 002547].
[135] E-mail from Ken Carfine to Matt Rogers (Mar. 17, 2009, 6:48 PM) [Treasury Production at 002553-54].
[136] *Id.*
[137] E-mail from Matt Rogers to Ken Carfine & Steve Isakowitz (Mar. 17, 2009, 7:12 PM) [Treasury Production at 002553].
[138] *Id*.
[139] E-mail from Ken Carfine to Paula Farrell (Mar. 17, 2009, 7:23 PM) [Treasury Production at 002553].
[140] *Id.*

have now agreed to talk to us about the deal at hand. after [*sic*] learning Treasury was going to call about stopping the train."[141] However, that same day, documents indicate that Mr. Frantz informed Mr. Burner, CFO of the FFB, that DOE planned to issue a press release at 1:30 p.m. that afternoon.[142] Mr. Burner explained that the "Secretary of Energy is under pressure to get a program announced."[143] He stated that Mr. Frantz was prepared to brief Treasury that day and that Mr. Frantz had admitted to him "that the process could have been better," and that he wanted to "improve the process."[144]

When Ms. Farrell became aware of DOE's plans to issue a press release on the afternoon of March 18, she notified Karthik Ramanathan, then-Acting Assistant Secretary for Financial Markets.[145] Mr. Ramanathan, in turn, notified three senior Treasury officials, including Treasury Secretary Timothy Geithner's Chief of Staff, Mark Patterson, about DOE's plan to announce the Solyndra conditional commitment that afternoon. Mr. Ramanathan noted that DOE's press release would state that the Department of the Treasury had consulted on the terms and conditions, but he explained that Treasury "didn't get these 'terms' until just now."[146] Further, he stated that Treasury had "blocked the release from being issued last night [March 17] since the Secretary of the Treasury has not agreed to anything or been consulted, but now the Sec of Energy wants to release it today."[147] He then informed them that a teleconference was scheduled for that afternoon so that a recommendation could be made to the Secretary of the Treasury. He concluded his summary of events by noting that "Energy is being very difficult on this issue."[148]

Treasury staff began their review of the Solyndra term sheet on March 18, 2009. Mr. Burner stated that there were "three things [he] would change in a perfect world."[149] The first issue was the debt-to-equity split of the Solyndra loan guarantee. Mr. Burner stated, "This should have been 65% debt and 35% equity instead of 73% debt and 27% equity."[150] He noted that "[t]his is the first deal out the door and I am worried that it will set a standard for subsequent deals . . . DOE says that their hands are tied on this issue because the law says the loan can cover up to 80% of the project cost. They are under pressure to complete a deal. The borrower says they cannot raise the additional capital in this credit market."[151] Mr. Burner went on to explain that he doubted this explanation, because Solyndra had just refinanced their first fabrication line; the line had originally

---

[141] E-mail from Paula Farrell to Ken Carfine (Mar. 18, 2009, 9:21 AM) [Treasury Production at 002553].
[142] *See* E-mail from Gary Burner to Ken Carfine et al. (Mar. 18, 2009, 1:13 PM) [Treasury Production at 002556-57].
[143] *Id.*
[144] *Id.*
[145] *See* E-mail from Paula Farrell to Karthik Ramanathan, Acting Assistant Sec'y for Fin. Mkts., U.S. Dep't of Treasury (Mar. 18, 2009, 1:49 PM) [Treasury Production at 02556-57].
[146] E-mail from Karthik Ramanathan to Mark Patterson, Chief of Staff to Sec'y of the Treasury, U.S. Dep't of Treasury et al. (Mar. 18, 2009, 2:07 PM) [Treasury Production at 002556].
[147] *Id.*
[148] *Id.*
[149] E-mail from Gary Burner to Paula Farrell (Mar. 18, 2009, 2:46 PM) [Treasury Production at 02566].
[150] *Id.*
[151] *Id.*

been financed with debt, but the company had "refinanced with 100% equity."[152] Given the structure of the Solyndra agreement with DOE, he observed that DOE did not have rights to the first fabrication line in the event of default. According to Mr. Burner, "DOE said they tried to get rights to the first [fabrication line] upon default but were unsuccessful. I am not sure why they felt their hands were tied, but they did."[153] He also raised an issue with regard to how the term sheet explained the interest rate to be charged on the loan. In closing, Mr. Burner stated that he "[did] not like this deal, but it is not the worst I've seen."[154]

Despite pressure from DOE to sign off on the Solyndra terms and conditions so that Energy's press release could be issued, Treasury officials were able to negotiate a two-day extension, until March 20, 2009, for Treasury to complete its review of the term sheet. Even with this agreement, Secretary Chu's then-Chief of Staff, Mr. O'Connor, called Secretary Geithner's Chief of Staff, Mark Patterson, on the evening of March 18 to check on the status of their review. According to an email sent by Mr. Patterson, Mr. O'Connor was surprised about Treasury's objections to the deal, and concerned about DOE's consultation with Treasury, as DOE believed they had consulted previously with FFB staff.[155] Mr. Ramanathan responded to Mr. Patterson's email, explaining that he was a "VP" of the FFB, and Mr. Carfine was the President; as such, Mr. Ramanathan stated that they should be "in the loop."[156] Mr. Ramanathan also raised questions about the consultation Mr. O'Connor referenced. According to Mr. Ramanathan, "no choice was given to the director of the ffb . . . and energy stated that they were going on it one way or the other given Secretary Chu's interest."[157] Although DOE initially had agreed to give Treasury two extra days to review the deal, after Mr. O'Connor's phone call to Mr. Patterson, Treasury agreed to further expedite their review and complete it one day earlier, by March 19, so DOE could issue its press release announcing the Solyndra conditional commitment.[158]

On the afternoon of March 19, 2009, Treasury and DOE staff held a conference call to discuss Treasury's review of the Solyndra terms and conditions. According to the Audit Report issued by the Treasury IG, Treasury staff noted several concerns. The concerns listed in the Treasury IG's Audit Report were the same as those identified by Mr. Burner, mainly, the debt-to-equity split, Treasury's "preference for a partial guarantee versus 100 percent guarantee," and DOE's rights to Solyndra's intellectual property in the event of a default.[159] An email produced by Treasury to the Committee,

---

[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *See* E-mail from Mark Patterson to Ken Carfine & Kathik Ramanathan (Mar. 18, 2009, 8:16 PM) [Treasury Production at 002612].
[156] E-mail from Kathik Ramanathan to Mark Patterson & Ken Carfine (Mar. 18, 2009, 9:29 PM) [Treasury Production at 002614].
[157] *Id.*
[158] *See* E-mail from David Frantz to Gary Burner & Steve Isakowitz (Mar. 19, 2009, 9:24 AM) (stating that "[o]ur chief of staff, Rod O'Connor, talked with your Mark Patterson last night and agreed that DOE must release tomorrow morning. Hence we must have our mutual issue resolved this AM so the DOE staff can commence the roll out particularly with Congress this afternoon.") [Treasury Production at 002634-35].
[159] OFFICE OF INSPECTOR GENERAL SOLYNDRA AUDIT REPORT, *supra* note 115, at 5.

though, demonstrates that Treasury staff also raised a number of other specific questions about how the loan guarantee agreement would work. For example, after reviewing the Solyndra term sheet, Treasury staff had questions about the base equity commitment, restrictions on the sponsor's use of equity, overrun project costs and contingency funds, and rights to the intellectual property.[160] Further, a Memorandum to File regarding Treasury's consultation with DOE on the Solyndra loan guarantee — finalized one year after the Solyndra conditional commitment — reveals that FFB staff was also concerned about Solyndra's "expected market penetration" in light of the "[s]ubstitution effects with other solar panel manufacturers."[161]

While Treasury staff had identified a number of questions about the Solyndra loan guarantee in the one-day period it was given to review the terms, Treasury ultimately requested only one change to the term sheet: revisions to the section on the loan guarantee Interest Rate, and how the term sheet described the Interest Rate calculation.[162] Mr. Carfine emailed Secretary Geithner's Chief of Staff, Mr. Patterson, on March 19, 2009, and informed him that Treasury was giving DOE "clearance to announce the program and sign the term sheet."[163] Mr. Carfine also noted that Treasury and DOE would be "developing a protocol/process so that we won't experience this type of issue in the future."[164]

The Treasury IG's Audit Report on the Solyndra consultation states that Treasury staff told the IG's office that there was "enough time granted to perform a sufficient review of Solyndra's terms and conditions."[165] When asked during a hearing before the Subcommittee on Oversight and Investigations on October 14, 2011, whether the Solyndra consultation was rushed, Mr. Gary Grippo, the Deputy Assistant Secretary for Government Financial Policy at Treasury, would not give a direct answer. Instead, Mr. Grippo testified that "[w]e 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."[166] In addition, Treasury staff told the IG's office that "all pertinent questions and concerns were adequately addressed."[167]

Despite these statements by Treasury staff, the Treasury IG nonetheless found that the consultation was completed "in about 1 day." Further, the Treasury IG also found

---

[160] *See* E-mail from Financial Economist, Office of Debt Mgmt., U.S. Dep't of Treasury, to Paula Farrell et al. (Mar. 19, 2009, 2:16 PM) [Treasury Production at 000021].

[161] Memorandum to Files from FBB Loan Admin. Staff, *Treasury/FFB Consultation with the Department of Energy (DOE) on the Solyndra Fab 2 LLC Project ("the Project")* (Mar. 16, 2010) [Treasury Production at 000035-36].

[162] *See* E-mail from Paula Farrell to David Frantz et al. (Mar. 19, 2009, 4:02 PM) (attaching an excerpt from the term sheet with handwritten comments to Section 14, on Interest Rate) [Treasury Production at 002663-65]. In her e-mail, Ms. Farrell explicitly stated that "the change to the interest rate section is the most important one." *Id.*

[163] E-mail from Ken Carfine to Mark Patterson et al. (Mar. 19, 2009, 4:00 PM) [Treasury Production at 002666].

[164] *Id.*

[165] OFFICE OF INSPECTOR GENERAL SOLYNDRA AUDIT REPORT, *supra* note 115, at 7.

[166] Statement of Gary Grippo, *supra* note 127, at 62.

[167] OFFICE OF INSPECTOR GENERAL SOLYNDRA AUDIT REPORT, *supra* note 115, at 11.

that Treasury staff did not document how the concerns they identified with the Solyndra loan guarantee were resolved. Committee staff's review of documents produced by Treasury and other agencies involved in the review of the Solyndra application supports this conclusion. It is unclear how the many concerns identified by Treasury staff in the one day it was permitted to review the terms were resolved, if at all. By the time Treasury was asked to consult on the Solyndra term sheet, DOE had already scheduled the Credit Committee and Credit Review Board meetings. The fact that the acceleration of Treasury's review was dictated by DOE's desire to issue a press release and came after the Credit Review Board had approved the conditional commitment demonstrates that DOE had no intent to incorporate or otherwise reflect Treasury's comments or suggested changes, other than technical ones, in the term sheet.

H. The Involvement of the Office of Management and Budget Prior to Conditional Commitment

Although the Energy Policy Act requires DOE to consult with the Department of the Treasury prior to conditional commitment, it does not require a similar consultation with the Office of Management and Budget prior to conditional commitment. However, as OMB is responsible for reviewing the credit subsidy costs of Federal loan guarantees pursuant to its responsibilities under the Federal Credit Reform Act of 1990 (FCRA),[168] DOE regularly briefed OMB about the status of the Solyndra loan guarantee leading up to its closing in September 2009.

Documents produced to the Committee show that OMB was first informed about a possible loan guarantee to Solyndra in the fall of 2008. DOE staff then provided a briefing to OMB staff on January 9, 2009, on the same day as the first DOE Credit Committee meeting on Solyndra, or shortly thereafter.[169] Another briefing was provided on March 13, 2009, the day after the second Credit Committee approved the offering of a conditional commitment to Solyndra, subject to the DOE LPO clarifying or providing additional information on eleven different issues relating to the guarantee.[170]

While OMB's interaction with DOE was minimal in advance of the conditional commitment, OMB staff was kept abreast of DOE's actions. In early March, OMB staff exchanged an email stating, "DOE staff just told me that there's a 99 percent certainty that President Obama, on **March 19th** in California for other reasons, will announce that DOE is offering a loan guarantee to Solyndra. As far as I can tell the obligation won't be entered into until May, but once the President endorses it, I doubt seriously that the

---

[168] 2 U.S.C. § 661 *et seq*.

[169] *See* E-mail from Acting Assoc. Dir. for Legislative Affairs, OMB, to Energy & Commerce Comm. Staff (Apr. 15, 2011, 6:30 PM) (attaching document entitled "January Slides to send" and stating that "OMB's staff's recollection is that DOE briefed OMB on or shortly after January 9, 2009[.]").

[170] *See* U.S. Dep't of Energy, *Solyndra FAB 2, LLC: $733 Million Capacity Expansion for Manufacturer of Thin film Omnifacial Solar Modules for Commercial Roof Top Applications*, Presentation to OMB (Mar. 13, 2009). *See also* E-mail from Policy Analyst, OMB, to Courtney Timberlake, Deputy Assistant Dir. for Budget Review, OMB et al. (Mar. 14, 2009, 9:36 AM).

Secretary will withdraw for any reason."[171] The information about a potential visit from President Obama was then included in a Recovery Act update that was shared among OMB staff. On the same day, Ronald Klain, then-Chief of Staff to Vice President Joe Biden, sent an email to then-OMB Deputy Director of Robert Nabors and asked, "Can we chat on Monday about the DoE flag in here on Solyndra . . . If you guys think this is a bad idea, I need to unwind the WW QUICKLY."[172]

The Solyndra board approved the terms of the Solyndra loan guarantee on March 19, 2009. As discussed above, DOE stimulus advisor, Mr. Rogers, emailed Mr. Klain to inform him of this event, and stated that the agreement was "setting us up for the first loan guarantee conditional commitment for the president's visit to California on the 19th."[173] Mr. Klain then forwarded this email to OMB staff to ask their thoughts on the announcement. Mr. Nabors responded that "[w]e are working to get a legal read quickly," and summarized the process for moving a conditional commitment through DOE, the OMB, and Treasury.[174] In addition, Mr. Nabors asked Sally Ericsson, Associate Director of Natural Resources Programs at OMB, including the DOE Loan Guarantee Program, to "expedite the conversation" and noted that if he "need[s] to pull this off the track, its [*sic*] needs to be within the next few hours."[175] Ms. Ericsson responded that "[t]his deal is NOT ready for prime time," and explained that OMB staff had yet to see the "the draft Term Sheet (or any of the negotiated terms), the independent engineer's report, or the independent market assessment."[176]

The bulk of OMB's work on the Solyndra loan guarantee took place in August 2009, when an independent credit agency issued a risk rating for the deal. This review will be discussed later in this report.

IV. THE CLOSING OF THE SOLYNDRA LOAN GUARANTEE

Following the conditional commitment announcement in March 2009, Solyndra and DOE worked to complete the necessary steps for closing. For DOE, this meant obtaining a final marketing report, a final credit rating assessment from the Fitch credit rating agency, and completing other due diligence. In addition, it also involved the time-intensive task of drafting the final agreement with Solyndra, referred to as the "Common Agreement," as well as drafting the related agreements, including the one with the Federal Financing Bank, as the FFB would be making the disbursements under the Solyndra loan guarantee. Drafting these agreements was made more difficult by the fact that Solyndra was the first loan guarantee; the DOE Loan Programs Office was not able to work from a template or refer to past agreements.

---

[171] E-mail from Program Analyst, OMB, to Kevin Carroll, Energy Branch Chief, OMB et al. (Mar. 6, 2009, 10:56 AM) (emphasis in original).
[172] E-mail from Ron Klain to Robert Nabors, Deputy Dir., OMB (Mar. 7, 2009, 5:43 PM).
[173] E-mail from Matt Rogers to Ron Klain & Rod O'Connor (Mar. 10, 2009, 10:04 AM).
[174] *See* E-mail from Robert Nabors to Ron Klain (Mar. 10, 2009, 11:31 AM).
[175] E-mail from Robert Nabors to Sally Ericsson, Assoc. Program Dir., OMB (Mar. 10, 2009, 11:36 AM).
[176] E-mail from Sally Ericsson to Robert Nabors (Mar. 10, 2009, 11:59 AM).

For Solyndra, the period between the conditional commitment and the loan closing in September 2009 was spent fulfilling the conditions precedent to closing—mainly, raising the $198 million in equity from investors. Documents produced to the Committee and interviews with officials of Solyndra's largest investor Argonaut show that Solyndra had successfully completed this equity raise by July 17, 2009. With the completion of the equity raise, and the issuance of the final credit rating assessment by Fitch on August 7, 2009, DOE prepared to submit the Solyndra loan guarantee to the Office of Management and Budget for its review.

This section of the report chiefly addresses the role of OMB in the review of the Solyndra application prior to closing, in particular, the concerns OMB had with the Solyndra loan guarantee and how those concerns were resolved. In addition, this section discusses the adverse effect the White House's scheduling of an announcement event for the Solyndra closing featuring remarks by Vice President Joseph Biden had on OMB's review of the Solyndra application.

A. DOE Prepares to Submit the Solyndra Application to OMB for Review

By July 17, 2009, Solyndra had raised the equity contribution required to close the loan guarantee. In total, Solyndra, with the assistance of Goldman, Sachs & Company, raised $280 million in equity. Of that number, $198 million was applied to the equity contribution for the DOE loan guarantee project.[177] Argonaut, the primary investment arm of the George Kaiser Family Foundation (GKFF), contributed $130 million of the $286 million Solyndra raised, becoming the company's largest shareholder.[178] The money raised toward the loan guarantee equity contribution was placed into an escrow account controlled by Argonaut to be released once the loan guarantee closed.[179]

With the finalization of the conditional commitment, term sheet, and equity raise, Fitch Ratings issued its final rating for the Solyndra loan guarantee. In a letter dated August 7, 2009, Fitch assigned the Solyndra loan guarantee project, known as Solyndra Fab 2, LLC, a rating of "BB-," which Fitch explained was "Speculative" under Fitch's rating definitions.[180] According to Fitch's definitions, a "Speculative" rating "indicate[s] an elevated vulnerability to default risk, particularly in the event of adverse changes in business or economic conditions over time; however, business or economic flexibility exists which supports the servicing of financial commitments."[181] In the letter, Fitch

---

[177] *See* E-mail from Financial Analyst, U.S. Dep't of Energy, to Program Manager, U.S. Dep't of Energy Loan Programs Office (Aug. 3, 2009, 2:27 PM) (providing a "credit update" on the Solyndra loan guarantee). In addition to the $198 million required equity contribution, the remaining equity raised was divided between funds for sponsor operations ($32 million) and a revolving working capital line of credit for the sponsor ($50 million). *Id.*

[178] Interview with Steve Mitchell, Managing Dir., Argonaut Private Equity, in Washington, D.C. (June 16, 2011) (notes on file with author) [hereinafter, "Mitchell Interview"].

[179] *Id.*

[180] Letter from Managing Dir., Fitch Ratings, to Wilbur G. "Bill" Stover, CFO, Solyndra, Inc. (Aug. 7, 2009).

[181] *Id.* (internal quotations omitted).

noted that the pricing of photovoltaic solar panels was then under "extreme competitive pressures," and that these pressures "will be the largest challenge facing Solyndra and the largest credit risk incurred in repayment of the Fab 2 loan . . . ."[182] Fitch also noted that Fab 2, the DOE loan guarantee project, derived its financial and economic support from its parent company, Solyndra Inc. In addition to the rating, Fitch estimated that there would be an 89 percent chance of recovery in the event of default. Fitch observed that the BB- and 89 percent ratings were an improvement over the B+ and 63 percent recovery ratings issued in August 2008, a difference Fitch largely attributed to the successful commercialization of the Solyndra Fab 1 production lines.[183]

After receiving the Fitch ratings, DOE worked to complete its financial model of the Solyndra project in order to submit the loan guarantee to OMB for approval of the credit subsidy cost and apportionment. In a Credit Committee Update dated August 6, 2009, DOE noted that the due diligence and negotiations that had taken place since the March 2009 conditional commitment had not resulted in "significant material changes to the fundamental terms of [the] Loan Guarantee," and that the Solyndra project remained the "poster child for the original mission of the DOE Loan Guarantee Program."[184] In addition, DOE noted that there had been "significant improvements," including reductions in project and construction costs and progress with the existing production line.[185] Although the costs for the Solyndra loan guarantee project had decreased, DOE stated that the total project cost of $733 million would stay the same, and any "saved funds" would be kept in the project's budget.[186]

As DOE prepared to submit the Solyndra loan guarantee for OMB review, Ms. Colyar, then-Director of the LPO's Credit Policy Group at DOE, asked LPO staff on August 13, 2009, to identify where the eleven questions posed by the March 2009 Credit Committee, as well as the questions Ms. Colyar herself had asked, were addressed in the Solyndra documentation. In particular, Ms. Colyar asked for specific information about the liquidity of the project's parent company, Solyndra, Inc.[187]

Although LPO staff provided answers to some of Ms. Colyar's questions, she emailed LPO staff along with then-CFO of DOE, Mr. Isakowitz, and stated that there was "still . . . a major outstanding issue" with the Solyndra loan guarantee.[188] According to Ms. Colyar, the "Base Case" financial model showed that, by eliminating all working capital assumptions, the project cash balance fell to $62,000 in September 2011. If even a small amount of the project's cash was "tied up in working capital," Ms. Colyar

---

[182] *Id.*
[183] *See id. See also* Letter from Managing Dir., Fitch Ratings, to Wilbur G. "Bill" Stover (Aug. 27, 2008).
[184] E-mail from Financial Analyst, U.S. Dep't of Energy, to Program Manager, U.S. Dep't of Energy Loan Programs Office (Aug. 6, 2009, 4:31 PM).
[185] *See id.* The Credit Committee Update noted that equipment costs had increased 11 percent, but the "Facilities cost," including the size of the planned project building, and the cost of the land had decreased. *Id.*
[186] *Id.*
[187] *See* E-mail from Kelly Colyar to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (Aug. 13, 2009, 9:23 PM).
[188] E-mail from Kelly Colyar to Steve Isakowitz et al. (Aug. 19, 2009, 10:28 PM).

projected that the project "will face a funding shortfall" and that "[e]ven one day of [Accounts Receivable] results in a negative cash balance."[189] Ms. Colyar pointed out that the "issue of working capital assumptions has been a major issue repeatedly raised since December."[190] In response, LPO staff claimed that Ms. Colyar had "overlooked" a major factor in the Solyndra financial model: the parent company, Solyndra, Inc., had a duty to complete the project, Fab 2. According to LPO staff, this duty, together with the parent company's guarantee to cover all project overrun costs, meant that "[l]iquidity at the Project level is simply not relevant during this period."[191] Further, LPO staff believed that "[a]fter investing over $1 billion in cash equity at the parent and project levels, the equity investors will simply not permit any potential projected short term liquidity shortfall to prevent reaching Project Completion."[192]

After Ms. Colyar shared her concerns with Mr. Isakowitz, he asked Lachlan Seward, the Director of the Advanced Technology Vehicles Manufacturing (ATVM) program within the LPO, to intervene and resolve the matter.[193] Ultimately, the DOE addressed Ms. Colyar's concerns about Solyndra's working capital by simply tightening the definition of Project Overrun Costs in the Solyndra agreement with DOE and by revising the model to reflect working capital needs.[194] Even so, DOE still did not construct an integrated model of Solyndra; DOE only modeled the finances of the project company.

During interviews with Ms. Colyar, Mr. Frantz, and Mr. Isakowitz, Committee staff asked them to explain the significance of Ms. Colyar's concerns about Solyndra's working capital. Ms. Colyar stated that she was not satisfied that either a parent guarantee to complete the project or a Cost Overrun facility would address her concerns about working capital.[195] During her interview, Ms. Colyar explained that her position in August 2009 was that the parent guarantee to cover Project Overrun Costs did not address the issue unless DOE understood the strength of Solyndra, Inc., to make that guarantee.[196] Ms. Colyar also stated that the belief of other LPO staff that Solyndra's investors would not allow a default did not give her comfort.[197]

Similarly, during his interview, Mr. Isakowitz noted the seriousness of Ms. Colyar's concerns. He explained that while he had not been involved closely in the LPO's work in August 2009, he generally considered issues relating to working capital to be a "big deal."[198] Mr. Frantz concurred that the issues relating to Solyndra's working capital were significant. Although he did not recall receiving Ms. Colyar's email, Mr.

---

[189] *Id.*
[190] *Id.*
[191] E-mail from Program Manager, U.S. Dep't of Energy Loan Programs Office, to Kelly Colyar et al. (Aug. 20, 2009, 4:35 PM).
[192] *Id.*
[193] *See* E-mail from Steve Isakowitz to Lachlan Seward (Aug. 23, 2009, 11:45 AM).
[194] *See* E-mail from Lachlan Seward to Steve Isakowitz (Aug. 24, 2009, 12:42 PM).
[195] Colyar Interview, *supra* note 103.
[196] *Id.*
[197] *Id.*
[198] Isakowitz Interview, *supra* note 41.

Frantz recalled that DOE had obtained a "100 percent guarantee" by the parent to cover Project Overrun Costs.[199] Mr. Frantz stated that there was reason to believe at that time that Solyndra could meet this commitment due to its record operating Fab 1. In retrospect, however, Mr. Frantz stated that DOE should have "had the parent" as part of the deal.[200] By doing so, DOE would have improved its collateral in the deal and, by modeling the parent and project as an integrated entity, better understood the working capital issues presented by the Solyndra loan guarantee.

After purportedly addressing Ms. Colyar's concerns on August 24, 2009, DOE moved forward with a briefing for OMB staff on the Solyndra loan guarantee the next day. This briefing marked the beginning of OMB's review of the Solyndra application and its credit subsidy cost. However, almost two weeks before OMB was briefed by DOE and began its review of the credit subsidy cost, DOE and the White House had already scheduled an event for September 4, 2009, to commemorate Solyndra's closing. The Solyndra closing event, which featured an appearance by DOE Secretary Chu and remarks via satellite by Vice President Biden, impacted both the timing and quality of the OMB review.

B. White House and DOE Schedule Solyndra Closing Announcement Event Prior to OMB's Review and Approval of the Solyndra Loan Guarantee

Committee staff's review of documents produced by DOE, OMB, and the White House demonstrates that the White House was closely involved in planning the announcement of Solyndra's loan guarantee closing before OMB had the opportunity to even begin its review of the deal. Further, White House documents show that the Solyndra closing event was the idea of the President's Chief of Staff, Rahm Emanuel, and that while the event ultimately included Vice President Biden, the White House had discussed having the President give remarks via satellite at the event.

Only three days after Fitch issued its credit rating for the Solyndra loan guarantee, Aditya Kumar, the Director for Special Projects in the office of White House Chief of Staff Rahm Emanuel, emailed James Carney, then-Communications Director to Vice President Biden, Elizabeth Oxhorn, then-Spokesperson for the Vice President on Recovery Act-related issues, and Mr. Klain on August 10, 2009, about the Solyndra closing.[201] In particular, Mr. Kumar asked about the "announcement value" in the event, noting that the loan guarantee "will lead to thousands of new jobs" and would be the first DOE loan guarantee closing using Recovery Act funding.[202] Mr. Klain responded the same day, stating that "[t]his is great" and asked when the Vice President and President would next be in California.[203] In a July 26, 2012, interview with Committee staff, Mr.

---

[199] Frantz Interview, *supra* note 12.
[200] *Id.*
[201] *See* E-mail from Aditya Kumar, Dir. of Special Projects, The White House, to Jay Carney, Dir. of Commc'n, Office of the Vice President, Elizabeth Oxhorn, Spokeswoman for the Recovery Act, The White House & Ron Klain (Aug. 10, 2009, 11:07 PM) [White House Production at WH SOL 001238].
[202] *Id.*
[203] E-mail from Ron Klain to Aditya Kumar, Jay Carney & Elizabeth Oxhorn (Aug. 11, 2009, 8:11 AM) [White House Production at WH SOL 001238].

Kumar explained that it was his job to identify stimulus-related milestones and whether they would be suitable for public announcements and events.[204]

The following day, on August 11, 2009, Mr. Kumar contacted DOE ARRA advisor, Matt Rogers, Secretary Chu's then-Chief of Staff, Mr. O'Connor, and Sally Ericsson, the Program Associate Director at OMB, to discuss the announcement value in a Solyndra closing event. Mr. Kumar explained, "We know that the conditional agreement was already announced in March. That said, the VP will be in California in early September, and want to see if it's worth doing something here."[205] The following day, Mr. Kumar followed up with Mr. Rogers to ask for "[c]onfirmation that all contracting will be tied up in time" so that "people will be working / lines will be running" in time for an announcement visit to Solyndra by Vice President Biden.[206] In a separate email later on August 12, Mr. Kumar again asked Mr. Rogers to confirm that DOE was "100% OK" with the event before Mr. Kumar confirmed Vice President Biden's calendar.[207] At the time, based on the subject of the email, it appears Mr. Kumar was planning the announcement event for September 12, 2009.[208]

After contacting OMB and DOE staff to discuss the possibility for an event featuring Vice President Biden, Mr. Kumar spoke to Alan L. Hoffman, Vice President Biden's Deputy Chief of Staff, about the Solyndra announcement event. According to an email Mr. Kumar sent to Mr. Klain on August 13, 2009, Mr. Kumar and Mr. Hoffman thought that "perhaps the best way to go here is to have the Secretary and a Senior WH official (e.g. Carol Browner) go out there for an event," because, in part, it would give the White House greater flexibility for scheduling.[209] Mr. Kumar noted, though, that "if Rahm is interested," they could have the President and Vice President give remarks via satellite.[210]

By August 17, 2009, it appears that the White House had decided to move forward with an event at Solyndra that would feature remarks by the President. On August 17, 2009, Mr. Kumar emailed two scheduling and advance staff for the President, Alyssa Mastromonaco and Danielle Crutchfield, and stated that "Ron [Klain] said this morning that the POTUS definitely wants to do this (or Rahm definitely wants the POTUS to do this)? DoE says they should be ready to go by 8/28 or soon thereafter."[211] Mr. Kumar asked about the President's availability in early September for an appearance

---

[204] Interview with Aditya Kumar, former Dir. of Special Projects for the White House Chief of Staff, in Washington, D.C. (July 26, 2012) (notes on file with author) [hereinafter, "Kumar Interview"].
[205] E-mail from Aditya Kumar to Matt Rogers, Rod O'Connor & Sally Ericsson (Aug. 11, 2009, 11:19 AM).
[206] E-mail from Aditya Kumar to Matt Rogers (Aug. 12, 2009, 12:38 PM) [White House Production at WH SOL 001145].
[207] E-mail from Aditya Kumar to Matt Rogers (Aug. 12, 2009, 7:45 PM) [White House Production at WH SOL 001146].
[208] *See id.*
[209] E-mail from Aditya Kumar to Ron Klain & Alan Hoffman, Deputy Chief of Staff, Office of the Vice President (Aug. 13, 2009, 2:59 PM) [White House Production at WH SOL 001553].
[210] *Id.*
[211] E-mail from Aditya Kumar to Alyssa Mastromonaco, Assistant to the President & Dir. of Scheduling & Advance, The White House et al. (Aug. 17, 2009, 9:56 AM).

via satellite at the event, and indicated that the Solyndra event "passed vet by the VP team."[212] Ms. Crutchfield responded that the President's schedule was "packed" and that the earliest date available for a possible Solyndra event was September 8.[213] Forwarding his exchange with Ms. Crutchfield to DOE, Mr. Kumar asked Mr. Rogers, Mr. O'Connor, and other DOE staff whether an event on or about September 8, 2009, that would include in-person appearances by Secretary Chu and a senior White House official and satellite remarks by the President, would suit DOE's schedule.[214] If so, Mr. Kumar indicated that DOE would need to submit a scheduling proposal to the White House as soon as possible.[215] Steve Spinner, who was the Small Business Loan Guarantee Program Advisor on the Recovery Act Team at DOE, subsequently emailed Mr. Kumar that he had "submitted the proposal to Matt and Rod."[216]

After discussing a possible announcement event with DOE, documents produced by the White House show that Mr. Kumar became aware that Heather Zichal, a top deputy to White House Office of Energy and Climate Change Policy Director Carol Browner, had concerns about the Solyndra event. On August 18, 2009, Mr. Kumar emailed Ms. Zichal and Brandon Hurlbut, then-Director of Cabinet Affairs for the White House, and stated that he understood there were concerns and asked to talk with them.[217] At the same time, Mr. Kumar also emailed Mr. Klain's office to learn his "latest thoughts on Solyndra."[218] According to an email Mr. Kumar sent to Kevin Bailey, the Special Assistant to Mr. Klain, Mr. Kumar wanted to "[m]ake sure we have as much a mandate from him and Rahm as the last time he and I talked about this."[219] Mr. Bailey responded, "yes. you want your rear flank covered on this."[220]

The next day, August 19, 2009, Mr. Bailey emailed Mr. Kumar, Ms. Zichal, and Mr. Hurlbut and requested a meeting to discuss Solyndra.[221] In an email to Mr. Bailey, Mr. Kumar said that he now understood Ms. Zichal's concerns and, in particular, he wanted to look into her statement that the "funding community has concerns about this."[222] Mr. Kumar said that he had already emailed Steve Spinner at DOE to ask about Ms. Zichal's concerns.[223] Mr. Spinner was the Small Business Loan Guarantee Program

---

[212] *Id.*
[213] E-mail from Danielle Crutchfield, Deputy Assistant to the President & Dir. of Appointments & Scheduling, The White House, to Aditya Kumar et al. (Aug. 17, 2009, 11:51 AM).
[214] *See* E-mail from Aditya Kumar to Matt Rogers et al. (Aug. 17, 2009, 12:25 PM).
[215] *See id.*
[216] E-mail from Steve Spinner, Loan Programs Advisor, U.S. Dep't of Energy Loan Programs Office, to Aditya Kumar et al. (Aug. 17, 2009, 5:09 PM).
[217] *See* E-mail from Aditya Kumar to Heather Zichal, Deputy Assistant to the President, Office of Energy & Climate Change Policy, The White House et al. (Aug. 18, 2009, 5:45 PM).
[218] E-mail from Aditya Kumar to Kevin Bailey, Special Assistant to the Chief of Staff, Office of the Vice President (Aug. 18, 2009, 6:08 PM) [White House Production at WH SOL 001968].
[219] *Id.*
[220] E-mail from Kevin Bailey to Aditya Kumar (Aug. 18, 2009, 6:11 PM) [White House Production at WH SOL 001968].
[221] *See* E-mail from Kevin Bailey to Aditya Kumar et al. (Aug. 19, 2009, 9:58 AM) [White House Production at WH SOL 000932].
[222] E-mail from Aditya Kumar to Kevin Bailey (Aug. 19, 2009, 10:00 AM) [White House Production at WH SOL 000932].
[223] *See id.*

Advisor on the stimulus team at DOE. When Mr. Spinner responded to Mr. Kumar, he asked what the White House's specific concerns were with the Solyndra loan guarantee.[224] Mr. Kumar informed him that the concerns were coming from the Energy and Climate Change Office, and while he had "no idea what they're referring to," he wanted to "vet this concern."[225] Mr. Spinner said he "[hadn't] heard anything negative on my side."[226] The following day, he forwarded to Mr. Kumar a list of Solyndra's major investors and a Forbes.com biography of George Kaiser.[227] Mr. Kaiser is the billionaire investor behind Argonaut and a contributor to President Obama.

In order to resolve the matter, on August 19, Mr. Kumar contacted Jacob Levine, a colleague of Ms. Zichal's in the White House Office of Energy and Climate Change Policy, to determine what concerns the funding community had with Solyndra.[228] Mr. Kumar told Mr. Levine that DOE did not know about any funding community concerns and without more information from Ms. Zichal – who was then out of the office – DOE was unable to address them. Contrary to Mr. Levine's belief that the Solyndra closing event was in a "holding pattern" until certain "timing and comms" questions could be resolved,[229] Mr. Kumar explained that "Ron [Klain] wants to have this move through the process and NOT be in a 'holding pattern.' He has talked to Rahm about this, and feels like Rahm wants this too (barring any concerns)—POTUS involvement was Rahm's idea."[230] Mr. Kumar noted that they had not returned the scheduling request to the advance and scheduling staff "because we want to make sure we're all good with the funding community point you're raising."[231]

After discussing the matter with Mr. Kumar, Jacob Levine emailed Heather Zichal about the Solyndra closing event. Mr. Levine explained that he had "relayed" Ms. Zichal's "earlier message" to Mr. Kumar "without any mention of the finances," but he didn't believe that it would be useful to further respond to Mr. Kumar and Mr. Bailey on these issues.[232] Mr. Levine asked whether he should "touch base with Dan" regarding Ms. Zichal's other concerns, specifically, the finance question, the jobs numbers, and the fact that the Solyndra guarantee had already been publicly announced at the time of conditional commitment.[233] Ms. Zichal responded to Mr. Levine, indicating that she had

[224] E-mail from Steve Spinner to Aditya Kumar & Kevin Bailey (Aug. 19, 2009, 10:46 AM).
[225] E-mail from Aditya Kumar to Steve Spinner & Kevin Bailey (Aug. 19. 2009, 11:01 AM).
[226] E-mail from Steve Spinner to Aditya Kumar & Kevin Bailey (Aug. 19, 2009, 12:22 PM).
[227] *See* E-mail from Steve Spinner to Aditya Kumar (Aug. 20, 2009, 11:54 AM).
[228] *See* E-mail from Aditya Kumar to Jacob Levine, Policy Analyst, Office of Energy & Climate Change Policy, The White House et al. (Aug. 19, 2009, 4:14 PM) [White House Production at WH SOL 000949-50].
[229] E-mail from Jacob Levine to Aditya Kumar & Kevin Bailey (Aug. 19, 2009, 3:41 PM) [White House Production at WH SOL 000949].
[230] E-mail from Aditya Kumar to Jacob Levine et al., *supra* note 228.
[231] *Id.*
[232] E-mail from Jacob Levine to Heather Zichal (Aug. 19, 2009, 5:26 PM) [White House Production WH SOL 001565-66].
[233] *See id.*

already spoken to Dan Pfeiffer, the then-White House Deputy Communications Director.[234]

As Mr. Kumar attempted to address the funding community concerns with DOE and White House staff, Ms. Zichal contacted Ronald Klain about the event. In an email dated August 19, 2009, Ms. Zichal asked Mr. Klain if he was "pushing for POTUS to do this Solyndra announcement via video?"[235] Ms. Zichal stated that she had learned about the event from Mr. Kumar and wanted to know "who actually wants this."[236] Mr. Klain explained that "Rahm was super hot for this" because "[j]obs and high tech and Recovery Act is a winning combination."[237] Ms. Zichal stated that she was "worried" about the event because she felt it would not be "sexy" to the press given that the Administration previously had announced the conditional commitment to Solyndra. In addition, Ms. Zichal stated that "folks in the financing community" had also raised concerns about the Solyndra loan guarantee, "[b]ut if Rahm wants it, we'll make it happen." Ms. Zichal stated that her understanding was that the event would include appearances by Secretary Chu and Ms. Browner and that the President would appear via satellite.[238]

During an interview with Committee staff on July 17, 2012, Committee staff asked Ms. Zichal to explain the precise nature of the funding community's concerns about Solyndra. Ms. Zichal explained that the concerns were "off hand comments" raised "on the edges of a meeting about something else."[239] She stated that she did not recall what the concerns of the funding community were, or who had raised the concerns, but that her recollection was that the funding community was not raising specific questions or concerns about Solyndra. Instead, Ms. Zichal explained that they had expressed surprise that DOE was moving forward with the Solyndra guarantee.[240]

Although Ms. Zichal stated that part of her job was flagging potential issues or identifying pros and cons about matters for other White House staff, she stated that she did not ask the individuals who raised the concern for more information about Solyndra. Ms. Zichal also told Committee staff that she never contacted DOE about the funding community concerns, because she assumed that DOE would have been aware of them because they had retained legal, financial, and technical consultants for the Solyndra loan guarantee review.[241] Although Ms. Zichal was concerned enough about the "off hand comments" to raise them with Ron Klain, the Vice President's then-Chief of Staff, and Mr. Klain tasked Mr. Kumar with determining what those concerns were and whether DOE knew about them, Ms. Zichal stated she did not know whether the information about the funding community's concerns was ever shared with DOE.

---

[234] *See* E-mail from Heather Zichal to Jacob Levine (Aug. 19, 2009, 10:20 PM) [White House Production at WH SOL 001565].
[235] E-mail from Heather Zichal to Ron Klain (Aug. 19, 2009) (reviewed *in camera* by Committee staff).
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] Interview with Heather Zichal, Deputy Assistant to the President, Office of Energy & Climate Change Policy, The White House, in Washington, D.C. (July 17, 2012) [hereinafter, "Zichal Interview].
[240] *Id.*
[241] *Id.*

On the same day that Ms. Zichal clarified that Mr. Emanuel was in favor of the Solyndra event, a scheduling proposal was drafted by the White House for the Solyndra closing event. The proposal, which was made available to Committee staff for an *in camera* review, but not produced to the Committee, was a request for "satellite remarks" by the President.[242]

The August 19, 2009, White House scheduling proposal for the Solyndra closing stated that the purpose of the President's remarks at the event was to "amplify the good news" of the first DOE loan guarantee closing and send a "good signal to the clean technology community that the White House is engaged and that this program is moving forward." The proposal provided some background information about the DOE Loan Guarantee Program, and stated that the Solyndra loan guarantee was a "prime example of a public-private partnership in which government involvement has reinvigorated the private capital markets." It also noted that the Solyndra loan guarantee was expected to create 3,000 construction jobs and 1,000 operations jobs. As for scheduling, even though OMB had not yet begun its review, the proposal estimated that the loan guarantee would be finalized by August 28, and recommended that the event take place shortly thereafter. The proposal also outlined the event itself, stating that the White House "would request Solyndra have a large number of construction workers and heavy equipment present for the ceremony" as well as invite some of Solyndra's customers to participate.[243]

Although the August 19, 2009, scheduling proposal requested that President Obama give remarks via satellite at the Solyndra closing event, by August 25, 2009, the plan for the announcement event had changed. Instead of featuring the President and taking place on September 8, 2009, Mr. Kumar explained to Mr. Rogers and Mr. Spinner of DOE and Elizabeth Oxhorn of the Vice President's staff that "[w]e are thinking (technical logistics allowing) that we would want the VP [to] satellite into the event on 9/4 . . . . It's the same day unemployment numbers come out, and we'd want to use this as an example of where the Recovery Act is helping create new high tech jobs."[244] Mr. Kumar then inquired whether DOE planned to send Secretary Chu to the event and noted

---

[242] The document viewed by Committee staff, stamped as WH SOL 003349-50, contained two redactions at the top and bottom of the document and sender and recipient information was not included; the White House Counsel's office informed Committee staff that these redactions were made due to certain Executive Branch institutional sensitivities. According to the White House Counsel's office, the scheduling proposal was dated August 19, 2009, and was drafted internally by White House staff based on a scheduling proposal initially submitted to the White House by DOE. The DOE proposal, previously discussed, had been drafted by Steve Spinner and shared with Matt Rogers and Rod O'Connor for review. Mr. O'Connor then forwarded it to the White House. *See* E-mail from Steve Spinner to Aditya Kumar et al. (Aug. 17, 2009, 5:09 PM), *supra* note 216 (explaining that he had "just submitted the proposal to Matt [Rogers] and Rod [O'Connor] . . . they are reviewing and will give me the definitive response later today on dates."). *See also* E-mail from Special Assistant to the Chief of Staff, U.S. Dep't of Energy, to Steve Spinner (Aug. 18, 2009, 5:25 PM) (stating that "Rod just spoke with Kevin Bailey out of the VP's office. He will send the solyndra request to him shortly.").

[243] Aug. 19, 2009 White House Scheduling Proposal (reviewed *in camera* by Committee staff) [White House Production at WH SOL 3350].

[244] E-mail from Aditya Kumar to Steve Spinner et al. (Aug. 25, 2009, 10:28 AM).

that the White House was still discussing whether they would send a White House official, such as Carol Browner.[245]

The changes to the announcement event described by Mr. Kumar seemed to surprise DOE staff. Mr. Spinner forwarded Mr. Kumar's email to Secretary Chu's Deputy Chief of Staff, Missy Owens and asked whether the September 4 date would work for the Secretary.[246] Mr. Spinner also noted that Solyndra – which was not yet aware of the event change - was hoping that the event would take place on September 8, and that the company would have to "scramble" to put together the event by September 4.[247] Ms. Owens then responded to Mr. Kumar, copying Steve Spinner and others, and stated that "as of last Friday the POTUS was set to satellite in" and the event was scheduled for September 8.[248] Mr. Kumar clarified that "POTUS on the 8th was what we were going for, but that's looking unlikely. With POTUS unlikely, we wanted to give this to the VPOTUS, and 4th was looking best."[249]

The White House's decision to move up the Solyndra closing event to September 4 was made on the same day that DOE briefed OMB on the Solyndra loan guarantee. This decision — to schedule the event before OMB had begun its review — put pressure on OMB staff to quickly approve the Solyndra loan guarantee and ultimately impacted the quality of their review.

C. White House and DOE Pressure OMB to Complete Its Review of the Solyndra Loan Guarantee in Time for the September Closing Event

On August 25, 2009, DOE provided a PowerPoint briefing to OMB regarding the Solyndra loan guarantee.[250] This briefing effectively commenced OMB's review of the Solyndra loan guarantee and its credit subsidy cost.

Of the three briefings provided by DOE to OMB,[251] this was the most comprehensive. The briefing provided Solyndra's financial model for the deal and the critical ratings, such as the credit subsidy score, risk ratings, probability of default, and recovery estimates, which would inform OMB's review.[252] The briefing also provided a construction timeline, a schedule for panel output, and a list of critical issues or risks and their mitigants. In the summary for the presentation, DOE stated that the "Key Risks" for the project related to the "project's cost structure relative to existing and potential

---

[245] *See id.*
[246] *See* E-mail from Steve Spinner to Missy Owens, Deputy Chief of Staff to the Sec'y, U.S. Dep't of Energy (Aug. 25, 2009, 11:54 AM).
[247] *See id.*
[248] E-mail from Missy Owens to Aditya Kumar et al. (Aug. 25, 2009, 11:51 AM).
[249] E-mail from Aditya Kumar to Missy Owens et al. (Aug. 25, 2009, 11:54 AM).
[250] *See* U.S. Dep't of Energy, *Solyndra FAB 2, LLC: $733 Million Capacity Expansion for Manufacturer of Thin film Omnifacial Solar Modules for Commercial Roof Top Applications*, Presentation to OMB (Aug. 25, 2009) [hereinafter, "Aug. 25, 2009, OMB Briefing"].
[251] DOE also provided briefings to OMB just prior to the January and March 2009 Credit Committee Meetings.
[252] *See* Aug. 25, 2009 OMB Briefing, *supra* note 250.

competitors and the industry's growth and potential for price competition."[253] According to DOE, these risks were mitigated by the "product's low cost of installation, its niche market applications and the short tenor of the project debt."[254] Following the briefing, OMB requested follow-up data on two specific points: the energy efficiency information for Solyndra's panels compared to other flat panel systems and a "[b]reakout" of capacity from current sales contracts.[255]

Only two days after OMB's review got underway, both White House and DOE staff began contacting the agency about the timetable for its review, and whether it would be complete in time for the Solyndra closing event. On the morning of August 27, Ms. Colyar asked OMB staff "whether there are any issues regarding a closing on Sept. 3 for a Sept. 4 VP event on Solyndra?" She explained that this schedule meant that the review and approval of the Solyndra deal must be complete by September 1, so that DOE could get "internal approval" for the credit subsidy cost for the loan guarantee.[256] Elizabeth Oxhorn, a White House spokesperson for the Recovery Act, also reached out to a number of DOE and White House staff on August 27 and asked about the OMB timeline. Ms. Oxhorn asked if anyone could "provide a quick rundown of what final step this is that OMB would be clearing? We just want to make sure we can be as helpful as possible in ensuring this gets done for you on timeline."[257]

As White House and DOE staff pressed OMB about the Solyndra review schedule, OMB staff continued to work through its questions and concerns about the loan guarantee. On the afternoon of August 27, one OMB staff member in the Budget Review Division informed the Director of that division, Courtney Timberlake, that the credit subsidy model OMB was using to review the Solyndra deal was based on a different recovery scenario than the one submitted by DOE—the OMB model assumed a workout scenario whereas the DOE model assumed liquidation.[258] Although the credit subsidy models assumed different factors, the OMB employee noted that "[g]iven the time pressure we are under to sign-off on Solyndra, we don't have time to change the model."[259] Ms. Timberlake replied, "As long as we make it crystal clear to DOE that this is only in the interest of time, and that there's no precedent set, then I'm okay 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."[260]

In addition to reviewing the model, on the evening of August 27, a member of the OMB Energy Branch sent DOE a list of four follow-up questions on the Solyndra loan guarantee. These questions related to the recovery and risk ratings for the project,

---

[253] *Id.* at 2.
[254] *Id.*
[255] *See* E-mail from Kelly Colyar to Kevin Carroll et al. (Aug. 25, 2009, 4:11 PM).
[256] *See* E-mail from Kelly Colyar to Program Analyst, OMB et al. (Aug. 27, 2009, 10:31 AM).
[257] E-mail from Elizabeth Oxhorn to Missy Owens et al. (Aug. 27, 2009, 4:39 PM).
[258] *See* E-mail from Program Analyst, OMB to Courtney Timberlake et al. (Aug. 27, 2009, 3:10 PM). By including the incorrect scenario, the projected recoveries in the DOE model differed from those in the OMB model.
[259] *Id.*
[260] E-mail from Courtney Timberlake to Program Analyst, OMB et al. (Aug. 27, 2009, 4:40 PM).

Solyndra's market competitors and the pricing of its panels, and the efficiency of Solyndra's panels and their power output compared to competitors' panels.[261] In particular, regarding the risk rating, the OMB staff member stated that OMB believed the risk rating should be notched down one ranking as the parent company, Solyndra, Inc., was only ensuring completion of the project and not repayment of the loan guarantee.[262] He also questioned Fitch's analysis of PV prices, stating that it "may have been optimistic," as recent projections of market prices were "well below Solyndra's assumed price point."[263]

In response to OMB's questions, and to refute OMB's position that the risk rating should be notched down to reflect what OMB perceived as greater risk, DOE provided some information on August 28 to support the ratings it had assigned to the Solyndra loan guarantee. With regard to OMB's questions about Solyndra's panel efficiency and its cost advantage over market competitors, DOE was not able to produce any data to show how Solyndra compared to other panel manufacturers. In an attempt to answer OMB's question, DOE pointed to the R.W. Beck report, and its statements about "cell efficiency gain over other thin film technologies," as well as panel power ratings and other information included in Solyndra's DOE application.[264] DOE's answer did not satisfy OMB staff, who asked DOE to provide "real-world results" of tests that compare Solyndra's panels to other flat panels and verify "not in theory, but in practice – the performance advantages advantage that Solyndra claims."[265] Again, DOE was not able to provide the real-world information that OMB requested; instead, on August 31, DOE forwarded to OMB a PowerPoint put together by Solyndra, which the company claimed would substantiate its accuracy in predicting panel output.[266]

While OMB attempted to resolve its outstanding questions about the Solyndra loan guarantee, the White House and DOE grew increasingly anxious about the amount of time OMB was taking to review the deal. A number of emails and calls were placed by DOE and the White House to OMB to determine the status of the Solyndra review. For example, during her discussions with OMB about Solyndra's real-world performance data, Ms. Colyar also asked on August 28 for a "sense of the timing" in order to "make sure we're ready to respond and execute given the timeline we've been given for the broader closing/event."[267] The next day, during an email exchange with White House and DOE staff about the OMB's review and how it impacted the closing event, Steve Spinner stated that "OMB is fully aware of the Friday timeline."[268] Mr. Spinner also asked Ms. Colyar if there was "[a]ny word from OMB" because he had "the OVP and WH breathing down [his] neck on this."[269] On August 31, 2009, Mr. Isakowitz emailed Richard Mertens, Deputy Associate Director for Natural Resources Programs at OMB, to

[261] *See* E-mail from Program Examiner, OMB to Kelly Colyar et al. (Aug. 27, 2009, 6:14 PM).
[262] *See id.*
[263] *Id.*
[264] *See id.*
[265] E-mail from Program Examiner, OMB to Kelly Colyar (Aug. 28, 2009, 7:06 PM).
[266] *See* E-mail from Kelly Colyar to Program Examiner, OMB (Aug. 31, 2009, 12:29 PM).
[267] E-mail from Kelly Colyar to Program Examiner, OMB et al. (Aug. 28, 2009, 4:42 PM).
[268] E-mail from Steve Spinner to Elizabeth Oxhorn et al. (Aug. 28, 2009, 10:08 AM).
[269] E-mail from Steve Spinner to Kelly Colyar (Aug. 28, 2009, 12:51 PM).

ask about finalizing the Solyndra credit subsidy.[270] On that same day, Elizabeth Oxhorn of Vice President Biden's staff again pressed the issue with Mr. Kumar. She stated, "We are walking a fine line with Solyndra needing to begin notifying investors to fly in for the Friday [September 4] event, but this OMB piece not being final. Our concern on the press end is that this leaks out before the OMB portion is cooked – if there is any way to accelerate, would give a lot of peace of mind/flexibility on that front." The email goes on to note that the event leaking out before OMB had finished its review would "leave us in an awkward place."[271] Mr. Kumar agreed to check with OMB.[272]

Mr. Kumar proceeded to contact senior OMB staff, including the Associate Director of Natural Resources Programs, Sally Ericsson, and Mr. Mertens. On August 31, Mr. Kumar noted the Vice President's announcement at Solyndra was set for September 4 and asked whether "there is anything we can help speed along on the OMB side."[273] Mr. Kumar's email was then forwarded by Mr. Mertens to Kevin Carroll, Chief of the OMB Energy Branch, who was participating in the Solyndra review. Mr. Carroll responded that "I would prefer that this announcement be postponed . . . . This is the first loan guarantee and we should have a full review with all hands on deck to make sure we get it right."[274] He went on to state that there was only one item left in OMB's review, but it was unclear how it would affect Solyndra's credit subsidy cost. Mr. Carroll also noted that OMB's outstanding follow-up request to DOE was for "field performance data" in order to validate Solyndra's claimed price advantage. He concluded, "Recent developments in the solar market, in particular, pricing pressure from China from silicon wafer plants scheduled to come on line . . . raise concerns about how strong Solyndra's position will be in the face of rising competition."[275]

OMB staff concerns about the time pressure to review the Solyndra deal prompted Mr. Carroll to reach out to Terrell P. McSweeny, Vice President Biden's Domestic Policy Advisor. On August 31, 2009, Mr. Carroll asked Ms. McSweeny, "[W]ho schedules announcements and events with the Department of Energy that you folks are participating in? We have ended up in a situation of having to do rushed approvals on a couple of occasions (and we are worried about Solyndra at the end of the week). We would prefer to have sufficient time to do our due diligence reviews and have the approval set the date for the announcement rather than the other way around."[276] Ms. McSweeny did pursue the matter with Ms. Ericsson, who informed her that there were "some issues" with Solyndra, but she thought that they were "resolvable."[277] Ms. McSweeny forwarded this

[270] *See* E-mail from Steve Isakowitz to Richard Mertens et al. (Aug. 31, 2009, 7:20 PM). *See also* E-mail from Steve Isakowitz to Program Manager, U.S. Dep't of Energy Loan Programs Office et al. (stating that Isakowitz "[s]poke to Mertens . . . I pressed her for a quicker turnaround . . . .").
[271] E-mail from Elizabeth Oxhorn to Aditya Kumar et al. (Aug. 31, 2009, 3:05 PM).
[272] *See* E-mail from Aditya Kumar to Elizabeth Oxhorn et al. (Aug. 31, 2009, 3:17 PM).
[273] E-mail from Aditya Kumar to Sally Ericsson et al. (Aug. 31, 2009, 3:23 PM).
[274] E-mail from Kevin Carroll to Richard Mertens et al. (Aug. 31, 2009, 4:27 PM).
[275] *Id.*
[276] E-mail from Kevin Carroll to Terrell McSweeny, Domestic Policy Advisor, Office of the Vice President (Aug. 31, 2009, 12:48 PM).
[277] E-mail from Sally Ericsson to Terrell McSweeny (Aug. 31, 2009, 7:25 PM).

email to Mr. Kumar, stating "Good sign."[278] In a July 26, 2012, interview with Committee staff, Mr. Kumar stated that he had not recalled OMB raising any concerns about pressure to complete its Solyndra review.[279]

During their interviews, Committee staff asked Ms. Ericsson and Mr. Carroll to discuss the pressure OMB felt to complete their review in time for the Solyndra closing event. Mr. Carroll stated that he raised his concern about the Solyndra closing event with Ms. McSweeny because he knew that the Administration was interested in taking credit for Recovery Act events, and that he believed OMB needed to be in the loop on when those events were scheduled. Ms. Ericsson also acknowledged that her "preference" was for OMB to complete its work before events were scheduled, and the fact that this did not happen in Solyndra's case was "unusual." Both Mr. Carroll and Ms. Ericsson indicated that the Recovery Act and the related timing pressures were largely to blame for this. According to Mr. Carroll, his concern that OMB was being rushed in its review due to an upcoming announcement event was not unique to Solyndra; with the Recovery Act, there was a great deal of activity and "urgency" by the Administration as it tried to execute the stimulus.

On the morning of September 1, 2009, OMB staff debated whether DOE had provided sufficient information to answer OMB's question about Solyndra's panel efficiency. Although one staff member thought that the company had provided some information to validate their results, he stated, "Solyndra has not commissioned a test which I think is really the gold standard – comparison of the performance of Solyndra vs. regular panel installations at scale on similar roofs. This really should be possible, and I find it disturbing that only modeling results for such a comparison are available."[280] On the other hand, the OMB staff member observed that DOE's internal credit rating had accounted for this uncertainty and that OMB could ask DOE to further notch down the rating to reflect the lack of data.[281]

In addition to concerns over the rating on September 1, OMB staff also discussed whether approving the Solyndra loan guarantee would violate the requirement in the Energy Policy Act rule that OMB should have 30 days to review the loan guarantee. Mr. Mertens observed that OMB had confirmed with its counsel, as had DOE, that OMB had the "ability to waive this regulatory requirement if desired."[282] He cautioned, however, that "[i]f we waive the 30 days for Solyndra, we should definitely make clear to DOE and the White House that it truly is a rare exception to the rule. We could say that we would not expect to waive it in the future except for extraordinary (emergency?) circumstances. The problem is that no extraordinary circumstances exist for Solyndra, and DOE and others could conclude that if we can do it now, why can't we do it in the future."[283] Mr. Mertens recommended contacting Robert Nabors, the Deputy Director of OMB, to

---

[278] E-mail from Terrell McSweeny to Aditya Kumar (Aug. 31, 2009, 7:26 PM) [White House Production at WH SOL 000972].
[279] Kumar interview, *supra* note XX.
[280] E-mail from Program Examiner, OMB to Kevin Carroll et al. (Sept. 1, 2009, 11:02 AM).
[281] *See id.*
[282] E-mail from Richard Mertens to Sally Ericsson & Kevin Carroll (Sept. 1, 2009, 2:34 PM).
[283] *Id.*

discuss waiving the rule, as it was "more of a policy call."[284] Documents produced to the Committee do not indicate whether Mr. Nabors was ultimately contacted. However, during his interview with Committee staff, Mr. Carroll acknowledged the waiver and stated that he believed OMB ultimately waived the rule a "few more times" when reviewing Section 1705 loan guarantees.[285]

Coincidentally, on the afternoon of September 1, Secretary Chu's Chief of Staff, Mr. O'Connor, contacted Mr. Nabors and asked for his help. Mr. O'Connor noted the Solyndra closing event, and that the date for the event was moved "back from the 8th to the 4th (Friday) at the request of the WH."[286] Mr. O'Connor stated that he believed that DOE had provided all the information OMB had requested and asked, "How can we move it forward?"[287] Mr. Nabors responded, "Let me work on it."[288]

Later in the evening of September 1, 2009, OMB staff concluded that the Solyndra deal could go forward with a "one notch reduction in the credit rating."[289] This determination was "based on the lack of firm performance data . . . as well as the weakening world market prices for solar generally."[290] In a previous email to OMB staff, Kelly Colyar had expressed that she was "not surprised on the concern with the score…we couldn't answer basic questions."[291] Even with this decision, the technical work to run the credit subsidy calculations remained. OMB staff conducting these calculations also noted the time pressure from the Vice President's office to complete the work before the September 4 event.[292]

The September 4, 2009, groundbreaking event at Solyndra went ahead, as scheduled, with an appearance via satellite by Vice President Biden and Secretary Chu appearing in person. It is clear that the date for the Solyndra closing was not determined by OMB's review and approval of the Solyndra credit subsidy cost. The closing date instead had been set by the White House and DOE before OMB's substantive review had even begun. The documents described above also show that OMB staffers working on the Solyndra deal were well aware of the White House's interest in and the time pressure associated with completing the review in time for the September 4 groundbreaking event. Despite assertions to the contrary by OMB staff in interviews with Committee staff, the documents also show that this pressure may have had a tangible impact on the Solyndra credit subsidy cost calculations, as OMB staff stated that they did not have time to adjust the factors in their modeling due to the time constraints.

---

[284] *Id.*
[285] Interview with Kevin Carroll, Energy Branch Chief, OMB, in Washington, D.C. (March 5, 2012) (notes on file with author) [hereinafter, "Carroll Interview"].
[286] E-mail from Rod O'Connor to Robert Nabors (Sept. 1, 2009, 4:47 PM).
[287] *Id.*
[288] E-mail from Robert Nabors to Rod O'Connor (Sept. 1, 2009, 5:55 PM).
[289] E-mail from Kevin Carroll to Kelly Colyar et al. (Sept. 1, 2009, 10:06 PM).
[290] *Id.*
[291] E-mail from Kelly Colyar to Program Analyst, OMB (Aug. 31, 2009, 2:31 PM) (ellipsis in original).
[292] *See* E-mail from Kevin Carroll to Courtney Timberlake (Sept. 2, 2009, 9:57 AM) *and* E-mail from Kevin Carroll to Courtney Timberlake (Sept. 2, 2009, 10:10 AM) (stating that the "pressure to get it done faster" was "based on pressure from the VP's office. Rob [Nabors] checked on it last night.").

In addition, it is important to note the limited amount of time OMB spent reviewing the Solyndra deal compared to other DOE loan guarantees. An October 25, 2010, White House Memorandum addressed to President Obama from Carol Browner, then-Director of the White House Office of Energy and Climate Change Policy, Ronald Klain, then-Chief of Staff to Vice President Joe Biden, and Lawrence Summers, then-Director of the National Economic Council (NEC), states that the average OMB review time for DOE loan guarantees processed after September 1, 2009, was 28 calendar days.[293] OMB's review of Solyndra took a mere nine days, an extraordinarily short period of time, especially given that the Solyndra loan guarantee was the first DOE loan guarantee ever made. Committee staff asked Ms. Colyar about the time period for the Solyndra's review, and how it compared to other OMB reviews of loan guarantees. While Ms. Colyar maintained that Solyndra was the first guarantee, and that OMB had been aware of the deal prior to the August review, she acknowledged that other OMB reviews typically have taken between 21 and 28 days.[294]

V. DOE'S MONITORING OF THE SOLYNDRA LOAN GUARANTEE AND THE COMPANY'S EFFORTS TO OBTAIN ADDITIONAL CAPITAL (2010)

While the Solyndra loan guarantee closed in September 2009, the company's efforts to obtain additional capital were only just beginning. As then-CEO of Solyndra, Christian Gronet, phrased it in an early October 2009 email to Steve Mitchell, Argonaut's lead investor and principal contact with the company, "The Bank of Washington continues to help us!"[295] Soon after the loan closed, conversations about when the company could go public accelerated. It is clear from documents produced to the Committee that a key component of Solyndra's ability to do so was securing a second DOE loan guarantee, this time for the second phase of the Fab 2 facility.

As questions about Solyndra's financial condition began to mount in the spring of 2010, with the company ultimately cancelling its planned initial public offering (IPO) in June, individuals at DOE remained determined to see the second loan guarantee through to a successful close. However, when a second loan guarantee seemed unlikely to occur, securing government contracts became a primary strategic element of Solyndra's plans to stay afloat.

This section of the report discusses what DOE knew or should have known about Solyndra's deteriorating financial condition throughout 2010, including in advance of President Obama's visit in May 2010. It also details Solyndra's efforts—led by its

---

[293] *See* Memorandum for the President from Carol Browner, Dir., Office of Energy & Climate Change Policy, The White House, Ron Klain, Chief of Staff, Office of the Vice President & Lawrence Summers, Dir., Nat'l Econ. Council, The White House, Renewable *Energy Loan Guarantees and Grants* (Oct. 25, 2010) [hereinafter, "Oct. 25, 2010 Memorandum for the President"].
[294] Colyar Interview, *supra* note 103.
[295] E-mail from Chris Gronet to Steve Mitchell (Oct. 2, 2009, 4:31 AM) [Argonaut Production at AVI-HCEC-0015116-17].

investors and lobbyists—to obtain a second DOE loan guarantee and secure additional government assistance during this time period. Finally, the report addresses the events that precipitated Solyndra's running out of cash and approaching DOE with a request to restructure the loan guarantee.

A. DOE's Monitoring of Solyndra's Financial Condition

Following the closing of the $535 million Solyndra loan guarantee in September 2009, DOE began authorizing disbursements to the company for the construction of Fab 2. In the first six months after closing, Solyndra received approximately $286 million—over half of the loan guarantee amount. Nonetheless, on March 16, 2010, Solyndra's auditors, PricewaterhouseCoopers (PwC), filed an addendum to Solyndra's S-1 registration with the Securities and Exchange Commission (SEC). In it, the auditors stated that the "Company ha[d] suffered recurring losses from operations, negative cash flows since inception and ha[d] a net stockholders' deficit that, among other concerns, raise[d] substantial doubt about its ability to continue as a going concern."[296]

Solyndra's filing set off alarm bells in the CFO's office at DOE. Then-CFO Isakowitz emailed the Director of DOE's Office of Risk Management on April 9 and noted that he had met with the Executive Director of the DOE LPO, Jonathan Silver, about the amended S-1. While Mr. Silver had informed him that it was "expected," Mr. Isakowitz stated that "he admitted that his monitoring is currently inadequate so he wouldn't know if things were indeed deteriorating."[297] While the Director of Risk Management agreed with the state of the Loan Programs Office monitoring efforts, she disagreed with the notion that the PwC findings were routine. She informed Mr. Isakowitz that "it is simply not accurate that every startup receives a going concern letter" and committed to sending him "additional market analyst info shortly that raises several serious questions regarding viability in the current market."[298]

The filing raised concerns at OMB as well. Prompted by the S-1 report, OMB staff requested information from DOE about its monitoring of the Solyndra loan guarantee.[299] OMB staff also began expressing concern about the extent of DOE's monitoring.[300] OMB asked DOE to share its monitoring reports for Solyndra, which DOE did on April 19, 2010. According to OMB staff, the DOE monitoring reports received on April 19, 2010, held that "the project continues to be successful and in accordance with the business plan, despite the parent's recent financial audit."[301] One

---

[296] Solyndra, Inc., Amendment to S-1 Registration Statement (Form S-1/A), at F-2 (Mar. 16, 2010), *available at* http://www.sec.gov/Archives/edgar/data/1443115/000119312510058567/ds1a.htm [hereinafter, "Solyndra Registration Statement Amendment"].
[297] E-mail from Steve Isakowitz to Dir. Office of Risk Mgmt., U.S. Dep't of Energy et al. (Apr. 9, 2010, 11:39 PM).
[298] E-mail from Dir. Office of Risk Mgmt., U.S. Dep't of Energy, to Steve Isakowitz et al. (Apr. 9, 2010, 11:58 PM).
[299] *See* E-mail from Kelly Colyar to Program Specialist, OMB (Apr. 9, 2010, 9:18 AM).
[300] *See* E-mail from Fouad Saad, Program Examiner, OMB, to Sally Ericsson et al. (Apr. 14, 2010, 11:27 AM).
[301] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB (Apr. 19, 2010, 5:37 PM).

OMB staff member was concerned that "DOE seems to separate the parent from the project in terms of the risk monitoring, but I think the deal is structured in a way that does not support that view."[302] Ms. Colyar, who had previously been the Director of the Credit Policy Group at DOE, began working for OMB in January 2010 in the Energy Branch as a Program Examiner. After examining the Solyndra monitoring reports, Ms. Colyar observed that the "parent is the prime equipment supplier and sole purchaser for the project's output," and "[a]lthough the parent has pledged full construction completion support . . . [t]he deteriorating financial status of the parent could impact the ability to fund the construction completion account and increase completion risk for the project."[303]

On June 17, 2010, Solyndra announced that it had cancelled its planned IPO, and would instead raise capital from its existing shareholders. With the announcement, a Program Examiner in the OMB Energy Branch, Mr. Fouad Saad, stated that the "challenges Solyndra is having should be used to insist that DOE ramp up its monitoring function immediately; if DOE does not stay on top of the project, it risks becoming embarrassing given the high profile S-1, POTUS, and VPOTUS events over the past year."[304] Following this announcement, OMB and Treasury staff continued to work together to analyze DOE's monitoring reports for Solyndra, and collaborated on a list of twelve follow-up items to send to DOE relating to the company's financial status.[305] That list was sent to DOE on July 26, one day before a Loan Guarantee Meeting between Secretary Chu, OMB Director Peter Orszag, and Assistant Secretary of the Treasury for Financial Markets Mary Miller to address "policy issues."[306] One month later, it appears from documents produced to the Committee that DOE had yet to provide the follow-up information requested by OMB.[307] Secretary Chu testified on November 17, 2011, that Solyndra was not discussed in his meeting with Mr. Orszag and that "[they] were discussing much higher policy issues than a particular loan, I believe, at that time."[308]

B. Solyndra's Planned IPO and Second Loan Guarantee Application

During this period of heightened concern about Solyndra's financial condition and DOE's monitoring efforts, the company was in discussions with DOE about a second loan guarantee for the second phase of Fab 2, to expand the plant's manufacturing capacity. Approval of this $469 million loan guarantee was not only important to

---

[302] *Id.*
[303] *Id.*
[304] E-mail from Fouad Saad to Sally Ericsson et al. (June 23, 2010, 11:44 AM) (emphasis in original).
[305] *See* E-mail from Kelly Colyar to David Frantz et al. (July 26, 2010, 5:13 PM). The email requested information relating to twelve items, including parent financial statements; actual performance against loan covenants; monthly variance reports; market price and production information; cost data; questions about accounting standards governing going concern statements; changes Solyndra had requested; and data regarding panel efficiency. *Id.*
[306] *Id.*
[307] *See* E-mail from Fouad Saad to David Frantz & Kelly Colyar (Aug. 23, 2010, 3:43 PM).
[308] *The Solyndra Failure: Views from DOE Secretary Chu: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. 84 (2011) (testimony of Steven Chu, Sec'y, U.S. Dep't of Energy), *available at* http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=9090 [hereinafter, "Chu Testimony"].

building out Fab 2, but documents indicate that it was a key component of Solyndra's ability to go public.

Advisors from Argonaut, Solyndra's largest investor, had extensive conversations about the second loan guarantee application. On December 17, 2009, an Argonaut investment manager emailed George Kaiser and others stating "G[oldman] S[achs] and we agree that a second DOE loan is a necessary condition for going public in spring 2010."[309] While Mr. Kaiser responded that he thought there was "significant risk to getting a second loan (because of the political concern about giving too much to one supplicant and one technology,"[310] Steve Mitchell replied that "one of the key reasons for GS on the left was their very good work with the doe to date and going forward[.]"[311] Mr. Kaiser tacitly agreed when responding, "But they need to be publicly invisible. I wouldn't disclose anything about the offering or the selection of underwriters until after the DOE has processed the application and Chu/Rahm have signed off on it."[312] The next day, Solyndra's Vice President of Business Development emailed Jonathan Silver and others at DOE, "I am pleased to inform you that today Solyndra filed its S-1 registration statement, positioning the company to raise the equity contribution required for its Fab 2-Phase 2 project . . . . We believe that by demonstrating clear access to equity capital, we now have the final piece in place to ensure Solyndra's ability to commence construction of the Solyndra Phase 2 project immediately upon the close of a loan guarantee, if Solyndra's application is approved by DOE."[313]

As Solyndra and its investors made plans for an IPO that were based, in part, on obtaining a second loan guarantee, an email between Dr. Lawrence H. Summers, then-Director of the NEC, and an advisor to one of Solyndra's investors, Brad Jones of Redpoint Ventures, shows that Solyndra's own investors were questioning the viability of the company.[314] Mr. Jones questioned the stimulus "policy" with regard to clean energy, stating "[t]he allocation of spending . . . is haphazard; the government is just not well equipped to decide which companies should get the money and how much."[315] Mr. Jones acknowledged that Solyndra, one of the solar companies in which his firm was invested, had "revenues of less than $100 million (and not yet profitable) [and] received a government loan of $580 million; while that is good for us, I can't imagine it's a good way for the government to use taxpayer money …."[316] Further, Mr. Jones observed that "[e]very administration seems to feel like it knows better than the private markets how to allocate capital, and I've just never seen that be true."[317] Dr. Summers responded and

---

[309] E-mail from Inv. Manager, Argonaut Private Equity, to George Kaiser, Chairman, BOK Fin. Corp. & Steve Mitchell, Managing Dir., Argonaut Private Equity (Dec. 17, 2009, 9:39 AM).
[310] E-mail from George Kaiser to Steve Mitchell et al. (Dec. 17, 2009, 9:42 AM).
[311] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 17, 2009, 9:58 AM).
[312] E-mail from George Kaiser to Steve Mitchell et al. (Dec. 17, 2009, 4:02 PM).
[313] E-mail from Vice President of Bus. Dev., Solyndra, Inc., to Jonathan Silver, Executive Dir., U.S. Dep't of Energy Loan Programs Office et al. (Dec. 18, 2009, 5:26 PM).
[314] *See* E-mail from Lawrence Summers to Brad Jones, Founding Partner, Redpoint Ventures (Dec. 26, 2009, 9:28 PM) [White House Production at WH SOL 000912-13].
[315] E-mail from Brad Jones to Lawrence Summers (Dec. 26, 2009, 9:10 PM) [White House Production at WH SOL 000912-13].
[316] *Id.*
[317] *Id.*

noted, "I relate well to your view that gov is a crappy vc and if u were closer to it you'd feel more strongly."[318]

During January 2010, Argonaut seemed to hedge somewhat on whether the second loan guarantee was essential to the IPO effort. Mr. Mitchell observed in a January 17, 2010, update on the status of the IPO that "They don't need the doe loan to go public but if the per share price isn't high enough ($10 per share which is 2.5x are [*sic*] basis) then we have a block on the company's ability to go public. Without the loan they will have trouble getting that valuation (at least that's what I think) so if they don't get the loan and they want to go public it will be up to us."[319] He went on to note, "We were the first group passed to the final level for this batch of loans and [DOE has] been talking with us as if we will get it. Let's just hope politics don't get in the way as the doe seems inclined to give it to us soon."[320] Subsequent email chains, though, indicate that politics were in fact driving this decision.

On February 9, 2010, Chris Gronet and several other Solyndra representatives met with Mr. Silver about the second loan guarantee. According to Solyndra's Vice President of Business Development, "[Silver] is acutely sensitive to the political ramifications of any LGPO action, and this pressure colored all of this comments." He stated, "Jonathan appeared to acknowledge that we will likely move to the due diligence stage when he directly engaged in a discussion of the potential political challenges that a second Solyndra loan guarantee would present. Rather than challenge the merits of our application, he moved on to think through the political implications of a second loan guarantee." Mr. Silver then solicited Solyndra's help in answering questions along those lines that he anticipated fielding from "his various constituents," which Solyndra's Vice President of Business Development understood to mean "DOE's CRB (Credit Review Board), Congress, OMB, the Treasury, and other entities that have influence."[321]

Meanwhile, as conversations about this second loan guarantee were ongoing with DOE, George Kaiser and Ken Levit, the Executive Director of the GKFF, met with individuals in the Office of the Vice President at the White House on February 24, 2010. According to a February 27, 2010, email from Mr. Levit, "They about had an orgasm in Biden's office when we mentioned Solyndra,"[322] to which Steve Mitchell replied, "That's awesome! Get us a doe loan[.]"[323] When Committee staff asked Mr. Kaiser about this meeting at the White House and how Solyndra was discussed, he replied that someone in the meeting had asked whether they were "doing anything about renewables."[324] He

---

[318] E-mail from Lawrence Summers to Brad Jones (Dec. 26, 2009, 9:28 PM) [White House Production at WH SOL 000912-13].
[319] E-mail from Steve Mitchell to Kenneth Levit, Executive Dir., George Kaiser Family Found. (Jan. 17, 2010, 8:43 PM).
[320] E-mail from Steve Mitchell to Kenneth Levit (Jan. 17, 2010, 8:46 PM).
[321] E-mail from Chris Gronet to Steve Mitchell et al. (Feb. 10, 2010, 7:41 PM) (forwarding "report regarding our meeting with Jonathan Silver yesterday.").
[322] E-mail from Kenneth Levit to Steve Mitchell (Feb. 27, 2010, 7:55 AM).
[323] E-mail from Steve Mitchell to Kenneth Levit (Feb. 27, 2010, 2:00 PM).
[324] Interview with George Kaiser, Chairman, BOK Fin. Corp., in Washington, D.C. (Nov. 8, 2011) (notes on file with author) [hereinafter, "Kaiser Interview"].

stated that he responded, "There are dozens of [solar] companies that are working to improve technologies. We have an interest in one of them."[325] According to Mr. Kaiser, "Ken [Levit] said 'Solyndra' and I said 'Yeah' and they all smiled and nodded."[326]

On March 5, 2010, Mr. Mitchell forwarded Mr. Kaiser and others at the GKFF an update on Solyndra's discussions with Mr. Silver about the second loan guarantee. Mr. Mitchell stated, "Apparently our application has been caught up with several other groups who were also wanting a second bite at the DOE loan guaranty apple. This started a policy discussion as to whether a company should be able to get a second loan. Jonathan Silver championed the cause that they should and he has just this week apparently won that battle."[327] He concluded, "So it appears things are headed in the right direction and Chu is apparently staying involved in Solyndra's application and continues to talk up the company as a success story."[328] While Mr. Mitchell alluded to Mr. Silver that Secretary Chu was staying involved in the second loan guarantee application, it is unclear from documents produced to the Committee whether Mr. Silver actually commented on this point to Mr. Mitchell. In addition, Secretary Chu testified on November 17, 2011, that he was only recently made aware of Solyndra's second loan guarantee application and that "this did not come before me to the point where there was serious consideration to give Solyndra the second loan."[329]

Mr. Kaiser responded to Mr. Mitchell's update email asking, "Sounds good. I assume that we would not move ahead with the offering until we have formal DOE approval or would you issue while you are under due diligence?"[330] He also noted his recent visit to the White House, stating "BTW, a couple of weeks ago when Ken and I were visiting with a group of Administration folks in DC who are in charge of the Stimulus process (White House, not DOE) and Solyndra came up, every one of them responded simultaneously about their thorough knowledge of the Solyndra story, suggesting it was one of their prime poster children."[331]

Less than a week later, Chris Gronet emailed Steve Mitchell and the other key investors with an update on the discussions with DOE. He stated, "I just finished a very positive call with Jonathan Silver. He would like us to move forward with the diligence for Phase 2 of Fab 2 immediately. He anticipates that the diligence will be efficient and will likely use the same third parties as Phase 1."[332] Documents produced to the Committee indicate that Solyndra's application for the second loan guarantee was slated to enter into due diligence on March 17, 2010, though it took some additional time to

---

[325] *Id.*
[326] *Id.*
[327] E-mail from Steve Mitchell to George Kaiser et al. (Mar. 5, 2010, 3:39 PM) [Argonaut Production at AVI-HCEC-0055354-55].
[328] *Id.*
[329] Chu Testimony, *supra* note 308, at 185.
[330] E-mail from George Kaiser to Steve Mitchell et al. (Mar. 5, 2010, 6:38 PM) [Argonaut Production at AVI-HCEC-0055354-55].
[331] *Id.* at AVI-HCEC-0055354.
[332] E-mail from Chris Gronet to Steve Mitchell et al. (Mar. 11, 2010, 9:42 AM) [Argonaut Production at AVI-HCEC-0056141].

finalize contracts with the same team of outside consultants that was used for the company's first application.[333]

On March 16, 2010, as previously discussed, Solyndra filed an amendment to its S-1 registration statement with the SEC. However, it was not until early April 2010 that media stories about the amended filing began to appear. On April 6, DOE's Deputy Director of Public Affairs forwarded one such story to Mr. O'Connor, Mr. Hurlbut, Mr. Silver, and other senior officials at DOE, noting that it "[m]ight influence how we position Solyndra as our gold standard moving forward."[334] Mr. Silver responded by offering his assessment of the filing: "While we do need to track Solyndra (and will), it is not uncommon for high growth, development stage companies to get what are called 'going concern' letters from their auditors. This is simply recognition of the fact that these companies continue to need to raise capital to reach profitability (and, hence, one of the reasons they file IPO's). This information is not new; it's just new to the bloggers, who found it in the company's SEC filings . . . . In 2008, Solyndra did 6 million in revenue; last year, they did 100 million. Their first quarter this year is very strong. This doesn't mean the company can't run into trouble and, if the effort to go public were shelved and they couldn't raise private capital, there could well be issues. But, the fat [*sic*] that they got a going concern letter is not, at the moment, material."[335] Despite Mr. Silver's reassuring message, talking points were forwarded around the LPO on April 6 regarding "the latest Solyndra tempest."[336] One of the talking points addressed the offering's relationship to the first loan guarantee and stated, "None of the proceeds for the intended IPO are required for or will be used to support the existing DOE loan facility."[337]

Neither Mr. Silver's email nor the talking points mentioned that DOE had entered into due diligence on a second loan guarantee for Solyndra's Fab 2, the requisite equity for which was intended to come from the IPO.[338] On April 7, 2010, after seeing several media stories related to the amended S-1, Mr. Kaiser asked Mr. Mitchell, "I wonder what impact this all has on the DOE. It's a very risky strategy but perhaps they need to emphasize how completion of Fab 2 is the critical variable in assuring the company's success. It's the old bad money after good argument."[339] A response by Mr. Mitchell was not produced to the Committee, though he provided Mr. Kaiser with updates on April 25 and May 8 which indicate they were still optimistic about the second loan

---

[333] *See* E-mail from Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office, to Jonathan Silver et al. (Mar. 23, 2010, 10:32 AM). *See also* E-mail from Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office, to Dir. of Technical Mgmt., U.S. Dep't of Energy (Mar. 23, 2010, 12:50 PM).
[334] E-mail from Deputy Dir. of Pub. Affairs, U.S. Dep't of Energy, to Rod O'Connor et al. (Apr. 6, 2010, 9:28 AM).
[335] E-mail from Jonathan Silver to Deputy Dir. of Pub. Affairs, U.S. Dep't of Energy et al. (Apr. 6, 2010, 10:27 AM).
[336] E-mail from Program Manager, U.S. Dep't of Energy Loan Programs Office, to David Frantz et al. (Apr. 6, 2010, 10:55 AM).
[337] *Id.*
[338] *See id.*
[339] E-mail from George Kaiser to Steve Mitchell (Apr. 7, 2010, 1:12 PM) [Argonaut Production at AVI-HCEC-0031485-86].

guarantee being approved, though they did not anticipate that it would happen until October.[340]

After documenting in detail the increasingly dire financial situation at Solyndra, Mr. Mitchell informed Mr. Kaiser on April 25, 2010, "Across the board management does believe we will get the DOE approval for phase 2, but the government does things in its own time line. The delay in the second phase pushes revenue generation from phase 2 off on a day for day basis."[341] On May 8, 2010, he highlighted the relationship between the second loan guarantee and the IPO, telling Mr. Kaiser, "As discussed earlier today, both Goldman and Morgan Stanley have advised that Solyndra cannot realistically access the public markets today in light of size of capital need ($300 to $350 million) . . . and it would be very helpful to have the DOE approval for phase 2 in hand prior to an IPO as well."[342] The GKFF's Chief Investment Officer summarized Mr. Mitchell's update to other senior GKFF officials stating, "Cutting to the chase – we will not be going public during 2010 and our longer term business plan looks to be somewhat in jeopardy" and "[t]he punch line is that if all goes according to plan we will be asked to put more $'s into the company along with other insiders in order to bridge us to an IPO. The DOE loan, despite these issues, is still on track for October and should be flexible enough to allow for a 2011 IPO."[343]

On June 17, 2010, Solyndra was ultimately forced to cancel the $300 million offering. Two days beforehand, employees in the DOE LPO visited Solyndra to discuss a draft term sheet and other materials related to the second loan guarantee.[344] It is not apparent from the documents produced to the Committee whether Solyndra informed the DOE deal team about its plans to pull the IPO at this meeting in Fremont on June 15. Regardless, work on the second application continued.[345]

On July 9, 2010, DOE forwarded to OMB a Project Report dated June 25, 2010, for "Solyndra II." That report indicates that the project was "in due diligence," that the

---

[340] *See* E-mail from Steve Mitchell to George Kaiser (April 25, 2010, 9:53 PM) [Argonaut Production at AVI-HCEC-0056509-11]. *See also* E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (May 8, 2010, 2:02 AM) (copying "[e]mail's from Steve [Mitchell] today and a week ago[.]" [Argonaut Production at AVI-HCEC-0056462-64].

[341] E-mail from Steve Mitchell to George Kaiser (Apr. 25, 2010, 9:52 PM) [Argonaut Production at AVI-HCEC-0056509-11].

[342] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (May 8, 2010, 2:02 AM) (copying "[e]mail's from Steve [Mitchell] today and a week ago[.]" [Argonaut Production at AVI-HCEC-0056462-67].

[343] *Id.* at AVI-HCEC-0056462.

[344] *See* E-mail from Vice President of Bus. Dev., Solyndra, Inc., to Vice President & General Counsel, Solyndra, Inc. et al. (June 15, 2010, 10:43 PM) (attaching a document entitled "Solyndra – Fab 2 Phase II Term Sheet (Redline from Phase I) 20100615."). *See also* E-mail from Vice President of Bus. Dev., Solyndra, Inc., to Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office et al. (June 16, 2010, 8:25 PM) (thanking DOE for "committing so much concentrated time to Solyndra yesterday.").

[345] *See* E-mail from Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office, to Advisor, U.S. Dep't of Energy Loan Programs Office (June 22, 2010, 10:14 AM) *and* E-mail from Advisor, U.S. Dep't of Energy Loan Programs Office, to Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office (June 22, 2010, 10:17 AM). *See also* E-mail from Advisor, U.S. Dep't of Energy Loan Programs Office, to Senior Inv. Officer, U.S. Dep't of Energy Loan Programs Office (June 23, 2010, 10:47 AM).

technical and legal independent consultants had been selected, and that the independent marketing report was scheduled to be submitted in early July 2010. At that point in time, OMB staff questioned whether the company's finances could support a second guarantee, noting in a July 13, 2010, memorandum that "Energy Branch staff expressed concern regarding a second loan guarantee commitment to Solyndra (scheduled for the Credit Review Board in September) due to financial trouble in the project's parent company. While a second loan guarantee to Solyndra could create economies of scale…the proposal could add stress to the parent company . . . ."[346]

Not until September 2010 did DOE seem to express some hesitation about moving forward with the second loan guarantee. According to a September 17, 2010, DOE monitoring report on the first phase of Fab 2, "[Solyndra] has submitted a loan application for $469 million for Phase 2 of the Fab 2 project. The LGO [Loan Guarantee Office] is proceeding with due diligence on this loan application, but is mindful of the company's current challenges."[347] Documents indicate that it was not until late October that DOE suspended its due diligence efforts on the second application. As one DOE staff member stated on October 28, "Solyndra 2 is not happening because Solyndra 1 is in trouble and is being restructured."[348]

C. President Obama's Visit to Solyndra in May 2010

As Solyndra struggled to maintain its financial footing in 2010, White House staff planned to have President Obama visit Solyndra's manufacturing facilities on May 26, 2010, in an attempt to highlight successful Recovery Act projects.

Based on documents produced or made available to the Committee by the White House, White House staff began to plan for President Obama's visit to Solyndra on May 19, 2010. That day, Alyssa Mastromonaco, the President's then-Director of Scheduling and Advance, emailed other White House staff about a "Bay Area Event."[349] As guidance for planning the event, the email stated that "Rahm was very pleased" with a previous White House event, "and everyone agrees we should keep on with the Main Street tour. . . My gut is best options will be in the SF/Oakland area."[350] Another staffer asked what "type" of company they were looking for, and suggested that while "companies like Solyndra — that manufacture solar panels or parts for broadband, etc. — have good stories, but I'm not sure if that's the direction you want to go in . . . if not, I

[346] Memorandum from OMB Staff, to Alex Mas, Assoc. Dir. of Econ. Policy & Chief Economist, OMB, *Update Meeting with Energy Branch Regarding DOE Loan Guarantee Program* (July 13, 2010).
[347] E-mail from Dir., [*Redacted*], to Legal Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Sept. 17, 2010, 12:33 PM) (attaching a draft memorandum entitled "Periodic Loan Review Report" dated Sept. 17, 2010).
[348] E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Advisor, U.S. Dep't of Energy Loan Programs Office (Oct. 28, 2010, 1:13 PM).
[349] E-mail from Alyssa Mastromonaco to Elizabeth Oxhorn et al. (May 19, 2010) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 3160-3164].
[350] *Id.*

will focus on more 'traditional' manufacturing."[351] Another staffer responded that Solyndra was a good option, "if advance likes the photos."[352]

As the Advance team moved forward, one White House staffer shared an article about Solyndra's amended S-1 filing, which stated that the company was at risk of failing.[353] The Advance staff then contacted Brian Deese, a Special Assistant to the President for Economic Policy at the NEC, because the Advance team "need[ed] a policy person to give the thumbs up, too."[354] Mr. Deese finally responded, giving Advance the approval to move forward with the event.

Just two days before President Obama's visit, Steve Westly, a venture capitalist and contributor to the President, emailed Valerie Jarrett, Senior Advisor and Assistant to the President for Intergovernmental Relations and Public Liaison, to express his concerns about the President's trip to Solyndra. Mr. Westly stated that "[a] number of us are concerned that the president is visiting Solyndra."[355] Mr. Westly referenced the "going concern" letter from PricewaterhouseCoopers and the fact that Solyndra was "burning through capital at a rate of over $10.0 M per month."[356] Mr. Westly recommended that Ms. Jarrett check with DOE to make sure the department was "comfortable with the company[.]"[357]

On May 24, 2010, Ms. Jarrett forwarded Mr. Westly's email to Vice President Biden's Chief of Staff, Ronald Klain, and asked "[a]s you know, a Going Concern letter is not good. Thoughts?"[358] Mr. Klain then asked Secretary Chu's Chief of Staff and the DOE ARRA Advisor to "look at this ASAP and get back to me."[359] The DOE ARRA advisor, Mr. Rogers, responded that the "'going concern' letter is standard for companies pre-IPO" and "[w]e will see these with all the pre-IPO companies that we fund and is not a general concern."[360] He went on to note market factors impacting Solyndra's condition, including that "[t]hey have been counting on an energy bill to pass, including a renewable energy standard to ensure adequate US market size."[361] The advisor reassured White House advisors that the company might "face issues in the 18-24 month window, but the company should be going strong into the fall . . . ."[362] The Secretary's Chief of Staff

---

[351] E-mail from White House Staffer to Alyssa Mastromonaco et al. (May 19, 2010) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 3160-3164].
[352] *Id.*
[353] *See* E-mail from Allison Kelly, Vetter, The White House, to Margaret Olmos, Deputy Research Dir., The White House et al. (May 19, 2010, 3:54 PM) [White House Production at WH SOL 001990-91].
[354] E-mail from Alyssa Mastromonaco to Elizabeth Oxhorn et al. (May 19, 2010) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 3160-3164].
[355] E-mail from Steve Westly, Managing Partner, The Westly Group, to Valerie Jarrett, Senior Advisor to the President, The White House (May 24, 2010, 3:10 AM).
[356] *Id.*
[357] *Id.*
[358] E-mail from Valerie Jarrett to Ron Klain (May 24, 2010, 6:10 AM).
[359] E-mail from Ron Klain to Rod O'Connor & Matt Rogers (May 24, 2010, 8:38 AM).
[360] E-mail from Matt Rogers to Rod O'Connor & Brandon Hurlbut, Deputy Chief of Staff to the Sec'y, U.S. Dep't of Energy (May 24, 2010, 9:17 AM).
[361] *Id.*
[362] *Id.*

bolstered that message, stating that the "[b]ottom line is that we believe the company is okay in the medium term, but will need some help of one kind or another down the road."[363]

The President's event at Solyndra went forward on May 26, 2010, at which he declared, "The true engine of economic growth will always be companies like Solyndra."[364]

D. Solyndra's Efforts to Secure Additional Government Assistance

While hope remained that the DOE would approve the second loan guarantee, Solyndra officials and investors knew by May that the company's excessive operating capital concerns would not be addressed by a near term IPO. Instead, the company issued $175 million of convertible promissory notes to various existing investors and began to aggressively pursue additional assistance from "the Bank of Washington," particularly in securing government contracts.

This new pillar of Solyndra's strategy emerged prior to President Obama's visit on May 26, 2010, and is evident in Steve Mitchell's response to Solyndra CFO Bill Stover's invitation to attend the event. He declined the invitation and stated, "I don't need to meet him. What does need to occur is him to see our company and those panels as a national asset that should have preference on government buildings and in tax related incentives on American soil."[365] According to emails from Tom Baruch, founder of CMEA Capital, a significant investor in Solyndra, the company heeded Mr. Mitchell's advice.

Mr. Baruch stated in an August 2010 email to one of his partners, "Getting business from Uncle Sam is a principal element of Solyndra's channel strategy. When Obama visited Solyndra in June 2010, Chris Gronet spoke very openly to Obama about the need for installation of Solyndra's rooftop solar on U.S. government buildings. I heard Obama actually promise Chris that he would look into it when he returned to Washington. The point is that the government has to pay for energy no matter what. The capital funding to deploy a lot of rooftop solar on government buildings (say $300 million) just falls off the table in Washington anyway."[366] On June 17, 2010, just a few weeks after President Obama's visit, Steve McBee, the President of McBee Strategic Consulting (McBee), a lobbying firm, began to chart out this course in an email to Mitchell.[367] Mr. Mitchell forwarded McBee's proposal to Mr. Gronet and another Solyndra executive noting, "The white house offer to help may cut this short but it could

[363] E-mail from Rod O'Connor to Ron Klain (May 24, 2010, 9:56 AM).
[364] President Barack Obama, Remarks by the President on the Economy at Solyndra, Inc., Fremont, CA (May 26, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-economy-0.
[365] E-mail from Steve Mitchell to Wilbur G. "Bill" Stover (May 22, 2010, 8:13 AM) [Argonaut Production at AVI-HCEC-0030957-58].
[366] E-mail from Tom Baruch, Founder & Partner Emeritus, CMEA Capital, to Steve Mitchell et al. (Aug, 10, 2010, 7:46 PM) [Argonaut Production at AVI-HCEC-0033153-60].
[367] E-mail from Steve McBee, President & CEO, McBee Strategic Consulting, LLC, to Steve Mitchell (June 17, 2010, 6:19 AM). [Argonaut Production at AVI-HCEC-0030070-72].

be done in conjunction."[368] This new emphasis on garnering assistance in the procurement of government contracts was shared with and supported by George Kaiser and Ken Levit.

After another visit to the White House on June 25, 2010, Mr. Levit emailed a photograph of a framed picture of President Obama at the Solyndra plant to Steve Mitchell, George Kaiser, and the GKFF's Chief Investment Officer, and commented, "This picture is hanging in the White House, in the stair well in the West Wing. Gosh . . . no pressure."[369] Mr. Mitchell stated, "Ugh. Trust me. I feel it,"[370] to which Mr. Levit replied, "Seriously. I can only imagine. Issue came up in Harry Reid staff meeting too. Wild."[371] The GKFF's Chief Investment Officer responded, "Helps us get them to straighten the DOD out and thus we can sell a mountain of MW's to them . . . Far more important than another loan."[372] Mr. Mitchell replied, "Absolutely"[373] and, then separately to Mr. Levit, "Get them to buy our panels. All they have to do is do some US content type of requirements for DOD procurement."[374] Mr. Levit responded, "We could work on that."[375] Mr. Kaiser also offered his opinion stating, "I think the immediate issue is getting the DOD to see some urgency in buying product though, of course, the subsidy legislation would also be lovely."[376] During an interview on November 8, 2011, Mr. Kaiser told Committee staff that Solyndra was not discussed with individuals in the White House on June 25, 2010.[377]

Around this time, both Tom Baruch and Steve McBee began to play key advisory and messaging roles related to Solyndra's new emphasis on government sales. Christian Gronet's removal as CEO in July 2010 and the Solyndra board's appointment of Brian Harrison to succeed him, if anything, only accelerated these efforts. Soon after Mr. Harrison's arrival, Mr. Baruch emailed him on August 4, 2010, offering "the power of my relationships in the Washington, DC and the nonprofit sector as you angle to achieve the optimum channel control for Solyndra."[378] Mr. Harrison wrote Mr. Baruch on August

---

[368] E-mail from Steve Mitchell to Chris Gronet et al. (June 17, 2010, 9:07 AM) [Argonaut Production at AVI-HCEC-0030070-72].
[369] E-mail from Kenneth Levit to Steve Mitchell et al. (June 25, 2010, 4:10 PM) [Argonaut Production at AVI-HCEC-003002-03].
[370] E-mail from Steve Mitchell to Kenneth Levit (June 25, 2010, 4:15 PM) [Argonaut Production at AVI-HCEC-003002-03].
[371] E-mail from Kenneth Levit to Steve Mitchell (June 25, 2010, 4:17 PM) [Argonaut Production at AVI-HCEC-003002-03].
[372] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (June 25, 2010, 8:03 PM) [Argonaut Production at AVI-HCEC-0055715].
[373] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (June 25, 2010, 8:43 PM) [Argonaut Production at AVI-HCEC-0055715].
[374] E-mail from Steve Mitchell to Kenneth Levit (June 25, 2010, 4:23 PM). [Argonaut Production at AVI-HCEC-003002-03].
[375] E-mail from Kenneth Levit to Steve Mitchell (June 25, 2010, 4:22 PM) [Argonaut Production at AVI-HCEC-003002-03].
[376] E-mail from George Kaiser to Kenneth Levit et al. (June 25, 2010, 11:33 PM) [Argonaut Production at AVI-HCEC-0055715].
[377] Kaiser Interview, *supra* note 324.
[378] E-mail from Tom Baruch to Brian Harrison, CEO, Solyndra, Inc. & Steve Mitchell (Aug. 2, 2010, 12:32 PM) [Argonaut Production at AVI-HCEC-0029721-22].

17, 2010, and connected him with Solyndra's Senior Vice President of Corporate Development and General Counsel who brought Mr. Baruch up to speed and informed him that "McBee's role in the execution of our Gov't Procurement strategy will be with high-level policymakers that they know well in the DOD, DOE, [and the] White House . . . ."[379] Mr. Baruch replied copying Mr. Mitchell and stating, "The Gov't procurement strategy is very specific to Solyndra. It sounds like you have it well covered. I'd love to spend some time with the person charged with the articulation of our Gov't procurement strategy to make sure that whatever message I communicate in Washington is completely consistent with Solyndra's message on economic justification to our customers."[380] A few weeks later, Baruch attempted to convert this message into action.

On September 3, 2010, Mr. Baruch again emailed Mr. Harrison and Solyndra's Senior Vice President of Corporate Development and General Counsel about his contacts at the White House, attaching a brief, unrelated email he had received from White House Chief of Staff Rahm Emanuel, and asked the Solyndra officials, "Let me know when and if I can get a message to him in the WHouse."[381] Without receiving a response by September 9, Mr. Baruch followed up by stating in part and asking, "I will be back in Washington, DC on September 21 and 22, 2010. If I do schedule a meeting at the White House, are there some specific agenda items I can pursue on behalf of Solyndra? I am sure the subject of Solyndra will come up in any event. Please give me your guidance."[382] Frustrated by not receiving a response from the Solyndra executives, Mr. Baruch forwarded the previous offers of assistance to Mr. Mitchell. He stated, "[I] will be at the White House helping some of our other portfolio companies this coming week. Can you give me any guidance about what is going on? I am happy to try you via cell phone whenever it works for you, if you prefer."[383] No further correspondence was produced to the Committee and it is not known whether Mr. Baruch discussed Solyndra during this meeting in the White House or others. What is known is that engaging the White House was viewed by Solyndra and its lobbyists as the most effective way to leverage the federal government's purchasing power.

On October 3, 2010, Steve Mitchell sent George Kaiser an update on efforts to address Solyndra's rapidly deteriorating financial condition. He stated in part, "We are not just sitting back and hoping that Goldman can pull a rabbit out of the hat. Management has been working on several different scenarios over the weekend…The leading thought is too [*sic*] dramatically slow down Fab 2…and spend 2011 further developing our market channels and bring Fab 2 online one year late. This requires a concession from the DOE – which they should do as it protects jobs and is a far better

[379] E-mail from Senior Vice President of Corporate Dev., Solyndra, Inc., to Tom Baruch et al. (Aug. 17, 2010, 12:53 AM) [Argonaut Production at AVI-HCEC-0033132-36].
[380] E-mail from Tom Baruch to Senior Vice President of Corporate Dev., Solyndra, Inc. et al. (Aug. 17, 2010, 2:16 PM) [Argonaut Production at AVI-HCEC-0033132-36].
[381] E-mail from Tom Baruch to Brian Harrison & Senior Vice President of Corporate Dev., Solyndra, Inc. (Sept. 3, 2010, 2:50 PM) [Argonaut Production at AVI-HCEC-0033096-97].
[382] E-mail from Tom Baruch to Brian Harrison & Senior Vice President of Corporate Dev., Solyndra, Inc. (Sept. 9, 2010, 10:34 PM) [Argonaut Production at AVI-HCEC-0033096].
[383] E-mail from Tom Baruch to Steve Mitchell (Sept. 18, 2010, 8:48 PM) [Argonaut Production at AVI-HCEC-0033096].

solution than handing them the keys in January. However, it is the federal government and this could become politically charged very quickly. We are also planning to ask the DOD to execute a purchase order to buy our panels – DOD has 3X the rooftops of Wal-mart and is the biggest consumer of electricity in the US (and wants to buy solar panels). We are still exploring the right way to approach this without getting bogged down in all of the government pitfalls (the US needs a Premier for just one day). The current thinking is that the White House chief of staff is the right person to approach – obviously big changes in that role and they have asked who has strong connections there."[384] Mr. Kaiser forwarded the update to Mr. Levit and noted, "Dismal report. See reference to new chief of staff as well."[385] The new White House Chief of Staff was then-interim Chief of Staff, Peter Rouse.

Over the next several days, the business plan and related strategies developed, and Mr. Mitchell sent Mr. Kaiser another update on October 6, 2010. After informing him of a new plan to consolidate the manufacturing plants, Mr. Mitchell stated, "In addition, the consensus is that a meeting with the new White House Chief of Staff is the best avenue to approach the administration for support on the DOE front and for assistance in securing any type of procurement commitments form [*sic*] the government or the military…. Are you open to helping Solyndra secure a meeting – the desired date would be next Friday if at all possible but I will firm that up as we hear from the DOE."[386] After Mr. Levit expressed concern about this level of involvement from Mr. Kaiser and asked why Solyndra's lobbyists could not reach out to the White House instead,[387] Mr. Mitchell responded, "I think they were just hoping that George may have a more direct pathway for getting a meeting set up. I've warned them that we probably don't and that all of our Washington efforts have always been around philanthropy but that I would ask."[388]

Solyndra's in-house lobbyist echoed this line of thinking and also expressed concerns about using McBee to orchestrate a White House meeting on this occasion. In response to one Solyndra executive asking him to "lay out for Steve [Mitchell] our washington consultants and the extent and strength of their contacts at the high levels of the Administration[,]"[389] Solyndra's in-house lobbyist stated on October 6, 2010, "Due to the very sensitive nature of the items I believe we intend to discuss, I'm hesitant to inform any of our outside consultants of our facts to the extent necessary for them to really help . . . . Everyone in Washington will be trying to access Pete Rouse for the next few weeks and if Mr. Kaiser has a long personal relationship with him he'll get to the

[384] E-mail from Steve Mitchell to George Kaiser (Oct. 3, 2010, 11:24 PM) [Argonaut Production at AVI-HCEC-0056311-13].
[385] E-mail from George Kaiser to Kenneth Levit (Oct. 4, 2010, 12:03 PM) [Argonaut Production at AVI-HCEC-0056311].
[386] E-mail from Steve Mitchell to George Kaiser et al. (Oct. 6, 2010, 12:17 PM) [Argonaut Production at AVI-HCEC-0056292-96].
[387] *See* E-mail from Kenneth Levit to Steve Mitchell et al. (Oct. 6, 2010, 12:27 PM) [Argonaut Production at AVI-HCEC-0056292].
[388] E-mail from Steve Mitchell to Kenneth Levit et al. (Oct. 6, 2010, 6:15 PM) [Argonaut Production at AVI-HCEC-0056292].
[389] E-mail from Senior Vice President of Corporate Dev., Solyndra, Inc., to Dir. of Gov't Affairs, Solyndra, Inc. et al. (Oct. 6, 2010, 1:47 PM) [Argonaut Production at AVI-HCEC-0017821-22].

head of the line . . . ."[390] Though Solyndra's lobbyist did not specifically detail the items they intended to discuss, an email from Mr. Mitchell to Mr. Levit on the same day provides some clarification. In response to Mr. Levit's expression of hesitation about Mr. Kaiser's involvement in the meeting, Mr. Mitchell stated, "All we are asking is that the WH helps us soften some of the terms of the DOE financing we received and work with us to give Solyndra the runway needed to take off (i.e. help us get some orders with DOD and others – which Obama offered to do in May). If they don't, it will be a tragic failure of not just one high-potential company, but of an Obama effort to nurture an industry of the future. AND GKFF will have $400m less to pursue other charitable initiatives and the kind of high-risk investments this country needs for new job creation."[391]

While Mr. Mitchell was more aggressive in his pitch for Mr. Kaiser to request the meeting when communicating with Mr. Levit, once Mr. Kaiser offered his opinion on the matter, Mr. Mitchell seemed to relent. Mr. Kaiser responded to the earlier emails opining on his potential involvement stating, "I question the assumption that WH is the path to pursue when both of your issues are with DOE. I doubt whether Rouse/Browner would intervene and, if they did, I am concerned that DOE/Chu would resent the intervention and your problem could get more difficult. I would see an appeal as only a last resort and, even then, questionable. We need to discuss."[392] Mr. Mitchell replied that he understood but clarified, "The WH meeting is more about assistance in selling panels to the government than it is about getting the DOE loan revised. The WH has offered to help in the past and we do have a contact within the WH that we are working with."[393] Even with a better understanding of the specific objectives, it is apparent that Mr. Kaiser was unwilling to directly intervene in the proposed meeting, though he seemed to agree that the White House was the path to pursue. He stated, "As we discussed briefly, I think the same political calculus for the DOD. Why don't you pursue your contacts in the WH to follow up on the casual comment during the plant visit and we can possibly reinforce the effort so long as it is in the form of 'I thought you should know, in case it comes up' rather than 'can you help with this.'"[394] According to an email from Mr. Mitchell to several Solyndra officials on October 6, 2010, someone from the White House had already reached out to Solyndra. He asked, "Are we following up with the guy from the White House who called Gronet after Obama visited the factory in May?"[395]

When Committee staff asked Mr. Kaiser whether he knew what the "casual comment" entailed, he stated, "I don't know. I don't know who made the comment. I

---

[390] E-mail from Dir. of Gov't Relations, Solyndra, Inc., to Steve Mitchell et al. (Oct. 6, 2010, 2:26 PM) [Argonaut Production at AVI-HCEC-0017821].
[391] E-mail from Steve Mitchell to Kenneth Levit (Oct. 6, 2010, 6:54 PM) [Argonaut Production at AVI-HCEC-0056286].
[392] E-mail from George Kaiser to Steve Mitchell et al. (Oct. 6, 2010, 3:04 PM) [Argonaut Production at AVI-HCEC-0017810-15].
[393] E-mail from Steve Mitchell to George Kaiser et al. (Oct. 6, 2010, 3:07 PM) [Argonaut Production at AVI-HCEC-0017810-15].
[394] E-mail from George Kaiser to Steve Mitchell et al. (Oct. 8, 2010, 12:58 PM) [Argonaut Production at AVI-HCEC-0017810-15].
[395] E-mail from Steve Mitchell to Senior Vice President of Corporate Dev., Solyndra, Inc. et al. (Oct. 6, 2010, 1:47 PM) [Argonaut Production at AVI-HCEC-0024808-09].

assume I was talking about the President's visit to the Solyndra plant." When asked who the contact in the White House was, Mr. Kaiser replied, "I don't know who [Mitchell] is referring to." Committee staff also asked Kaiser to further elaborate on the aforementioned email chains from early October 2010 regarding a potential meeting with the White House. With respect to Steve Mitchell's request on behalf of the company, he stated, "Ken and I turned him down." He stated that he never requested a meeting with the White House Chief of Staff on these issues because he felt "very uncomfortable with trying to pursue [his] own personal interests with any level of government."[396] Mr. Levit, however, was clearly not opposed to Mr. Kaiser raising the issue with the White House in other settings.

On October 23, 2010, Mr. Kaiser attended a fundraiser for Senator Harry Reid, at which he was seated next to President Obama. In preparation for this event, Mr. Kaiser asked Mr. Levit about potential topics of conversation to raise with the President and listed several issue areas. Mr. Levit's only substantive response read: "[I]t seems like an aside to Messina that sounds like 'Jim, is there an effective, appropriate channel to make the case to DoD for Solyndra product given the fact that the USG has an important stake in the company? No desire to jump in front of process but seems like Administration has a legitimate interest in making sure the Solyndra product has every opportunity to compete in the DoD process. Is there an appropriate person either at WH or DoD who looks at these kinds of things? If so, how best to secure a conversation?'"[397]

After the dinner, Mr. Kaiser sent Mr. Levit a recap of his conversations. He stated, "I talked in general [to President Obama] about the Chinese and solar but didn't want to get too specific with him. Talked to Messina about government agencies bypassing the Buy American Act and he said they were drafting a directive. I never mentioned Solyndra directly."[398] When Mr. Mitchell asked Mr. Kaiser in a separate email on October 29, 2010, how the fundraiser went and whether he was "able to discuss solar, China, or Solyndra,"[399] Mr. Kaiser stated, "I did not name Solyndra specifically and don't know how good [President Obama's] staff work was but I did talk to him about the Chinese subsidy over the past nine months and the effect it was having on US solar and wind manufacturers…"[400] When Committee staff questioned Mr. Kaiser about his conversation with President Obama, he stated, "I asked about the tremendous Chinese subsidies in renewable energy. I don't recall if the President even answered that question."[401] He stated that he did not discuss Solyndra with the President.[402]

---

[396] Kaiser Interview, *supra* note 324.
[397] E-mail from Kenneth Levit to George Kaiser (Oct. 21, 2010, 10:32 AM) [Argonaut Production at AVI-HCEC-0017803].
[398] E-mail from George Kaiser to Kenneth Levit (Oct. 23, 2010, 12:28 AM) [Argonaut Production at AVI-HCEC-0055672].
[399] E-mail from Steve Mitchell to George Kaiser (Oct. 29, 2010, 3:44 PM) [Argonaut Production at AVI-HCEC-0028006-09].
[400] E-mail from George Kaiser to Steve Mitchell (Oct. 29, 2010, 11:14 PM) [Argonaut Production at AVI-HCEC-0028006-09].
[401] Kaiser Interview, *supra* note 324.
[402] *Id.*

As Solyndra continued to struggle, it was ultimately unsuccessful in securing many DoD contracts. Amendments to the Buy American Act were, however, signed into law in January 2011 as part of the Department of Defense Authorization Act. The relevant section states: "The Secretary of Defense shall ensure that each contract described in subsection (b) awarded by the Department of Defense includes a provision requiring the photovoltaic devices provided under the contract to comply with the Buy American Act (41 U.S.C. 10a et. seq.), subject to the exceptions to that Act provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.) or otherwise provided by law."[403] This was a priority of Solyndra and an effort embraced by Mr. Kaiser because, as he told Committee staff, "it bothered me from a policy standpoint" and "it seemed peculiar to me that you could bypass a legislative directive by engaging with a consulting firm and then [purchase] the goods and services from foreign companies."[404]

On November 8, 2010, Solyndra's Senior Vice President of Corporate Development and General Counsel sent Mr. Harrison and Mr. Mitchell a government affairs planning document. It stated in part that, "Solyndra will continue to quietly advocate for…a stronger Buy American Act in Defense Department procurements."[405] When Mr. Mitchell forwarded Mr. Kaiser a lengthy update on Solyndra's near term business plans and discussions with DOE on November 23, 2010,[406] Mr. Kaiser responded, "What about DOD (and other government entity) sales efforts? Do the DOE people focus at all on how a Buy American plan could be a win win win for them and do they have any influence?"[407] Several weeks later, on December 2, he also raised with Mr. Levit whether certain Senators could assist in related efforts. Prior to a call with one such Senator, Mr. Kaiser asked Mr. Levit, "Anything we want from him at the moment? Is there a strategy that has Boxer and Feinstein, led by Reid approach the DOE (or even DOD) to put in a good word for Solyndra or is that heavy handed and dangerous?"[408] No reply was produced to the Committee. Again on December 6, Mr. Kaiser asked Mr. Levit in an email titled "Mecca," "Should I bring up Buy American at all in our visit today?"[409] When Mr. Levit responded, "I prefer the one point message, given that it's the midnight hour."[410] Mr. Kaiser agreed and stated, "Also, concerned about tying ourselves

[403] Pub. L. No. 111-383, § 846, 124 Stat. 4285 (2011).
[404] Kaiser Interview, *supra* note 324.
[405] E-mail from Senior Vice President of Corporate Dev. & Gen. Counsel, Solyndra, Inc., to Brian Harrison et al. (Nov. 8, 2010, 9:52 AM) (attaching a "short summary of [Solyndra's] major objectives/strategy" entitled "Solyndra Government Affairs November 8, 2010.") [hereinafter, "November 8, 2010 Strategy Document"] [Argonaut Production at AVI-HCEC-0056779-83].
[406] *See* E-mail from Steve Mitchell to George Kaiser et al. (Nov. 23, 2010, 8:19 PM) [Argonaut Production at AVI-HCEC-0056715-19].
[407] E-mail from George Kaiser to Steve Mitchell et al. (Nov. 24, 2010, 8:45 AM) [Argonaut Production at AVI-HCEC-0056715].
[408] E-mail from George Kaiser to Kenneth Levit (Dec. 2, 2010, 7:26 AM) [Argonaut Production at AVI-HCEC-0056671].
[409] E-mail from George Kaiser to Kenneth Levit (Dec. 6, 2010, 12:20 PM) [Argonaut Production at AVI-HCEC-0027956].
[410] E-mail from Kenneth Levit to George Kaiser (Dec. 6, 2010, 12:23 PM) [Argonaut Production at AVI-HCEC-0027956].

too closely to that deal with the WH."[411] It is not clear what message Mr. Levit was contemplating or who they were visiting.

Additional documents reviewed by Committee staff show that potential government purchasers were not limited to DoD nor were Solyndra's advocates limited to its employees, lobbyists, or investors. As the November 8, 2010, strategy document described it, "We have built a strong working relationship with GSA . . . ."[412] On July 14, 2010, soon after Solyndra began to accelerate its government sales strategy, Jonathan Silver connected Chris Gronet with Robert Peck, then-Commissioner of Public Buildings at the General Services Administration (GSA), asking him to meet with Solyndra and noting that he would "personally appreciate it."[413] Solyndra officials met with GSA the next week.[414] On August 29, 2011, days before the company filed for bankruptcy, Mr. Silver reached out to Mr. Peck again. Mr. Peck connected Mr. Silver with two GSA colleagues and stated, "Jonathan Silver runs a loan program at DOE focused on the renewable energy market. He tells me that a California company that manufactures solar panels is looking for business. Who could Jonathan have the company talk to about opportunities on our projects for this company? I told Jonathan that many if not most of our ARRA projects may have already contracted for their solar panels, where solar is a part of the project scope. I'm copying Jonathan on this email so we can go through him directly to the company."[415] One of Mr. Peck's colleagues then told Mr. Silver, "[F]eel free to have someone from this company contact me…We will put together a list of projects and associated GC's that have not yet purchased the solar panel requirement of our projects."[416]

E. Solyndra Runs Out of Cash

While Solyndra and its advocates were pursuing an aggressive government sales strategy throughout the fall of 2010, the company's financial condition was rapidly declining.

In June 2010, Solyndra's shareholders had invested $175 million in the company, with the understanding that an additional $175 to $225 million would need to be raised by the end of the 2010 in order to reach "cash flow breakeven."[417] The company's

---

[411] E-mail from George Kaiser to Kenneth Levit (Dec. 6, 2010, 6:26 PM) [Argonaut Production at AVI-HCEC-0027956].
[412] November 8, 2010 Strategy Document , *supra* note 405. [Argonaut Production at AVI-HCEC-0056781].
[413] E-mail from Jonathan Silver to Robert Peck, Comm'r, Public Bldgs. Serv., U.S. Gen. Serv. Admin. (July 14, 2010, 3:44 PM) [Argonaut Production at AVI-HCEC-0024859-62].
[414] E-mail from Chris Gronet to Steve Mitchell (July 15, 2010, 7:55 PM) [Argonaut Production at AVI-HCEC-0024859].
[415] E-mail from Robert Peck to Dir., Pub. Bldgs. Serv., U.S. Gen. Serv. Admin. & Assistant Comm'r for Project Delivery, Pub. Bldgs. Serv., U.S. Gen. Serv. Admin. (Aug. 29, 2011, 12:50 PM) [Argonaut Production at AVI-HCEC-0077102-05].
[416] E-mail from Dir., Pub. Bldgs. Serv., U.S. Gen. Serv. Admin., to Jonathan Silver et al. (Aug. 29, 2011, 3:02 PM) [Argonaut Production at AVI-HCEC-0077102-03].
[417] E-mail from Steve Mitchell to George Kaiser (Oct. 3, 2010, 11:24 PM) [Argonaut Production at AVI-HCEC-0056311-13].

revised business plan showed, though, that due to declining sales prices, Solyndra would instead need $300 million to break even.[418] While Solyndra's new CEO, Brian Harrison, began to implement several cost-cutting measures, Argonaut officials acknowledged that these measures were insufficient to counterbalance the "reality of our unsold inventory this quarter . . . and our [Accounts Receiveable] collection period [that] has pulled the cash need back to the end of the year."[419] These problems, according to Mr. Mitchell, were due in part to the fact that the company was doing "such a poor job developing . . . markets" and failing to have "channels robust enough to absorb all our current production."[420] The outlook in 2011 was not favorable, as Mr. Mitchell anticipated that the company would need $150 million "to get through the first 6 months of 2011 and the company will likely have a tough [first quarter]."[421]

DOE, however, appeared to be only beginning to understand the extent of Solyndra's financial problems. On September 17, 2010, the Portfolio Management Group in the DOE LPO drafted an "Annual Loan Review" for Solyndra.[422] The memorandum noted that the Solyndra loan guarantee project was proceeding "on schedule and on budget."[423] With respect to the LPO's "Financial Condition and Credit Assessment" of Solyndra, the Annual Loan Review recognized that the solar market was weakening due to reduced subsidies and incentives, increased supply, and the fact that "Solyndra's price premium realized has been lower than originally expected."[424] The review listed some startling financial statistics about Solyndra, including the fact that the company was burning $15 million in cash per month and that current payables were approximately $90 million, which represented three months of the company's operating expenses.[425] The LPO also noted that the "company will need to raise additional cash in four to six months to remain solvent."[426] Despite recognizing the company's weakened cash position, and the fact that it would need to raise equity in a challenging market, the LPO stated that it was "proceeding with due diligence" on Solyndra's second loan guarantee application, although the LPO stated that it was "mindful of the company's current challenges."[427] With regard to the existing loan guarantee, LPO merely recommended that Solyndra's risk rating be downgraded to B- from B+ and that the DOE initiate "increased monitoring" of the company, specifically of its liquidity.[428]

Shortly after DOE completed Solyndra's Annual Loan Review, Navigant Consulting submitted a report on September 22, 2010, to the Loan Programs Office that it

[418] *See id.* at AVI-HCEC-0056311
[419] *Id.*
[420] *Id.*
[421] *Id.* at AVI-HCEC-0056312.
[422] Memorandum from Portfolio Mgmt, U.S. Dep't of Energy Loan Programs Office, to Files, *Solyndra Fab 2 LLC – Annual Loan Review* (Sept. 17, 2010).
[423] *Id.* at 1.
[424] *Id.*at 9.
[425] *Id.* at 7.
[426] *Id.*
[427] *Id.* at 11.
[428] *Id.* at 1, 11-12.

had prepared on Solyndra.[429] The report identified several areas in the company that raised concerns about its continued viability. Navigant examined four areas: Solyndra's project business plan, financial projections and models, industry and competitors, and the legal and regulatory environment.[430] The market report noted the significant market pressures, in particular from Chinese manufacturers.[431] The report also noted that Solyndra had a "unique differentiated PV product," but also found that "Solyndra's current cost structures are too high to compete long term in the solar PV market."[432] With regard to Solyndra's sales forecasts and pipeline, Navigant "concluded that it will be critical for Solyndra to start receiving large orders from customers by the 2011-2012 timeframe to provide reasonable assurance that Phase 2 production will have similar demand . . . to service. Based on the near-term sales pipeline information, the risk of actually not selling product is high, especially at a premium. This implies Solyndra will likely need to meet market targets at large volumes and lower ASPs (impacting project margins)."[433] Navigant also examined Solyndra's products' performance. Navigant's assessment identified another concern, finding that "achievable module power is ~20-30% lower than Solyndra's."[434] Navigant recommended that this finding be validated by the independent engineer "to understand if there are specific differences in module power performance, and Solyndra's power roadmap over time, that must be accounted for."[435] In addition, Navigant reviewed the finances of the company, and noted relative high costs for building construction, equipment, and maintenance.[436]

While DOE began to track Solyndra's liquidity, Solyndra's revised business plan to consolidate operations accelerated throughout September as Goldman Sachs was unsuccessfully trying to find new outside investors. As of October 6, 2010, the Solyndra board felt as though "[t]he most viable Plan B option is shaping up to be a plan in which Solydnra [*sic*] shuts down Fab 1 and uses the Fab 1 equipment to finish lines 2 & 3 of Fab 2."[437] On October 12, 2010, Solyndra executives informed DOE that the company's "situation has changed quite dramatically."[438] Bill Stover, Solyndra's Chief Financial Officer (CFO), informed DOE that it would not be able to raise capital by the end of the year, as it originally had planned to do, and "[w]ithout access to FFB loan funds in October, November, and December for work that has been completed, Solyndra would run out of cash in November."[439]

---

[429] Navigant Consulting, Inc., *DOE Loan Guarantee Program Final Report*, Sept. 22, 2010 (attached financial information on file with author) [hereinafter, "Navigant Consulting Solyndra Report"].
[430] *Id.* at 1.
[431] *Id.* at 5-6.
[432] *Id.* at 13.
[433] *Id.* at 27.
[434] *Id.* at 30.
[435] *Id.*
[436] *Id.* at 41, 47.
[437] E-mail from Steve Mitchell to George Kaiser et al. (Oct. 6, 2010, 12:17 PM) [Argonaut Production at AVI-HCEC-0017811-12].
[438] E-mail from Wilbur G. "Bill" Stover to Frances Nwachuku et al. (Oct. 12, 2010, 2:27 AM) (attaching presentation entitled "Fab 2 Front End – October 10, 2010").
[439] *Id.*

Solyndra ultimately proposed a "Consolidation Plan" to DOE on October 12, 2010, that it contended would help address many its concerns. Under the plan, in addition to the plant consolidation, Solyndra's interest and principal payments would be delayed by one year; its loan tenure would be extended by three years; the $30 million cost overrun reserve account requirement would be removed; and the company would have continued access to remaining loan funds in exchange for a commitment by the company and its investors to inject $150 million in new capital. Solyndra also proposed a first priority interest in all of the parent company's assets to DOE and withdrawing its application for a second DOE loan guarantee. The Consolidation Plan noted that it would result in the layoffs of approximately 200 employees.[440] Upon learning this, DOE revised the Annual Loan Review it had drafted only one month earlier. In the "Update to Annual Loan Review" dated October 15, 2010, DOE belatedly recognized that "the company will be unable to raise the amount of equity capital required to fund planned growth." The update further stated that the company would "run out of cash" by late November if DOE refused to authorize disbursements under the loan guarantee agreement. The LPO further downgraded Solyndra's credit rating to CCC.[441]

On October 25, Mr. Harrison emailed Ms. Nwachuku, Director of Portfolio Management in the DOE LPO, stating, "It is our view inside Solyndra that while not desirable from DOE perspective we need to internally announce to employees and with one selected press member on Thursday of this week, October 28."[442] Ms. Nwachuku forwarded this email to Jonathan Silver, who in turn forwarded it to Mr. O'Connor, Secretary Chu's Chief of Staff, and Brandon Hurlbut, Mr. O'Connor's then-Deputy, noting, "We should discuss in the morning."[443] On October 26, 2010, at 5:20 p.m., Mr. O'Connor forwarded this email to Carol Browner, Ronald Klain, and Heather Zichal in the White House asking whether they wanted to discuss it.[444] Ms. Browner responded to Mr. O'Connor, without copying the others, asking what the announcement was, to which he replied, "Left you a VM on your cell."[445] It is not apparent from the documents whether Ms. Browner and Mr. O'Connor connected after this voicemail. However, less than three hours later, Mr. O'Connor updated the earlier email he sent to Ms. Browner, Mr. Klain, and Ms. Zichal stating, "We have been told the announcement has been delayed a week."[446] On the morning of October 27, 2010, Ms. Zichal replied to Mr. O'Connor's email from the night before at 10:11 a.m, without copying the others, stating, "Meant to ask you about this. You have time to talk?" [447]

The documents indicate that Mr. O'Connor and Ms. Zichal did have a conversation the morning of October 27, 2010, after which Ms. Zichal emailed Ms. Browner, Joseph Aldy, and Dan Utech in the White House Office for Energy and Climate

---

[440] *Id.*
[441] Memorandum from Portfolio Mgmt., U.S. Dep't of Energy Loan Programs Office, to Files, *Solyndra Fab 2 LLC – Update to Annual Loan Review* (Oct. 25, 2010).
[442] E-mail from Brian Harrison to Frances Nwachuku (Oct. 25, 2010, 9:28 PM).
[443] E-mail from Jonathan Silver to Rod O'Connor & Brandon Hurlbut (Oct. 25, 2010, 10:01 PM).
[444] E-mail from Rod O'Connor to Heather Zichal et al. (Oct. 26, 2010, 5:20 PM).
[445] Email from Rod O'Connor to Carol Browner (Oct. 26, 2010, 5:32 PM).
[446] E-mail from Rod O'Connor to Heather Zichal et al. (Oct. 26, 2010, 8:00 PM).
[447] E-mail from Heather Zichal to Rod O'Connor (Oct. 27, 2010, 10:11 AM).

Change Policy at 10:23 a.m. stating, "Spoke with Rod [O'Connor] to follow up on last night's email. Here's the deal – Solyndra is going to announce that they are laying off 200 of their 1,200 workers. No es bueno. Sounds like they will now make this announcement next week but press is sniffing around so it could come out sooner."[448] Ms. Zichal had separately emailed Aditya Kumar, Senior Advisor to the Vice President's Chief of Staff, at 10:21 a.m. informing him that Solyndra is "going to announce they are laying off 200 workers."[449] However, Mr. Kumar had already received Mr. Harrison's email to Ms. Nwachuku, which Ronald Klain forwarded to him at 9:50 a.m.[450] At 10:15 a.m., prior to receiving Ms. Zichal's email, Mr. Kumar responded to Mr. Klain's email stating, "Will talk to Rod and Jonathan at 4pm…I hear from HZ [Heather Zichal] that whatever announcement of 'problems' they are considering has been delayed a week."[451] It is not apparent from the documents whether this conversation occurred or whether anyone from the White House discussed the idea of delaying the layoffs announcement with Mr. O'Connor or Mr. Silver.

What is known is that someone from DOE asked Solyndra to delay the planned announcement until November 3, 2010, the day after the 2010 midterm elections. According to an overview of a Solyndra conference call with its primary investors that was emailed at 7:26 a.m. on October 27, 2010, "[Solyndra] discussed their timeline for announcing layoffs. They currently expect to tell suppliers/customers/potential investors on Oct 27 and employees/press on Oct 28 (thus Thursday). The DOE has requested a delay until after the election (without mentioning the election), but management believes they need to communicate as quickly as possible . . . ."[452] Solyndra's Chief Investment Officer confirmed this on October 30, 2010, stating in another update email, "[Solyndra] recently decided to delay the announcement date from 10/28 until 11/3 per the DOE's request."[453] Solyndra announced the layoffs on November 3. On November 17, 2011, in front of the Subcommittee on Oversight and Investigations, Secretary Chu mentioned a November 15, 2011, *Washington Post* article highlighting DOE's request and testified that he was "not aware of any communications with our loan office with the Solyndra people until that article came out."[454] He informed the Committee, "It is not the way that I do business . . . . Something like that was not discussed with me, and I would not have approved it."[455] When asked whether he planned to find out who was involved in making the request to Solyndra, Secretary Chu responded, "Well, certainly, our General Counsel's office will look at who was doing these things."[456] Committee staff was

---

[448] E-mail from Heather Zichal to Carol Browner, Dir., Office of Energy & Climate Change Policy, The White House et al. (Oct. 27, 2010, 10:23 AM) [White House Production at WH SOL 001157].
[449] E-mail from Heather Zichal to Aditya Kumar (Oct. 27, 2010, 10:21 AM) [White House Production at WH SOL 001156].
[450] *See* E-mail from Ron Klain to Aditya Kumar (Oct. 27, 2010, 9:50 AM). For Mr. Harrison's email to Frances Nwachuku, *see* E-mail from Brian Harrison to Frances Nwachuku (Oct. 25, 2010, 9:28 PM).
[451] E-mail from Aditya Kumar to Ron Klain (Oct. 27, 2010, 10:15 AM).
[452] E-mail from Solyndra Investor to Kenneth Levit et al. (Oct. 27, 2010, 7:26 AM) [Argonaut Production at AVI-HCEC-0024488].
[453] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (Oct. 30, 2010, 3:43 PM) [Argonaut Production at AVI-HCEC-0055663-66].
[454] Chu Testimony, *supra* note 308, at 112.
[455] *Id.*
[456] *Id.* at 119.

subsequently informed that the matter had been referred to the DOE Inspector General's office which, in turn, referred it to the Department of Justice.[457] Committee staff contacted Kim Berger of the Department of Justice on July 27, 2012, to ask about the current status of the investigation into the layoffs announcement. Ms. Berger stated that DOJ's investigation was active, and that she could not provide any other information.

DOE ultimately briefed OMB staff on Solyndra's Consolidation Plan on October 29, 2010. Although DOE had received Solyndra's plan just two weeks before, DOE's PowerPoint presentation to OMB suggests that DOE had already decided to promote the restructuring. DOE's presentation listed six points supporting the "Rationale for Consolidation Plan"[458] and touted the elements of the company's "New Sales and Marketing Plan," but listed only three concerns raised by the restructuring: the difficulty involved in selling Solyndra's story to equity investors, ongoing concerns regarding cost and pricing competitiveness in the photovoltaic market, and the potentially long lead time in building "sustainable demand" under the new sales plan.[459] An OMB email on October 29, 2010, confirms that DOE was already inclined to restructure the deal. According to that email, while DOE had not completed its evaluation of the proposal, "DOE's preliminary assessment indicates a restructuring is likely."[460] In addition, according to an October 30, 2010, email from the GKFF's Chief Investment Officer to other individuals at the foundation, "It appears that the DOE is willing to accommodate Solyndra's asks, but they appear to be concerned about 'looking bad' if they continue to fund Solyndra while (1) equity owners don't support the company or (2) Solyndra fails to execute on their business plan. Solyndra plans to draw additional funds from the DOE in November and December, so it is critical to have their approval to maintain adequate liquidity."[461]

In mid-November, Solyndra executives and DOE staff met again to discuss the proposed consolidation plan and related restructuring. Prior to this meeting, Frances Nwachuku emailed Solyndra's CFO, Bill Stover, on November 12, 2010, and informed him that DOE was focusing its analysis on "four factors critical to Solyndra's success," which included cost reduction, increased sales, additional equity, and continued involvement of the DOE.[462] Ms. Nwachuku noted, though, that the "depth of information

---

[457] *See* E-mail from Attorney Advisor, Office of Inspector Gen., U.S. Dep't of Energy, to Energy & Commerce Comm. Staff (Apr. 16, 2012, 3:32 PM).

[458] *See* E-mail from Jonathan Silver to Brandon Hurlbut & Rod O'Connor (Oct. 29, 2010, 10:29 AM) (attaching a document entitled "Solyndra – Presentation A"). DOE listed the following factors in support of consolidation: optimizing operations by consolidating Fab 1 and Fab 2; matching production levels with market demand; reducing cash burn rate; injecting new capital; executing the sales plan; and supporting the company's plan to "service the DOE Guarantee facility" while building its business at a moderate scale. U.S. Dep't of Energy Loan Programs Office, *Briefing Agenda - Solyndra*, Presentation to OMB Staff (Oct. 29, 2010) [hereinafter, "Oct. 29, 2010 DOE Presentation to OMB"]. Secretary Chu's Chief of Staff Rod O'Connor forwarded the presentation to Heather Zichal on October 29, 2010. *See* E-mail from Rod O'Connor to Heather Zichal (Oct. 29, 2010, 2:13 PM).

[459] *See* Oct. 29, 2010, DOE Presentation to OMB, *supra* note 458.

[460] E-mail from Kelly Colyar to Kevin Carroll & Fouad Saad (Oct. 29, 2010, 3:27 PM).

[461] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (Oct. 30, 2010, 3:43 PM) [Argonaut Production at AVI-HCEC-0055663-66].

[462] *See* E-mail from Frances Nwachuku to Wilbur G. "Bill" Stover (Nov. 12, 2010, 8:40 AM).

that we have received to-date and its related analysis has not been sufficient to allow us to come to any definitive conclusion as to the level of our participation in crafting a solution. This is largely because we are still unable to access [*sic*] the reasonableness of your projections related to both the cost reductions and sales."[463]

OMB staff emails during this time period echoed DOE's concerns about Solyndra's projected sales numbers. On November 4, 2010, OMB staff observed that the solar market was plagued by "vast oversupply" and that "industry-average inventory levels were up around 120 days several months ago."[464] OMB staff also noted that the premium Solyndra believed it could command for its product due to lower installation and Balance of Service (BOS) costs had dropped from $1.50 per watt to $.60 to $.70 cents per watt.[465]

By late November 2010, documents produced to the Committee suggest that DOE was growing "increasingly nervous" about continuing to fund Solyndra's loan disbursements without additional capital investment from Solyndra's current shareholders or new investors.[466] Mr. Mitchell informed Mr. Kaiser and others at the GKFF that while DOE had funded the October and November disbursements to the company, "[o]ur concern has been that they will withhold funding to try and force investors to contribute additional capital now."[467] Driving DOE's concern, Mr. Mitchell believed, was that DOE perceived itself to be "the only group funding the company and that they needed to be able to show their superiors and the OMB that the DOE is not the only group supporting Solyndra."[468]

VI. DOE'S DECISION TO RESTRUCTURE THE SOLYNDRA LOAN GUARANTEE

After Solyndra informed DOE in October 2010 that it had run out of cash and proposed a way to restructure the company, OMB and DOE began to review the company's proposed restructuring arrangement.

At the time DOE began to work on the Solyndra restructuring, the Loan Guarantee Program was the subject of increased scrutiny, including from the White House. A Memorandum to the President dated October 25, 2010, from three of the President's top advisors —Carol Browner, then-Director of the White House Office of Energy and Climate Change Policy; Ron Klain, then-Chief of Staff to Vice President Biden; and Dr. Lawrence Summers, then-Director of the National Economic Council — addressed problems with the administration of the DOE Loan Guarantee Program.[469] The

[463] *Id.*
[464] E-mail from Kelly Colyar to Kevin Carroll (Nov. 4, 2010, 2:24 PM).
[465] *Id.*
[466] *See* E-mail from Steve Mitchell to George Kaiser et al. (Nov. 24, 2010, 2:19 AM) [Argonaut Production at AVI-HCEC-0056732-35].
[467] *Id.* at AVI-HCEC-0056734.
[468] *Id.*
[469] *See* Oct. 25, 2010 Memorandum for the President, *supra* note 293.

memorandum sought President Obama's "direction" regarding the implementation of the program, and notes that the program had been criticized for its "slow implementation" and "making commitments to projects that would have happened anyway and thus fail to advance [the President's] clean energy agenda."[470] In addition, the memorandum stated that:

> OMB and Treasury . . . have raised implementation questions, including: "double dipping" — the total government subsidy for loan guarantee recipients, which have exceeded 60%; "skin in the game" — the relatively small private equity (as low as 10%) developers put into projects; and non-incremental investment — some loan guarantee projects would appear likely to move forward without the credit support offered by [Section 1705 loan guarantees] (including those projects that already exist and for which the loan guarantee simply provides a means for refinancing).[471]

Although the October 25, 2010, Memorandum to the President does not mention Solyndra specifically, the authors of the report were aware of the risks presented by the loan guarantee. In a November 10, 2010, email, Mr. Klain discussed with a reporter some of the challenges facing the DOE Loan Guarantee Program.[472] Mr. Klain explained "loan guarantees present harder problems than just giving people cash . . . [b]ecause with a loan guarantee, we are presumably expecting to get paid back."[473] The challenge, according to Mr. Klain, was determining which companies should receive loans. Mr. Klain noted, "If you loan money to people doing super risky things, like Solyndra (a plant to build a new kind of solar collector never used before) there's some chance (a decent chance) you won't get paid back. If you loan money to people doing proven (but larger) things like [REDACTED], folks argue, 'hey, that's just an old technology, those guys could get bank funding if they really tried to.' So on loan guarantees, you are searching for Goldilocks projects – too risky for the banks, but safe enough to have a high likelihood of repayment. That's a pretty narrow fit."[474]

By early December, DOE and Solyndra's largest investor, Argonaut, began intense negotiations about the restructuring. Based on documents produced to the Committee by DOE and Argonaut and interviews with DOE and Argonaut officials, Solyndra was seemingly out of options. Unless DOE restructured the company's loan guarantee and existing investors agreed to contribute additional funding to the company, Solyndra would have gone bankrupt. After seeming to reach a stalemate in those negotiations on December 7, 2010, Argonaut's documents show that the investor contemplated allowing Solyndra to go into bankruptcy. Only after DOE offered to subordinate the taxpayers' interest in the first $75 million recovered in the event of a

---

[470] *Id.* at 1.
[471] *Id.* at 4.
[472] E-mail from Ron Klain to Reporter (Nov. 10, 2010) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 3246-3247 and 3248-3250]. These documents were made available to Committee staff for *in camera* review. The name of the reporter, and other information in the email not relating to Solyndra, were redacted by the White House Counsel's office.
[473] *Id.*
[474] *Id.*

liquidation to Solyndra's two largest investors, Argonaut and Madrone, an arrangement that violates the Energy and Policy Act's prohibition on subordination, did the investors agree to contribute $75 million in funding, with the option to contribute an additional $75 million at a later time. With this agreement, OMB began to review the terms of the proposed Solyndra restructuring.

This section of the report details Solyndra's negotiations with Argonaut and DOE's offer to subordinate its own interest in the loan guarantee to the company's investors in order to reach a deal that would prevent an immediate bankruptcy and keep Solyndra afloat. Next, the report addresses OMB's review of the proposed restructuring and its analysis of whether the proposed terms would allow for greater recoveries to the government than a bankruptcy, as required by the Federal Credit Reform Act (FCRA) of 1990 and OMB Circular No. A-11. In addition, this section examines DOE's argument that the subordination did not violate the terms of the Energy Policy Act as well as OMB's review of this position.

A. DOE's Negotiations with Argonaut to Restructure the Solyndra Loan Guarantee

Committee staff's review of documents produced by DOE and Argonaut show that the chief disagreement between the parties relating to the Solyndra restructuring was whose debt — DOE's or the investors' — in Solyndra would have priority.

By the end of November 2010, DOE had approved a total of $440 million in loan guarantee disbursements to Solyndra, with disbursements of $32.175 million in October and $17.86 million in November.

On November 23, 2010, Mr. Mitchell, Argonaut's lead investor and principal contact with Solyndra and the DOE, provided Mr. Kaiser and others at GKFF an update on where things stood with DOE in addressing Solyndra's significant funding concerns. He stated, "As you know, we reached out to the DOE in late September early October to discuss our revised business plan that included consolidating Fab 1 and Fab 2 operations, the need to raise an additional $150 million and the need to alter the terms of our loan agreement with the DOE…Key to the company's viability and assumption underlying the $150 million need is that DOE will continue to fund under the funding schedule outlined in the loan agreement."[475]

At this time, DOE appeared cautiously optimistic that new investors could provide the $150 million in additional funding. However, Mr. Mitchell described the reality of the situation to Mr. Kaiser and others in a November 23 update email: "As you know, Goldman Sachs originally approached about 30 strategic investors to lead the app. $150 million of equity capital that [the] revised plan calls for to reach cash flow breakeven (this requires not only the $150 million but the requested concessions from the

[475] E-mail from Steve Mitchell to George Kaiser et al. (Nov. 23, 2010, 8:19 PM) [Argonaut Production at AVI-HCEC-0056715-19].

DOE as well). The strategic investors have all passed."[476] While they received a better response from another group of "financial investors," Mr. Mitchell explained that they "are making the case that the DOE is going to have to equitize a portion of its debt or more likely need to haircut the debt by 40% to 50% and that the subordinated debt will need to take a haircut or sit behind liquidation preferences."[477] When the GKFF's Chief Investment Officer asked whether he had "gotten any clarity on what the DOE is 'allowed' to do without significant additional govt approvals,"[478] Mr. Mitchell replied, "Frances, who is our day to day below Jonathan Silver, believes she can do everything we have asked of her without Chu's signature. We have yet to directly ask for a haircut on the debt. When I discussed that the concept was coming up with this concept she said it was something she could not do, but she didn't say if Chu or some other organization (congress, etc) would be required for such a change. We have been working with management to draw up strawman structures that may work – we have tried all sorts of variations that didn't discount [t]he debt but bifurcated a portion behind a new investment liquidation preference. Goldman's indication is that would probably not be enough for a new investor and that they would require a haircut on the senior debt."[479]

On November 24, 2010, DOE staff circulated a draft term sheet and proposed schedule for the Solyndra restructuring. At that time, DOE's proposed schedule envisioned a Credit Review Board meeting on the Solyndra restructuring to take place in mid-December, and for closing at the end of December.[480] According to the draft term sheet, the "proposed key business terms" were "designed to facilitate continued extension of the loan guarantee to Solyndra pursuant to the proposed 'Consolidation Plan'" and included "[t]he investment of at least $150 million in new equity to be provided in the very near term."[481] The draft term sheet did not specifically address where DOE thought this new $150 million would come from, nor did it outline a detailed financing structure. After a summary of the basic terms and conditions being contemplated, the draft stated, "Achieving all of these components are integral to bridging the company to a point where it may become cash flow positive. Even if they are all accomplished, this remain[s] a risky investment as the company must compete in the volatile PV market."[482]

Details of the plan to attract additional capital began to emerge in early December 2010, though DOE, Argonaut, and other existing investors, as well as potential outside investors, were still far apart in terms of an acceptable framework. On December 3, 2010, Mr. Mitchell noted that he would be meeting with DOE on December 6, "to discuss parameters under which the company can raise capital (internally and/or 3rd party) within

---

[476] *Id.* at AVI-HCEC-0056717.
[477] *Id.*
[478] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Steve Mitchell et al. (Nov. 24, 2010, 8:51 AM) [Argonaut Production at AVI-HCEC-0056715].
[479] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Nov. 24, 2010, 3:02 PM) [Argonaut Production at AVI-HCEC-0056715].
[480] *See* E-mail from Frances Nwachuku to Legal Advisor, U.S. Dep't of Energy Loan Programs Office (Nov. 24, 2010, 12:06 PM) (attaching a "draft Term Sheet and proposed schedule.").
[481] *Id.*
[482] *Id.*

the timeframe that the DOE has requested (before the end of the year)."[483] In an earlier email dated December 1, Mitchell described their initial "ask" going into the meeting: "[T]he DOE increase the loan by $100 to $110 million and current or new investors provide $50 to 40 million of equity (this gets the company $150 million and is within the original 73/27 debt to equity split). In a liquidation scenario the entire $150 million is ahead of the DOE loan and our $175 million of convertible debt (we may ask for the new debt and equity to be pari passu but the key is that it is ahead of the original $535 million)."[484] However, Mr. Mitchell was quick to mention that they had "made it clear that the current investors will not invest into a partially funded plan and we are not committing to invest if these changes are made – we are committing to consider the investment."[485] A PowerPoint slide presentation outlining this proposal was shared with DOE prior to the meeting.[486]

The meeting on December 6, 2010, marked the beginning of a series of arduous negotiations between DOE representatives, led by Ms. Nwachuku, and Solyndra officials, along with Mr. Mitchell, "to work out terms to the DOE loan that would enable the company to raise money (internally or externally) and also keep the DOE on its current funding schedule."[487] Throughout the course of the discussions, Mr. Mitchell provided detailed updates to and sought input from individuals at GKFF as well as Jamie McJunkin of Madrone Capital and David Prend of Rockport Capital. He set the stage by stipulating, "I have been very upfront that the likelihood of reaching a deal this week was low and that if the DOE decides not to fund on Friday [December 10, 2010] that we understand the ramifications (i.e. we move toward a liquidation scenario)."[488]

On the night of December 6, 2010, prior to describing the initial terms both sides agreed to use as "a framework…that could potentially get done," Mr. Mitchell stated in his update, "We were far apart from the DOE on our asks – I have been pushing them to haircut their loan by $335 million which they will not (cannot) politically get done and they would rather have the fallout from a bankrupt investment than appear to enrich others by discounting the loan . . . Frances (the lead negotiator for the DOE) understands she should discount the loan to increase the odds of a return of some portion of capital and her response is in the US government environment it is impossible for her to accomplish this."[489] Both groups agreed to go back to their "superiors / investment committee, etc to determine if these terms are even in the realm of possibility for getting

---

[483] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 3, 2010, 10:06 PM) [Argonaut Production at AVI-HCEC-0028589].
[484] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 1, 2010, 10:28 PM) [Argonaut Production at AVI-HCEC-0028589-90].
[485] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 3, 2010, 10:06 PM) [Argonaut Production at AVI-HCEC-0028589].
[486] *See* E-mail from Wilbur G. "Bill" Stover to Frances Nwachuku et al. (Dec. 3, 2010, 8:16 AM) *and* Solyndra, Inc., *Dept. of Energy Meeting – December 6, 2010 – 9:00 am*, Presentation to U.S. Dep't of Energy Loan Programs Office (Dec. 6, 2010).
[487] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 6, 2010, 8:26 PM) [Argonaut Production at AVI-HCEC-0056616-18].
[488] *Id*.
[489] *Id*.

a deal done."[490] Mitchell summarized the terms as such: "Current investors would commit to an additional $25 million of capital this week and would contribute an additional $50 into a fully funded plan (in other words, the company would only have to raise $75 million of outside capital to have a fully funded plan); the DOE would committ [*sic*] to funding its remaining $95 million of loan draws; the $150 million of new investor capital and the to be funded $95 million would make up the senior secured debt of Solyndra (secured by Fab 1, Fab 2, IP and corporate); the remaining $440 million would be subordinated to the newly funded $245 million senior debt and would be discounted to app. $250 million and would accrete back up to $440 million over a 15 year term."[491] After notifying others that they would be meeting with DOE again the next morning, Mr. Mitchell further clarified that "the $25 million would need to be split 50/50 from Argonaut and Madrone but would not get the company far enough along to have a serious chance of raising additional capital . . . If the DOE requires more than an additional $25 million commitment to continue funding through February I would not recommend moving forward. However, with the senior loan position alongside the DOE it is getting more interesting to give the company the additional runway to play out its channel devlopment [*sic*] and grow under Brian's leadership."[492] He concluded his overview of the December 6 meeting as "an incredibly odd set of negotiations" in which "[a]ppearances are far more important [to DOE] than economics."[493]

Prior to the next morning's meeting with DOE, Mr. Mitchell informed Mr. Kaiser that they "had quite a bit of internal discussions and some back and forth with the DOE since last night."[494] Based on these conversations, Mr. Mitchell did not think that "providing $25 million now to keep the DOE funding makes sense at this hour" because "[it] only gets us through February and we won't raise additional capital in that time period."[495] Therefore, he requested of Mr. Kaiser "authority to make an offer to the DOE today that would fully fund Solyndra's go forward plan and revise the DOE loan."[496] The proposal would ask for "the DOE [to] increase its loan by $75 million (we asked for this late last night and don't know if it is possible at this hour) and Argonaut and Madrone will underwrite a $75 million commitment (50/50) to fully fund the business on a go forward basis."[497] He told Mr. Kaiser, "We have consistently told the DOE we don't have the entire $150 million to fund the business and we won't invest in anything short of a fully funded plan. The DOE's $75 million plus the additional $95 million will be the senior secured debt of Solyndra. The argonaut/madrone $75 million will be subordinated to the senior loan but senior to the remaining $440 million of DOE loan . . . . I don't know the odds of the DOE agreeing to this – I put them around 50 / 50."[498] When Mr.

---

[490] *Id.*
[491] *Id.*
[492] *Id.*
[493] E-mail from Steve Mitchell to Kenneth Levit (Dec. 7, 2010, 3:40 AM) [Argonaut Production at AVI-HCEC-0056631].
[494] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 7, 2010, 9:59 AM) [Argonaut Production at AVI-HCEC-0056561-62].
[495] *Id.* at AVI-HCEC-0056562.
[496] *Id.*
[497] *Id.*
[498] *Id.*

Kaiser sought clarification that "the new $75MM on our side would be subordinate to the new $75MM on the DOE side,"[499] Mr. Mitchell replied, "As currently described – yes. But we have not communicated this to the DOE yet so we could ask for pari passu with their 75 and 95."[500] Mr. Kaiser replied, "I'd go in pari pasu [*sic*] but that is probably not a deal killer."[501] At this point, it is apparent that Mr. Kaiser and Argonaut were at least willing to propose a framework under which the additional $75 million they contributed towards a fully funded plan was subordinate to DOE's additional funding in a liquidation scenario.

Following the meeting with DOE on December 7, 2010, at which Mr. Mitchell offered these new terms, he informed Mr. Kaiser, "Unfortunately our proposal with the DOE did not fly. They acknowledge that they should be increasing the loan to provide additional capital or asking us to contribute to a fully funded plan in conjunction with the DOE loan being reduced to create incentive for new investment. However, they also acknowledge that politically they have no will or ability to get this done. The DOE really thinks politically before it thinks economically . . . ."[502] Mr. Mitchell continued, "After the DOE summarily shot down our proposal, we politely moved the conversation toward how we should use the time to start discussing the bankruptcy process since all of the relevant parties were in the room . . . . To me is was clear that the DOE folks were somewhat caught off guard that we weren't going to bail out the company. We broke from this meeting and Frances, the lead decision maker for the DOE at this week's negotiations (Jonathan Silver did not attend the meetings), grabbed me and wanted to discuss one final proposal from the DOE. She suggested that we (current investors) commit to fund $75 million now and in exchange the DOE would fund the remaining $95 million (all of the variables described in the transaction last night would apply lower in the capital stack). Under her new proposal, in a downside situation – i.e. a liquidation scenario – our $75 million would receive 100% of the liquidation proceeds until we were made whole and her $95 million would stand behind us."[503] According to Mr. Mitchell, Ms. Nwachuku did acknowledge that "this still required us to fund into an unfunded plan, however, in May/June timeframe if we did not feel good about the business then we could choose to liquidate at that time and in her mind we should be made whole on the entire amount of the $75 million."[504]

Even after DOE made what appears to be a desperate and illegal offer on December 7, 2010, to subordinate its debt to the first $75 million recovered in a liquidation scenario, Mr. Mitchell remained concerned about DOE's proposal because "[Argonaut] will need to make a funding decision on the next $75 million prior to a time

---

[499] E-mail from George Kaiser to Steve Mitchell et al. (Dec. 7, 2010, 10:03 AM) [Argonaut Production at AVI-HCEC-0056561].
[500] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 7, 2010, 10:06 AM) [Argonaut Production at AVI-HCEC-0056561].
[501] E-mail from George Kaiser to Steve Mitchell et al. (Dec. 7, 2010, 10:09 AM) [Argonaut Production at AVI-HCEC-0056561].
[502] E-mail from Steve Mitchell to George Kaiser et al. (Dec. 8, 2010, 5:02 AM) [Argonaut Production at 0056558-61].
[503] *Id.* at AVI-HCEC-0056558.
[504] *Id.*

in which the company will be able to attract 3rd party capital and we will be forced to make a decision to fund additional capital or liquidate the company at a time when it will be difficult to have real conviction around the ultimate success of the business."[505] He informed Mr. Kaiser that "Madrone is inclined to participate in the DOE proposal as they value the optionality that the senior secured position provides, however, they don't really have an appetite to provide a portion of the next $75 million (i.e. if Solyndra cannot raise the capital from outside investors in the next round than [*sic*] we would liquidate the business (regardless of how well the company has progressed))."[506] He concluded, "To restate my point: I do believe we (along with Madrone and smaller current investors) can fund the first $75 million and ultimately recover that capital if we don't like the company's progress. However, I think it will be incredibly tough to have the conviction in any situation but a disaster scenario to pull the rip cord and liquidate the company (not to mention it won't be our decision alone to make). For this reason I do not feel comfortable recommending moving forward."[507]

The two sides continued to negotiate through December 10, 2010, at which point the documents indicate the current investors had agreed to fund the initial $75 million after several changes to the terms and deal structure were made.[508] However, according to Mr. Mitchell, on the evening of December 10, "DOE came out with a ridiculous last second ask."[509] Mitchell clarified his earlier email stating, "essentially they said – by the way, you have to guaranty to fund even if we don't give you our side [of] the bargain."[510] By December 14, however, "after several days of back and forth with the DOE they agreed to fund, and did fund, our December draw based on the terms we discussed in the meeting last Thursday [December 9] and over email on Friday [December 10]."[511] The GKFF's Chief Investment Officer explained how the issue developed and was eventually resolved: "On Friday night they tried to insert a clause at the last minute that said that the insiders were required to fund on the terms agreed, but that they could adjust the deal as they saw fit afterwards. Clearly this was a non-starter. The issue is their ability to get signature on the deal before our expected funding on January 10th. The solution arrived at was an escrow, that we control, that aligns our equity funding with their delivering signatures on the amended loan deal and funding the January draw (also on the 10th)."[512]

Once these issues were resolved, particularly with respect to the December and January disbursements, DOE began working with its outside counsel to draft the necessary documents memorializing the restructured loan guarantee agreement. On

---

[505] *Id*. at AVI-HCEC-0056559.
[506] *Id.*
[507] *Id.* at AVI-HCEC-0056560.
[508] *See* E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Dec. 10, 2010, 2:15 PM) [Argonaut Production at AVI-HCEC-0035420-21].
[509] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Dec. 10, 2010, 5:40 PM) [Argonaut Production at AVI-HCEC-0035595].
[510] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Dec. 10, 2010, 5:58 PM) [Argonaut Production at AVI-HCEC-0035595].
[511] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Kenneth Levit et al. (Dec. 14, 2010, 1:45 AM) [Argonaut Production at AVI-HCEC-0056523].
[512] *Id.*

December 24, 2010, Mr. Mitchell received "a list of the largest issues on the Intercreditor Term Sheet proposed by DOE and MoFo [Morrison & Foerster]."[513] The document stated, in part, that "DOE has the right to approve amendments/waivers to Loan Documents, without the consent of other lender tranches…" and that "DOE has the sole right to initiate an acceleration of the debt and to direct foreclosure actions against the collateral after a default [except in limited circumstances]" and "Noteholders cannot initiate an involuntary filing against Solyndra."[514] Mr. Mitchell responded to the email, copying Jamie McJunkin of Madrone Capital and others, stating, "This sounds ridiculous. Did we cut a deal to be the senior debt or not? If we can never force a bktcy, start a liquidation process, or wipe out the lower debt in a bktcy – what good is being senior?…Unless I'm reading this wrong it appears to me that DOE isn't at all prepared to live up to the deal we cut and I'm not about to fund under these debt terms. Am I missing something?"[515] Mr. McJunkin shared Mr. Mitchell's concerns and was "very disappointed that this is what we're seeing."[516]

Again, the documents indicate that DOE capitulated after hearing the investors' concerns. On December 29, 2010, Mr. Mitchell had a discussion with Ms. Nwachuku to go over his issues with the DOE proposal. After the discussion, he informed Mr. McJunkin and others, "I think we have boiled down the issue to one thing – a broad thing – the DOE needs to control the process of liquidation. Having said that they realize we need a say – they are just worried we will short sell everything for $76 million and be on our merry way."[517] After laying out several options "they are open to," Mr. Mitchell stated that "[Ms. Nwachuku] wants us to mark up their document with what we need out and work on a way that gives them a true say in driving to the highest liquidation sale possible while also requiring that the outcome of liquidation value is the outcome. She would like to be sitting across from each other in DC sometime next week as well to hash this out conceptually before [January] 10th.[518]

On January 9, 2010, Mr. Mitchell updated Mr. Kaiser on the status of negotiations with DOE in advance of the January 10 funding date. He stated, "We continue to work out the terms of the senior secured loan that we agreed to with the DOE last month. The devil is certainly in the details with the DOE but it appears we have almost all of the terms finalized…As you know, the DOE went ahead and funded the loan draw on December 10 and the next draw is scheduled for tomorrow (January 10th). Assuming we work out the remaining details, Argonaut and Madrone will need to fund their respective pro-rata amounts of the December and January draws of our $75 million senior secured loan when the DOE funds the January draw on its loan. The Argonaut amount is

---

[513] E-mail from Partner, Gibson, Dunn & Crutcher LLP, to Steve Mitchell et al. (Dec. 24, 2010, 1:49 PM) [Argonaut Production at AVI-HCEC-0043953-55].
[514] *Id*. at AVI-HCEC-0043953-54.
[515] E-mail from Steve Mitchell to Partner, Gibson, Dunn & Crutcher LLP et al. (Dec. 24, 2010, 1:46 PM) [Argonaut Production at AVI-HCEC-0043952-53].
[516] E-mail from Jamie McJunkin, Gen. Partner, Madrone Capital Partners, to Steve Mitchell et al. (Dec. 24, 2010, 3:53 PM) [Argonaut Production at AVI-HCEC-0043952].
[517] E-mail from Steve Mitchell to Jamie McJunkin et al. (Dec. 29, 2010, 3:34 PM) [Argonaut Production at AVI-HCEC-0043950-51].
[518] *Id.* at AVI-HCEC-0043951.

approximately $6.82 million and would be funded on Tuesday or Wednesday."[519] Mr. Mitchell further described that "DOE is requiring that we fund into an escrow on their January funding just to see dollars moving on our part – if we ultimately do not close on the loan transaction then the escrowed dollars will be released back to Argonaut and Madrone."[520] When Mr. Mitchell asked "if it is okay to fund into escrow this week,"[521] Mr. Kaiser responded affirmatively.[522]

As of February 1, 2010, the restructuring agreement had not closed. As Mr. Mitchell explained in an update to Mr. Kaiser, "This is an ongoing process with the DOE. The deal was cut last year but getting the DOE to engage has been like pulling teeth. The company, myself and attorneys are continually offering to be in DC but the DOE continues to put us off. They have all but admitted they are working in real time to figure ou[t] how to actually amend the loan guaranty. They have had some selective memory on the deal a time or two but we have so far been able to keep them honest…our assumption is that someone outside of direct negotiations is pushing for the DOE to cut a better deal than what they agreed to last year."[523]

On February 17, 2011, Mr. Mitchell emailed Mr. Kaiser asking for approval to fund their monthly commitment for February. He stated, "We are finally wrapping up the Solyndra loan transaction. The deal is set to close next Tuesday [February 22], however, the DOE has agreed to go ahead and fund February's loan payment tomorrow [February 18]. As a result, Argonaut and Madrone are required to fund their pro rata portion of the $75 million loan into an escrow that will be released upon closing of the entire transaction (hopefully Tuesday). This amount is $4,540,636.41. In addition, Argonaut and Madrone are required to fund the remaining portion of the $37,500,000 commitment upon closing. This amount is $19,316,249.83."[524] Mr. Kaiser approved the funding described stating, "We have no choice, assuming Chu doesn't pull the plug on the payment, now that the Congressional investigation has begun."[525] Secretary Chu signed the Action Memorandum approving the restructuring agreement on February 22, 2011.

B. The Terms of the Solyndra Restructuring

After DOE offered to subordinate its interest in the loan guarantee to Solyndra's investors on December 7, 2010, the LPO Director of Portfolio Management, Ms.

---

[519] E-mail from Steve Mitchell to George Kaiser et al. (Jan. 9, 2011, 2:18 PM) [Argonaut Production at AVI-HCEC-0050415].
[520] *Id.*
[521] *Id.*
[522] *See* E-mail from George Kaiser to Steve Mitchell et al. (Jan. 10, 2011, 2:13 PM) [Argonaut Production at AVI-HCEC-0050415].
[523] E-mail from Steve Mitchell to George Kaiser (Feb. 1, 2011, 1:21 AM) [Argonaut Production at AVI-HCEC-0050297-300].
[524] E-mail from Steve Mitchell to George Kaiser et al. (Feb. 17, 2011, 5:09 PM) [Argonaut Production at AVI-HCEC-0050296].
[525] E-mail from George Kaiser to Steve Mitchell et al. (Feb. 17, 2011, 11:33 PM) [Argonaut Production at AVI-HCEC-0050296].

Nwachuku, circulated a summary of the Solyndra restructuring terms to LPO staff on December 10, 2010.[526]

The summary — which included the subordination of DOE's interest in the loan guarantee to Solyndra's investors — listed Solyndra's debt in tranches. The most senior tranche, Tranche A, was the $75 million in new funding to be contributed by Argonaut and Madrone, which would be senior to all DOE debt. Tranche B was comprised of $150 million of DOE debt, $55 million of which had already been disbursed to Solyndra and $95 million of which would be disbursed after the restructuring. After Tranche B, DOE and Solyndra agreed to insert a placeholder in Tranche C for an additional $75 million in funding to be contributed by Solyndra's investors at a later debt. Tranches A, B, and C represented the senior debt; the second senior debt of $560 million consisted of $385 million of DOE debt and $175 million of debt that Solyndra investors' had funded in June 2010. DOE's $385 million in debt was *pari passu* with the investors $175 million in debt, meaning that it was on equal footing with respect to repayment.[527]

C. DOE's Analysis of the Decision to Subordinate Its Interest to Solyndra's Investors

Like the closing of the original agreement, under the Federal Credit Reform Act, OMB is responsible for reviewing the restructuring of Title XVII loan guarantees. After reaching an agreement with Solyndra and its investors in early December 2010, LPO staff began preparing for OMB's review by producing financial models and other information to support DOE's position that restructuring the Solyndra loan guarantee agreement would result in greater recoveries for the government than an immediate liquidation. In addition, DOE began a legal review of the Energy Policy Act to determine if DOE's decision to subordinate its interest in the first $75 million recovered in a liquidation to two Solyndra investors was in violation of the Act's prohibition on subordination, set forth in Section 1702(d)(3). DOE's legal analysis, which was eventually set forth in a memorandum by LPO Chief Counsel Susan Richardson was also submitted by DOE for OMB review.

On December 8, the day after DOE offered to subordinate its interest, Ms. Richardson emailed the office of DOE General Counsel Scott Blake Harris to request a meeting with Mr. Harris. She stated, "We have a serious problem at Solyndra and need to be brief Scott as soon as possible."[528] The problem was that DOE's proposed subordination of the taxpayers' interest to private investors violated the plain language of

---

[526] *See* E-mail from Frances Nwachuku to Attorney Advisor, U.S. Dep't of Energy et al. (Dec. 10, 2010, 3:48 PM) (attaching draft "Solyndra Proposed Key Business Terms and Conditions."). A copy of the term sheet was also provided to Morrison & Foerster. *See* E-mail from Attorney Advisor, U.S. Dep't of Energy, to Partner, Morrison & Foerster LLP et al. (Dec. 10, 2010, 3:42 PM) (describing the attached document as a "revised term sheet which I believe reflects the agreement of the parties."). Ms. Nwachuku forwarded a final version of the summary to LPO staff later on December 10, 2010. *See* E-mail from Frances Nwachuku to LPO staff (Dec. 10, 2010, 4:02 PM).

[527] *See id.*

[528] E-mail from Susan Richardson, Chief Counsel, U.S. Dep't of Energy Loan Programs Office, to Executive Assistant to the Gen. Counsel, U.S. Dep't of Energy (Dec. 8, 2010, 2:51 PM).

the Energy Policy Act. In an interview with Committee staff, Ms. Richardson stated that during the December 8 meeting with Mr. Harris, she briefed him on the terms and conditions of the proposed Solyndra restructuring, including the subordination.[529] Although DOE had already agreed to subordinate its interest, Ms. Richardson explained that it was her understanding that the deal could not go forward until her office determined whether the subordination violated Section 1702(d)(3) of the Energy Policy Act.[530] Section 1702(d)(3) provides that "[t]he obligation shall be subject to the condition that the obligation is not subordinate to other financing."[531] The Act defines "obligation" as "the loan or other debt obligation that is guaranteed under this Section."[532] According to Ms. Richardson, at the time of the December 8 meeting, she had not reached a decision as to whether DOE's decision to subordinate violated the terms of the Energy Policy Act; instead, she stated that the statute's provision on subordination raised a question that required further analysis.[533]

Ms. Richardson told Committee staff during her interview that she and her staff began their analysis of the Energy Policy Act's provision on subordination after the December 8 meeting.[534] Based on documents produced by DOE, OMB, and DOE's outside counsel on the Solyndra loan guarantee, Morrison & Foerster LLP, Ms. Richardson's legal analysis of the subordination took place throughout December and early January. For example, an email produced by DOE to the Committee demonstrates that, as of December 15, the LPO's analysis of the Act and the question of subordination was underway.[535] Ms. Richardson raised the subordination issue with DOE's outside counsel during a call she convened on December 16, 2010 in order to discuss "our approach to Solyndra…to be sure we have a clear, defensible strategy that works with our authorities."[536] Based on Morrison & Foerster's notes from this call, DOE had already settled on a legal theory to justify the subordination. Specifically, the notes state the prohibition on subordination "needs to apply at origination."[537]

In an interview with Committee staff, Ms. Richardson explained that, in addition to the subordination provision, her office had asked Morrison & Foerster to do a comprehensive overview of the Energy Policy Act and its regulations because Solyndra was the first restructuring under Title XVII.[538] Morrison & Foerster forwarded a draft of this memorandum, entitled "DOE/Solyndra Restructuring Contractual and Legal

---

[529] Interview with Susan Richardson, Chief Counsel, U.S. Dep't of Energy Loan Programs Office, in Washington, D.C. (Nov. 7, 2011) (notes on file with author) [hereinafter, "Richardson Interview].
[530] *Id.*
[531] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1702(d)(3) (2005).
[532] *Id.* at § 1701(5).
[533] Richardson Interview, *supra* note 529.
[534] *Id.*
[535] *See* E-mail from Susan Richardson to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Dec. 15, 2010, 9:28 AM) (asking that they consider Section 1702(g)(3) and how that section applies to DOE's workout authority).
[536] E-mail from Susan Richardson to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office (Dec. 15, 2010, 7:11 PM).
[537] Notes of U.S. Dep't of Energy outside Counsel Morrison & Foerster LLP, *Call w/ SSR – Solyndra/Reg Overview* (Dec. 16, 2010) [Morrison & Foerster Production at MFHR00070].
[538] Richardson Interview, *supra* note 529.

Analysis," to DOE on January 3, 2011.[539] The memorandum sets forth section by section the provisions of the existing loan guarantee agreement as well as the "goals and issues" related to the restructuring.[540] With regard to subordination of DOE's interest to Solyndra's investors, Part III.B of the draft memorandum states that "Subordination of DOE-Guaranteed Loans is Prohibited," and beneath it, "[t]he Act and the Applicable Regulations prohibit subordination of the DOE-Guaranteed Loans."[541] The outside counsel's memorandum was never finalized. During an interview with Committee staff, Ms. Richardson stated that the outside counsel did not finish the legal analysis because DOE made the determination that it should be "done in house," as it was DOE's responsibility to interpret its own statute.[542] DOE did not submit a memorandum presenting its analysis of the subordination to OMB until January 19, 2011. DOE's interpretation of the Energy Policy Act will be discussed later in this report.

Despite Ms. Richardson's understanding that the Solyndra restructuring would not go forward until the subordination question was resolved, LPO staff, Solyndra, and Argonaut nonetheless worked to finalize the terms and initially planned for a January 7, 2011, closing.[543] At the same time, LPO staff began to prepare its valuations of the company under restructuring and liquidation scenarios. On December 8, 2010, a DOE financial advisor sent Ms. Nwachuku a "very simplistic analysis of company valuation under both an orderly liquidation and going-concern basis."[544] The advisor compared DOE's current collateral in the project company, which primarily consisted of the building and manufacturing equipment, to what its collateral would be after the restructuring, which would include rights to the equipment, intellectual property, and sales contracts owned by the sponsor. Assuming a liquidation value of 10 to 20 percent, the contractor valued the company at $15 to $30 million in an immediate liquidation scenario. Under the proposed restructuring, with an improved collateral package, the advisor estimated that the company would be worth between $200 million to $300 million.[545]

After receiving a summary of the restructuring terms from Ms. Nwachuku on December 10,[546] the same DOE financial advisor updated his recovery analysis on

---

[539] *See* E-mail from Partner, Morrison & Foerster LLP, to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Jan. 3, 2011, 6:52 PM) [Morrison & Foerster Production at MFHR04376]. *See also* Draft Memorandum of Morrison & Foerster LLP to U.S. Dep't of Energy Loan Programs Office, *DOE/Solyndra Restructuring Contractual and Legal Analysis* (Jan. 3, 2011) [Morrison & Foerster Production at MFHR04377-95] [hereinafter, "MoFo Contractual and Legal Analysis"].
[540] *Id.* at 10. [Morrison & Foerster Production at MHHR04386].
[541] *Id.*
[542] Richardson Interview, *supra* note 529.
[543] *See* E-mail from Susan Richardson to Scott Blake Harris, Gen. Counsel, U.S. Dep't of Energy et al. (Dec. 23, 2010, 9:23 AM).
[544] E-mail from Financial Advisor, U.S. Dep't of Energy, to Frances Nwachuku et al. (Dec. 8, 2010, 11:37 AM).
[545] *See id.*
[546] *See* E-mail from Frances Nwachuku to Financial Advisor, U.S. Dep't of Energy et al. (Dec. 10, 2010, 3:48 PM) (attaching draft "Solyndra Proposed Key Business Terms and Conditions.").

December 12 in a draft Solyndra Credit Paper.[547] He estimated that the current liquidation value of the company was between $50 million and $100 million, resulting in a recovery rate of between 11 and 22 percent. Noting that the proposed restructuring would "significantly enhance DOE's collateral position" by giving it access to the parent as well as the project company's assets, the contractor stated the "enterprise value" of Solyndra as a going concern was between $200 million and $300 million with a recovery rate of between 37 percent and 56 percent. He noted, though, that due to the subordination provision that allowed Solyndra's investors to recover the first $75 million in a liquidation, DOE's recovery percentage fell to between 23 percent and 42 percent.[548]

The draft Credit Paper also included DOE's assessment of the market for Solyndra's products and the company's viability. Despite finding that the valuation of the company after restructuring was greater than an immediate liquidation, the paper acknowledged certain market challenges facing Solyndra. Based on a market analysis that DOE commissioned from Navigant Consulting, Inc., in support of Solyndra's application for the second loan guarantee, DOE observed that the PV market would continue to grow, although estimates about the rate of growth in that market varied widely. The draft paper observed, though, that the price of PV modules had dropped by approximately 50 percent since 2007, and predicted that it would continue to drop, due to more efficient and lower cost solar facilities. Even with these concerns, DOE found that there was a "large" market for Solyndra's products and the Department still believed that Solyndra's unique design could "command a premium price" in the market place over crystalline silicon panels because of Solyndra's lower installation costs.[549]

While DOE moved forward with finalizing the restructuring terms, the Department had to wrestle with the question of whether to authorize Solyndra's December disbursement under the loan guarantee agreement. This question was complicated. DOE was in the middle of restructuring its loan guarantee agreement with Solyndra, which needed the funding to continue operating. The company, however, was in default of its obligations to DOE under the original agreement to fund $5 million into the Equity Funding Account by December 1 and to comply with Davis Bacon Act reporting requirements. DOE ultimately decided to issue a "reservation of rights" letter to the company noting that Solyndra had breached two covenants of the Common Agreement.[550] That letter, dated December 13, 2010, and signed by Jonathan Silver, did not waive the defaults. Rather, it stated that DOE would "forbear" exercising its remedies under the Common Agreement provided that Solyndra remedy the Davis Bacon

[547] *See* E-mail from Financial Advisor, U.S. Dep't of Energy, to Frances Nwachuku et al. (Dec. 12, 2010, 3:59 PM)(attaching "Solyndra Credit Paper 12-12-10.").
[548] *Id.*
[549] *Id.*
[550] *See* E-mail from Acting Assistant Gen. Counsel for Labor & Pension Law, U.S. Dep't of Energy, to Susan Richardson (Dec. 13, 2010, 9:18 PM). *See also* E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Acting Assistant Gen. Counsel for Labor & Pension Law, U.S. Dep't of Energy et al. (Dec. 13, 2010, (9:14 AM) (explaining that DOE was not waiving the default, but waiving the conditions precedent to funding).

Act reporting violations by January 10, 2011.[551] During an interview with Committee staff, Susan Richardson stated that DOE had to issue this letter in order to authorize the December disbursement of $16 million to Solyndra.[552]

In addition to preparing legal and factual analyses for OMB review, the LPO also had to determine the proper process for DOE review and approval of the restructuring agreement. For the conditional commitment and closing of loan guarantees, DOE procedures required that the DOE Credit Review Board approve the offer of a conditional commitment. By December 20, 2010, Ms. Nwachuku was pressing Ms. Richardson "as to how we proceed."[553] Ms. Nwachuku explained that DOE was trying to close the restructuring by January 7, and "Meeting that date will be challenging if we don't know whether or not Jonathan [Silver] can signoff or if we must run the package by the CRB."[554] Ms. Richardson responded, "I will circulate an e-mail shortly. But I don't think this is a legal issue. JS is going to have to get buy-in from CRB in process."[555] Mr. Isakowitz, a member of the CRB at the time of the Solyndra restructuring, stated during an interview with Committee staff that he was never consulted about the Solyndra restructuring in his capacity as a CRB member.[556] In an email to the DOE General Counsel on December 23, 2010, Ms. Richardson recommended that the LPO Director seek approval from the DOE Secretary through an "Action Memo," and that "there be no formal credit committee or CRB process."[557] Ms. Richardson stated that the statute and regulations applied only to the issuance of new loan guarantees, and that while the jurisdiction of the Credit Review Board was broad enough to include restructuring, it did not "expressly address" them or require CRB approval.[558]

DOE ultimately followed Ms. Richardson's recommendation that an Action Memorandum be presented to the DOE Secretary for approval. That memorandum, discussed in greater detail below, was signed by Secretary Chu on February 22, 2011. In her interview with Committee staff, Ms. Richardson stated that she did not know if the DOE Credit Review Board was consulted about the Solyndra restructuring. According to Ms. Richardson, it was not her responsibility to consult with the CRB; instead, her job was to interpret the applicable statutes, regulations, and policies to determine if it was required.[559] Steve Isakowitz, then-CFO of DOE and a member of the CRB during the Solyndra restructuring, informed Committee staff during his interview that the CRB was not consulted.[560] Even though he was the Chief Financial Officer for DOE, he did not learn of the restructuring until after it was finalized in February 2011.

---

[551] *See* Letter from Jonathan Silver, Executive Dir., U.S. Dep't of Energy Loan Programs Office, to Solyndra Fab 2 LLC & Solyndra, Inc. (Dec. 13, 2010).
[552] Richardson Interview, *supra* note 529.
[553] E-mail from Frances Nwachuku to Susan Richardson (Dec. 20, 2010, 12:40 PM).
[554] *Id.*
[555] E-mail from Susan Richardson to Frances Nwachuku (Dec. 20, 2010, 12:49 PM).
[556] Isakowitz Interview, *supra* note XX.
[557] E-mail from Susan Richardson to Scott Blake Harris et al. (Dec. 23, 2010, 9:23 AM).
[558] *See id.*
[559] Richardson Interview, *supra* note 529.
[560] Isakowitz Interview, *supra* note 41.

VII. OMB REVIEW OF THE SOLYNDRA RESTRUCTURING

A. OMB's Role in Reviewing the Solyndra Restructuring

Solyndra was the first restructuring of a loan guarantee under Title XVII of the Energy Policy Act. According to the OMB staff members who were interviewed by Committee staff, there was uncertainty about what the agency's role should be in the restructuring.[561]

Like the closing of the original loan guarantee agreement in September 2009, OMB's statutory role with respect to reviewing the restructuring is defined by Section 503(a) of the Federal Credit Reform Act of 1990 (FCRA). Pursuant to Section 503(a) of FCRA[562] and OMB Circular No. A-11,[563] OMB is responsible for reviewing and approving the credit subsidy estimates of Federal loans and loan guarantees. Under FCRA, for restructurings, OMB must determine whether the restructuring is a modification or a workout. OMB Circular A-11 Section 185.3(s) defines a modification as a "Government action" that was not assumed in the estimate of cash flows and changes the cost of a loan guarantee.[564] A workout is defined in Section 185.3(ac) as "plans that offer options short of default or foreclosure for resolving troubled loans or loans in imminent default . . . ."[565] Section 185.3(ac) further explains that workouts 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."[566]

During interviews with Committee staff, an OMB staff member who reviewed the Solyndra restructuring explained that the central question for OMB was whether the restructuring would optimize the government's recoveries or, conversely, present a lower cost to the government.[567] In general, this meant comparing the government's recovery in an immediate liquidation to the company's expected value after the restructuring. For the Solyndra restructuring, as discussed below, OMB expected DOE to present certain financial models and cash flows showing the company's value under an immediate liquidation scenario versus a restructuring scenario, and the expected recoveries for the government.

---

[561] Carroll Interview, *supra* note 285.
[562] Federal Credit Reform Act of 1990, Pub. L. No. 101-158, § 503(a).
[563] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT. OMB CIR. NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2011.pdf.
[564] *Id.* at § 185.3(s).
[565] *Id.* at § 185.3(ac).
[566] *Id. See also* E-mail from Policy Analyst, OMB, to Policy Analyst, OMB et al. (Jan. 3, 2011, 3:14 PM) (discussing the differences between a modification and a workout and stating that "if the borrower isn't able to repay under the terms of the restructuring, then a work-out should not be used.").
[567] Interview with Fouad Saad, Program Examiner, OMB, in Washington, D.C. (Mar. 1, 2012) (notes on file with author) [hereinafter, "Saad Interview"].

While FCRA and OMB Circular A-11 clearly contemplate a role for OMB with respect to the restructuring of a Federal loan guarantee, OMB struggled to define what the extent of its involvement should be. On January 3, 2011, just one week after DOE had submitted its first financial models for the restructuring, OMB staff held a meeting to discuss DOE's analysis and OMB's review. An email exchanged between OMB staff after this meeting indicates that they planned to raise the matter of OMB's role to then-OMB Director Jacob Lew and Deputy Director Jeffrey Zients. In that email, one OMB staff member stated that the question for the OMB Director "would be less on the terms of the restructuring and more on whether OMB should play an active role in these types of decisions."[568] Fouad Saad, a Program Examiner in the OMB Energy Branch who participated in the Solyndra restructuring review, explained to Committee staff that OMB was trying to determine whether it should perform a "typical examiner function," meaning it would analyze the models and their assumptions to see if the deal had minimized costs to the government, or whether the agency should play a more active role in questioning the overall advisability of DOE's decision to restructure.[569]

According to Mr. Saad, OMB staff eventually learned that OMB would assume its traditional examiner function during the Solyndra restructuring. This decision, which was made after OMB staff had already begun to question whether the restructuring would maximize recoveries for the government, paved the way for the approval of the restructuring and limited OMB's ability to fully review the transaction. As set forth below, many of the questions OMB staff raised in January and February 2011 about the advisability of the restructuring would be borne out only nine months later, when Solyndra filed for bankruptcy.

B. OMB's Review of DOE's Financial Analysis and Model of the Solyndra Restructuring Submitted in December 2010

After DOE reached an agreement in principal in early December 2010 with Solyndra's investors on the terms of the restructuring, DOE staff briefed OMB staff. Communications produced by OMB demonstrate that OMB staff was immediately skeptical of the Solyndra restructuring and whether it would improve the government's recoveries over an immediate liquidation of the company. As discussed below, OMB staff continued to raise concerns about the Solyndra restructuring, the company's viability, and DOE's legal rationale for subordinating its interest to Solyndra's investors throughout the course of OMB's review during the months of December 2010 and January 2011.

DOE staff first briefed OMB staff on the status of the restructuring negotiations on December 8, 2010, the same day Ms. Richardson met with the DOE General Counsel to discuss the Solyndra restructuring. After the briefing, Sally Ericsson, the Program Associate Director of the Energy Branch at OMB, emailed Ms. Browner, Ms. Zichal, and others in the White House stating, "I'm sure you already know this. Negotiations are

[568] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB et al. (Jan. 3, 2011, 6:22 PM).
[569] Saad Interview, *supra* note 567.

fluid. DOE has shared with us (and Treasury) that Solyndra is in the midst of a severe liquidity crisis. In its negotiations with Solyndra investors regarding potential restructuring options, DOE has created a deadline of THIS FRIDAY that may precipitate a meltdown that would likely be very embarrassing for DOE and the Administration."[570] Ms. Ericsson explained that DOE had made Solyndra's next disbursement under the loan guarantee contingent on reaching an agreement with Solyndra's investors to contribute an additional $75 million to the company.[571] She concluded, "If investors do not commit these funds, and DOE does not disburse on the loan, Solyndra may default on obligations to various suppliers soon thereafter. This would likely become public quickly, and could force the company into bankruptcy. If investors commit the funds, restructuring discussion will continue, and may involve significant changes including extending the current loan tenor and repayment grace periods, and even potentially discounting the value of DOE's debt and/or subordinating parts of it to attract further capital."[572] Emails produced by DOE and OMB show that the disbursement did not take place on December 10, 2010, as originally scheduled; instead, after Mr. Silver signed the reservation of rights letter on December 13, 2010, DOE disbursed $16 million under the loan guarantee agreement.

DOE next updated OMB on Solyndra's status on December 14, shortly after DOE had reached an agreement with Solyndra's investors on the terms of the restructuring and subordination. Based on an email exchanged between OMB staff on December 14 recounting the DOE briefing, OMB staff immediately had concerns about the terms.[573] For example, Kelly Colyar — formerly the Credit Policy Director at the DOE LPO and now a Program Analyst in OMB's Energy Branch — noted that because Solyndra had been "unable to attract new investors," the company's existing investors had agreed to provide $150 million in new senior debt.[574] In turn, Ms. Colyar noted that DOE had agreed to divide its debt, with $150 million becoming senior debt and the remaining $385 million becoming junior debt.[575] Ms. Colyar stated that she had asked for additional information from DOE "as to how the proposed changes maximize the potential recoveries for the U.S. government since this was not immediately clear."[576] She also noted a concern with the subordination, and stated that she planned to "follow up regarding the proposed structure's compliance with the statutory requirement that the DOE guaranteed debt not be subordinate to other financing."[577]

The concerns and questions Ms. Colyar expressed about the Solyndra restructuring and subordination were shared by her OMB colleagues. On December 15, 2010, Ms. Colyar's Branch Chief at OMB, Kevin Carroll, informed his superior Richard Mertens, the OMB Deputy Associate Director of Natural Resources Programs, of the DOE subordination, and questioned whether it was consistent with the Energy Policy Act

[570] E-mail from Sally Ericsson to Carol Browner et al. (Dec. 8, 2010, 7:18 PM).
[571] *See id.*
[572] *Id.*
[573] *See* E-mail from Kelly Colyar to Richard Mertens et al. (Dec. 14, 2010, 7:22 PM).
[574] *Id.*
[575] *See id.*
[576] *Id.*
[577] *Id.*

of 2005. Mr. Carroll stated that "[t]here 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 . . . I think they have stretched this definition beyond its limits."[578] Like Ms. Colyar, other OMB staff questioned DOE's analysis that the restructuring would improve the government's recoveries. One OMB staff member in the budget division stated that she "wonder[ed] whether this workout is really giving more to the parent [Solyndra, Inc.] than recovering for DOE."[579] Ms. Colyar also questioned how the subordination would impact DOE's recoveries and why DOE felt forced to subordinate its interest given the fact that Solyndra was already in default under the original agreement for failing to fund the Equity Funding or Cost Overrun Account.[580] She believed DOE had "the upper hand" since they could "call a default at any point," so was "vastly confused by DOE's decision to negotiate away their senior position in this transaction," because doing so would "displac[e] DOE's potential for recoveries."[581]

To address its concerns and to develop the cost estimate for the Solyndra restructuring, on December 16, 2010, OMB staff requested additional information about the terms of DOE's agreement with Solyndra. Specifically, in an email to Frances Nwachuku, the Director of Portfolio Management for the LPO and the primary negotiator with Argonaut, Ms. Colyar stated that OMB needed DOE's analysis that the restructuring constituted a workout rather than a modification.[582] According to Ms. Colyar's email, the two key considerations were whether the restructuring was due to "a default or imminent default" and whether the restructuring "optimizes recoveries for the U.S. government," meaning that the cost of the restructuring is less than that of an immediate liquidation.[583] Ms. Colyar requested DOE's analysis of the costs and recoveries under various scenarios, including a restructuring and an immediate liquidation of the company. Ms. Colyar also asked DOE to identify any other instances of default by Solyndra of the terms of the original agreement.[584]

On December 20, 2010, in response to OMB's request, DOE submitted its financial model for the Solyndra restructuring to OMB for its review, along with a presentation about the restructuring.[585] The recovery analysis was forwarded separately on December 21, 2010.[586] DOE and OMB staff held a conference call the following day to discuss DOE's analysis. In addition to running through Solyndra's current status, and outlining the restructuring terms, a summary of the call drafted by Fouad Saad indicates that DOE asserted that the restructuring should be considered a workout, as the parent

[578] E-mail from Kevin Carroll to Richard Mertens et al. (Dec. 15, 2010, 9:57 AM).
[579] E-mail from Policy Analyst, OMB, to Kelly Colyar (Dec. 15, 2010, 7:39 AM).
[580] *See* E-mail from Kelly Colyar to Fouad Saad et al. (Dec. 15, 2010, 11:49 AM).
[581] *Id.*
[582] *See* E-mail from Kelly Colyar to Frances Nwachuku (Dec. 16, 2010, 6:57 PM).
[583] *Id.*
[584] *See id.*
[585] *See* E-mail from Frances Nwachuku to Fouad Saad & Kelly Colyar (Dec. 20, 2010, 5:59 PM) (attached financial information on file with author).
[586] *See* E-mail from Frances Nwachuku to Fouad Saad & Kelly Colyar (Dec. 21, 2010, 1:05 PM).

company, Solyndra, Inc., was expected to run out of cash by January.[587] According to Mr. Saad's summary, DOE stated that the parent company's bankruptcy would "greatly impact[ ]" the ability of the DOE project company, Fab 2, to continue operations, "given how integral the parent is to the project."[588]

DOE and OMB also discussed the subordination of DOE's interest in the Solyndra loan guarantee during the December 22 call. In his summary, Mr. Saad emphasized that "the investors' new $75 million infusion would be allowed to receive first payment preference in a liquidation prior to March 2013," although DOE claimed that they did not believe this payment preference subordinated DOE's interest in the loan guarantee.[589] During the call, Mr. Saad asked DOE to provide OMB with its "legal position" on the subordination.[590] Mr. Saad confirmed this request in a December 22, 2010, email to Ms. Nwachuku.[591] With respect to DOE's analysis of expected recoveries under a restructuring scenario, Mr. Saad noted that DOE believed "recoveries that would result from this restructuring would exceed recoveries if the project were to default today."[592] Mr. Saad observed that DOE's analysis hinged on the "feasibility of the consolidation plan, and various assumptions around the value of Solyndra as a going concern if it gets the capital it needs and makes it to 2012." [593]

Following the December 22, 2011, call with DOE, OMB staff began its review of DOE's financial model for the Solyndra restructuring. Just over one week later, OMB had identified significant problems with DOE's analysis. For example, after comparing the values DOE had assigned in its liquidation analysis to various assets to the values assigned by Fitch and the Independent Engineer in their reports on Solyndra, Ms. Colyar believed that DOE had undervalued the Fab 2 building. Ms. Colyar concluded that the recoveries under an immediate liquidation were "significantly HIGHER than DOE's estimate of recoveries," meaning that the government "is better off liquidating the assets today than restructuring under DOE's proposal."[594] One of Ms. Colyar's colleagues at OMB validated her analysis, stating that it "confirms our earlier concern that DOE's restructuring could effectively result in higher costs than liquidation at this point."[595] This staff member went on to note that Solyndra was the first guarantee under Title XVII, and that "DOE is likely to be very sensitive about optics if it should default."[596] A Treasury staff member to whom Ms. Colyar had forwarded her analysis also found it to

---

[587] *See* E-mail from Fouad Saad to Kelly Colyar et al. (Dec. 22, 2010, 6:01 PM).
[588] *Id.*
[589] *Id.*
[590] *See id*.
[591] *See* E-mail from Fouad Saad to Frances Nwachuku & Kelly Colyar (Dec. 22, 2010, 6:05 PM) (asking DOE to "provide us with DOE's legal position regarding Tranche A, and the view you explained yesterday that the first payment preference for the investors' equity contribution does not constitute effective subordination of the DOE loan.").
[592] E-mail from Fouad Saad to Kelly Colyar et al. (Dec. 22, 2010, 6:01 PM).
[593] *Id.*
[594] E-mail from Kelly Colyar to Fouad Saad et al. (Jan. 3, 2011, 12:40 PM) (attaching documents entitled "Solyndra – Liquidation" and "Solyndra Liquidation Comparison" which compare DOE's liquidation values to those assigned by the Independent Engineer and Fitch).
[595] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB et al. (Jan 3, 2011, 1:42 PM).
[596] *Id.*

be on point. When Ms. Colyar asked the Treasury official whether she was "missing something here" with regard to the liquidation values,[597] the official responded that the cost of the building should have been within 10 to 20 percent of the values Fitch had assigned.[598] The Treasury staff member informed Colyar that the "DOE analysis is missing something, not you!"[599]

OMB staff convened a meeting on January 3, 2011, to discuss the Solyndra restructuring. In addition to Energy Branch and Budget Review Division staff, senior OMB officials attended this meeting, including Alex Mas, the OMB Director for Economic Policy and Chief Economist, Sally Ericsson, the Program Associate Director of the Energy Branch, and Deputy General Counsels Steven Aitken and William Richardson. In addition to discussing DOE's initial financial model, the primary purpose of the meeting appeared to be a discussion of OMB's role in reviewing the Solyndra restructuring. A readout of the meeting drafted by an OMB staff member stated that Mr. Mas "seemed to think that liquidating the project now was the best option in terms of the Government's interest, but wanted to tee it up for" OMB Director Jacob Lew and Deputy Director Jeffrey Zients.[600] The issue for Mr. Lew and Mr. Zients, as mentioned earlier in this report, was less on the Solyndra restructuring terms, and "more on whether OMB should play an active role in these kinds of decisions."[601]

In preparation for these meetings, OMB staff drafted a memorandum on the Solyndra restructuring, multiple drafts of which were produced by OMB to the Committee. While it is not clear whether this memorandum was finalized,[602] the drafts that were circulated among OMB staff make clear that the staff had significant concerns with DOE's plan to restructure Solyndra. The drafts produced to the Committee list three main concerns with the project: the subordination was not consistent with the Energy Policy Act or OMB's own guidance, Circular A-129; the proposed changes may not "optimize" recoveries for the government; and, even with a restructuring, OMB staff was concerned about the viability of the company as "bankruptcy and/or default are a real possibility."[603] A January 4, 2011, draft of this memorandum explained that OMB doubted the company's viability because "Solyndra's product is priced at a premium in a

---

[597] E-mail from Kelly Colyar to Financial Analyst, U.S. Dep't of Treasury et al. (Jan. 3, 2011, 11:58 AM) (attaching "Solyndra Liquidation Comparison").
[598] *See* E-mail from Financial Analyst, U.S. Dep't of Treasury, to Kelly Colyar et al. (Jan. 3, 2011, 12:17 PM).
[599] *Id.*
[600] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB et al. (Jan. 3, 2011, 6:22 PM).
[601] *Id.*
[602] On the evening of January 4, 2011, OMB Chief Economist Alex Mas emailed Richard A. Mertens, the Deputy Associate Director for Natural Resources Programs and told him to "hold" on the memorandum. *See* E-mail from Alex Mas to Richard Mertens (Jan. 4, 2011, 7:41 PM).
[603] Draft Memorandum from Energy, Sci. & Water Branch Div., Budget Analysis Branch, OMB, to Alex Mas, Assoc. Dir. of Econ. Policy & Chief Economist, OMB et al., *DOE Proposal for Restructuring the Solyndra Loan Guarantee* (Jan. 3, 2011). A later draft of this memorandum dated January 4, 2011, was addressed to Director Lew, through Alex Mas, Sally Ericsson, and Courtney Timberlake. *See* Draft Memorandum from Kelly Colyar, Branch Chief, OMB, to Jacob Lew, Dir., OMB, *DOE Loan Guarantee for Solyndra* (Jan. 4, 2011).

market with rapidly declining prices and the company's cost structure does not cover operating margins."[604]

Based on documents produced by OMB to the Committee, the Solyndra restructuring was raised with Deputy Director Zients during a meeting on January 4, 2011. According to an email drafted by an OMB staff member who attended this meeting, Mr. Zients believed the "choice" about OMB's role in the Solyndra restructuring should be "very explicit, of whether or not OMB should get involved in deciding whether to liquidate or allow a restructuring to proceed."[605] OMB documents also suggest that the matter of the restructuring and what OMB's role should be in reviewing it was raised with Director Lew either on January 4 or after a senior staff meeting on January 5, 2011.[606] During their interviews, Committee staff questioned Ms. Colyar, Mr. Carroll, Mr. Saad, Ms. Timberlake, and Ms. Ericsson on the guidance they received from OMB Director Lew and Deputy Director Zients on the Solyndra restructuring. With regard to the role OMB should play in this review, Mr. Carroll explained that the decision was between a more "active intervention" and OMB assuming its "traditional" oversight role. According to Mr. Carroll, Mr. Lew determined that OMB would play its "traditional statutory role" with respect to the Solyndra restructuring.[607] Mr. Saad, who reported to Mr. Carroll, confirmed this, telling Committee staff that it was determined that OMB would play its "typical examiner function" with respect to the Solyndra restructuring.[608] This determination seems consistent with information gathered by OMB staff regarding the agency's role in prior restructurings. According to a Budget Review Division staff member, OMB "typically do[es] not tell agencies how to restructure outstanding loans or guarantees, but rather determine[s] the budgetary treatment and how much it will cost."[609] The staff member noted, though, that OMB's decision that a restructuring posed a cost "can influence the agency's decisions and the terms offered[,]" especially if the agency does not have the budgetary authority to pay for the cost posed by the restructuring.[610]

At the time OMB staff received this guidance from the Director, it appears that it had reached a preliminary determination that the Solyndra restructuring was a modification, meaning it would not optimize the government's recoveries and would pose a cost to the government. During her interview with Committee staff, Ms. Colyar

---

[604] *Id.* at 1. *See* E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 4, 2011, 1:08 PM) (transmitting comments on the January 4, 2011 draft memorandum to OMB staff).
[605] E-mail from Fouad Saad to Kelly Colyar et al. (Jan. 4, 2011, 7:05 PM).
[606] In an email on January 4, 2011, Alex Mas asked Richard Mertens for a "paragraph or two" on the Solyndra restructuring so that he could "catch Jack" to discuss after the senior staff meeting on January 5, 2011. *See* E-mail from Alex Mas to Richard Mertens (Jan. 4, 2011, 4:52 PM). However, later on January 4, 2011, Mas emailed Mertens and told him that he had "spoken to Jack briefly and have some initial guidance." E-mail from Alex Mas to Richard Mertens (Jan. 4, 2011, 7:41 PM). "Jack" appears to be OMB Director Lew based on subsequent emails exchanged among OMB staff. *See* E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 6, 2011, 8:45 AM) (asking "[w]hat was the guidance from the director that Alex referenced?").
[607] Carroll Interview, *supra* note 285.
[608] Saad Interview, *supra* note 567.
[609] E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 4, 2011, 7:14 PM).
[610] *Id.*

claimed that OMB always assumes a modification; it is the responsibility of the agency administering the loan program to prove that the restructuring optimizes the government's recoveries and is a workout.[611]

Communications exchanged between OMB staff members suggest that their belief that the Solyndra restructuring was a modification was based on their review of DOE's financial model and recovery analysis that was submitted in late December. For example, during his interview with Committee staff, Energy Branch Chief Kevin Carroll explained that, "based on the information OMB had" in early January, OMB staff believed that the restructuring would require additional funds to pay the cost of the transaction.[612] Further, by January 4, 2011, OMB staff had weighed whether restructuring the loan—allowing DOE to distribute the remaining $75 million available under the loan guarantee to Solyndra—would improve recoveries over an immediate liquidation. In doing this analysis, Ms. Colyar concluded that under an immediate liquidation, DOE would lose $141 million.[613] If the loan were restructured, and DOE approved the disbursement of the balance of loan guarantee funds, Ms. Colyar estimated that DOE would take a greater loss of $385 million due, in part, to the subordination.[614] In addition, by early January, OMB staff had examined the original cash flows and subsidy estimates from the Solyndra closing in 2009, and determined that the assumptions underlying the credit subsidy estimate did not include a workout.[615] Because it did not, the effects or costs from the Solyndra restructuring might not be included in the Solyndra cash flows of the credit subsidy, thereby posing a cost to the government.

Despite this initial assessment in early January that the Solyndra restructuring did not maximize the government's recoveries, OMB staff proceeded to gather more information from DOE about its analysis. On January 3 and again on January 6, 2011, Ms. Colyar requested DOE's legal analysis of the restructuring.[616] On January 7, Ms. Richardson responded that DOE was "still working this through internally and anticipate having consensus soon."[617] Ms. Colyar also requested that Ms. Richardson send OMB the "legal definition of 'workout' that DOE is using in this analysis[.]".[618] Ms. Richardson replied that DOE was using the definition set forth in OMB Circular A-11.[619]

That same day, OMB staff prepared talking points for the OMB Office of General Counsel to use when discussing the Solyndra restructuring and DOE's analysis of

---

[611] Colyar Interview, *supra* note 103.
[612] Carroll Interview, *supra* note 285.
[613] *See* E-mail from Kelly Colyar to Fouad Saad et al. (Jan. 4, 2011, 2:08 PM).
[614] *See id.*
[615] *See* E-mail from Policy Analyst, OMB, to Policy Analyst, OMB (Jan. 4, 2011, 1:18 PM).
[616] *See* E-mail from Kelly Colyar to Frances Nwachuku (Jan. 3, 2011, 12:07 PM) (asking whether "DOE counsel opined on whether the proposal conforms with 1702(d)(3) of the authorizing statute?") *and see* E-mail from Kelly Colyar to Susan Richardson et al. (Jan. 3, 2011, 9:24 PM). *See also* E-mail from Kelly Colyar to Susan Richardson et al. (Jan. 6, 2011, 2:35 PM) ("I wanted to follow up on DOE's legal views on the issue of subordination. Do you have something you could go ahead and send over?").
[617] E-mail from Susan Richardson to Kelly Colyar et al. (Jan. 7, 2011, 9:06 AM).
[618] E-mail from Kelly Colyar to Susan Richardson et al. (Jan. 6, 2011, 2:35 PM).
[619] E-mail from Susan Richardson to Kelly Colyar et al. (Jan. 7, 2011, 9:06 AM).

recoveries with the DOE General Counsel.[620] These talking points reveal OMB's approach to reviewing the Solyndra restructuring — and the holes OMB had identified in DOE's analysis by mid-January 2011. In the talking points, OMB staff stated that DOE needed to be able to demonstrate that a workout of the Solyndra restructuring would "result[] in lower costs."[621] To perform an analysis of DOE's financial model for the restructuring, OMB staff stated that it still needed "several pieces of information," specifically, analyses of expected government recoveries under various scenarios.[622] OMB staff stated that DOE's analysis of an immediate Solyndra liquidation "appears to understate potential recoveries," due to the values assigned to land and due to the fact that it did not "reflect all assets in the collateral package."[623] Similarly, OMB staff observed that DOE's analysis of the government's expected recoveries after restructuring seemed to suggest that "Solyndra and the project would effectively be on par with stronger competitors . . . . With increasing competition from China, and other low-cost competitors, it wasn't clear how Solyndra would be able to achieve the scale-up and margins needed given a more specialized niche . . . ."[624] OMB's Deputy General Counsel William Richardson communicated these requests for additional information to DOE during a phone call on January 11.

Ms. Colyar, Ms. Timberlake, Mr. Carroll, and Ms. Ericsson all told Committee staff during their interviews that the values that DOE assigned to Solyndra's land and buildings were an important factor in OMB's determination of whether the restructuring maximized recoveries. On January 7, 2011, DOE provided OMB with information showing how they calculated the value of Solyndra's buildings and land.[625] DOE explained that they had contacted a real estate consultant about the current market value of the property, and using information the consultant provided, DOE valued Fab 2 at $60 million.[626] Although Ms. Colyar noted during her interview that OMB had used "old data" in their original analysis of Fab 2's value,[627] Ms. Nwachuku's explanation of how DOE valued Solyndra's building still did not appear to address OMB's concerns. In an email to her OMB colleagues on January 7, Ms. Colyar commented that "accepting DOE's market value" for Solyndra meant that the liquidation value should be $87 million, not $60 million.[628]

C. DOE Submits Its Legal Opinion on the Subordination to OMB

While OMB's review of DOE's recoveries analysis continued, the LPO Chief Counsel, Susan Richardson, worked to develop DOE's legal opinion on the subordination. Shortly after OMB asked DOE on January 3, 2011, if DOE counsel had

---

[620] *See* E-mail from Kevin Carroll to William Richardson, Deputy Gen. Counsel, OMB et al. (Jan. 7, 2011, 2:51 PM). *See also* E-mail from Kelly Colyar to Policy Analyst, OMB et al. (Jan. 7, 2011, 4:25 PM).
[621] *Id.*
[622] *Id.*
[623] *Id.*
[624] *Id.*
[625] *See* E-mail from Frances Nwachuku to Kelly Colyar (Jan. 7, 2011, 5:11 PM).
[626] *Id.*
[627] Colyar Interview, *supra* note 103.
[628] *See* E-mail from Kelly Colyar to Policy Analyst, OMB et al. (Jan. 7, 2011, 5:22 PM).

"opined" as to whether the subordination was consistent with the Energy Policy Act, the LPO Chief Counsel's office contacted DOE's outside counsel on Solyndra, Morrison & Foerster, to discuss OMB's request.[629] The handwritten notes of Morrison & Foerster attorneys that were taken during their phone calls and meetings with DOE on Solyndra show that attorneys for the firm spoke to Ms. Richardson and other LPO counsel about DOE's legal rationale for the subordination on at least five occasions on January 4, January 6, and January 7. The notes from a call on January 4 with the LPO Chief Counsel's office indicate that DOE's primary legal argument was that the Energy Policy Act's prohibition on subordination applied at origination only and was "not [a] continuing obligation."[630] This theory was again referenced in Morrison & Foerster's notes from a call on January 6 with the LPO Chief Counsel's Office.[631] The notes from a January 7, 2011, meeting between Morrison & Foerster and LPO counsel, including Chief Counsel Ms. Richardson, state "OMB has requested legal analysis."[632]

The notes taken by Morrison & Foerster counsel also suggest that they discussed OMB Circular No. A-129 (Revised) with DOE. This OMB circular is a guidance document which prescribes policies and procedures for managing all Federal credit programs, including "[d]irect loan programs" and "[l]oan guarantee programs…in which the Federal Government bears a legal liability to pay for all or part of the principal or interest in the event of borrower default[.]"[633] Section II holds in part that unless a waiver is approved, "The Government's claims should not be subordinated to the claims of other creditors, as in the case of a borrower's default on either a direct loan or a guaranteed loan. Subordination increases the risk of loss to the Government, since other creditors would have first claim on the borrower's assets."[634]

After several discussions with its outside counsel about subordination, Ms. Richardson spoke to OMB Deputy General Counsel William Richardson on January 11, 2011, about DOE's legal theory on subordination.[635] According to a summary of their conversation forwarded to OMB staff by Mr. Richardson, DOE's argument was "[b]ased on the present tense language and structure of the provision" and that DOE interpreted the subordination provision "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."[636] In general, Mr. Richardson stated that he believed DOE's "bottom line position to be that Congress did not clearly and

---

[629] *See* E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Partner, Morrison & Foerster LLP (Jan. 3, 2011, 6:44 PM) [Morrison & Foerster Production at MFHR05266].
[630] Notes of U.S. Dep't of Energy outside Counsel Morrison & Foerster LLP (Jan. 4, 2011) [Morrison & Foerster Production at MFHR00102].
[631] Notes of U.S. Dep't of Energy outside Counsel Morrison & Foerster LLP (Jan. 6, 2011) (stating "Arises in origination context") [Morrison & Foerster Production at MFHR00103].
[632] Notes of U.S. Dep't of Energy outside Counsel Morrison & Foerster LLP (Jan. 7, 2011) [Morrison & Foerster Production at MFHR00105].
[633] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT. OMB CIR. NO. A-129 (REVISED), POLICIES FOR FEDERAL CREDIT PROGRAMS AND NON-TAX RECEIVABLES (2000), *available at* http://www.whitehouse.gov/omb/circulars_a129rev/.
[634] *Id.* at § II(3)(c).
[635] *See* E-mail from William Richardson to Kelly Colyar et al. (Jan. 11, 2011, 3:39 PM).
[636] *Id.*

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 . . . ."[637] During the call, Mr. Richardson asked DOE to provide its legal analysis in writing to OMB. Mr. Richardson also requested that DOE provide an expected values analysis.[638]

Notes taken by Morrison & Foerster after talking with DOE staff about its call with OMB suggest that OMB advised DOE that it "has the right to interpret its own statute."[639] DOE's interpretation, however, did not appear to convince the OMB staff who were reviewing the Solyndra restructuring that the subordination was consistent with the statute. For example, DOE had asserted that the 2009 revisions to the Energy Policy Act rule supported its interpretation that subordination applies only at origination because the subordination provision was placed in the same section as other requirements that applied at origination; Ms. Colyar, though, stated that she "[did not] recall that this was the intent of the revisions to the Rule."[640] Another OMB staff member contended that DOE's interpretation implied "that basically DOE could modify to allow subordination on any loan, at any time, for any reason, if we were to push this to the extreme."[641] OMB Branch Chief Kevin Carroll remarked that DOE's interpretation meant "that Congress had no intent to govern the program with the statute."[642]

Shortly after the conference call with OMB, DOE forwarded the first draft of its legal memorandum on subordination to DOE's outside counsel, Morrison & Foerster, on January 13, 2011.[643] After reviewing this draft, a counsel for Morrison & Foerster forwarded to DOE a comment on the draft made by another Morrison & Foerster attorney, which stated that it "makes the best case possible based on a reasonable interpretation supported by the restructuring policy arguments."[644] DOE staff informed Committee staff that Secretary Chu was specifically referring to this email when he asserted in his November 17, 2011, testimony before the Oversight and Investigations Subcommittee that "Morrison & Foerster . . . concurred with us in an email, in a final email, saying that this was a reasonable interpretation of the law . . . ."[645]

The legal theory advanced by DOE in these drafts is the same theory Ms. Richardson explained to OMB during the conference call. In short, DOE viewed the

---

[637] *Id.*
[638] *Id.*
[639] Notes of U.S. Dep't of Energy outside Counsel Morrison & Foerster LLP (Jan. 11, 2011) [Morrison & Foerster Production at MFHR00107].
[640] E-mail from Kelly Colyar to Kevin Carroll et al.(Jan. 11, 2011, 3:43 PM).
[641] E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 11, 2011, 4:25 PM).
[642] E-mail from Kevin Carroll to Policy Analyst, OMB et al. (Jan. 11, 2011, 4:44 PM).
[643] *See* Draft Memorandum of U.S. Dep't of Energy Loan Programs Office (Jan. 12, 2011) (including edits and comments from Morrison & Foerster attorney made on Jan. 13, 2011) [Morrison & Foerster Production at MFHR00115-24] [hereinafter, "Jan. 12, 2011 DOE Draft Subordination Memorandum"].
[644] E-mail from Of Counsel, Morrison & Foerster LLP, to Partner, Morrison & Foerster LLP (Jan. 13, 2011, 11:41 AM). For the e-mail forwarding the comment to the Department of Energy Loan Programs Office, *see* E-mail from Partner, Morrison & Foerster LLCP, to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office (Jan. 13, 2011, 11:50 AM).
[645] Chu Testimony, *supra* note 308, at 195.

prohibition on subordination as a "condition precedent to the issuance of a loan guarantee" and not 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."[646] DOE based its interpretation of the subordination provision on its placement in the statute and the "plain meaning of the words." DOE focused on the word "is" in the subordination provision and argued that because the provision was stated in the present tense — "the obligation is not subordinate to other financing" — it applied only at a "single point in time." In addition, DOE contended that a continuing prohibition on subordination was inconsistent with commercial practice. Finally, DOE interpreted the statute as providing broad authority to the Secretary of Energy, especially when a loan is distressed.[647]

Ms. Richardson ultimately forwarded DOE's legal memorandum on subordination to OMB on January 20, 2011.[648] Included with DOE's memorandum were the underlying financial analysis and the financial model for the restructuring. OMB's analysis of DOE's financial analysis is discussed below.

D. OMB's Review of DOE's Financial Analysis and Determination that the Restructuring Was a Modification

Included with DOE's subordination memorandum was a new set of financial analyses and a model of the restructuring. This information did not resolve OMB's questions about the deal. Further, according to Ms. Colyar, the information DOE submitted did not show that the government's recoveries would be optimized by the restructuring.[649] In a January 25, 2011, email, an OMB staff member observed that "DOE's financial analysis did not contain any new information on the value under liquidation today,"[650] and, specifically, that DOE had not changed the value assigned to the Solyndra building, which OMB believed to be undervalued.[651] OMB staff also found that DOE's analyses were missing other important factors, such as the recovery analysis of the company as a going concern[652] and "analytical data supporting the assumptions indicating positive cash flow under a restructuring."[653]

---

[646] *See* Jan. 12, 2011 DOE Draft Subordination Memorandum, *supra* note 643, *and* Draft Memorandum of U.S. Dep't of Energy Loan Programs Office (Jan. 14, 2011) [Morrison & Foerster Production at MFHR04198-203] [hereinafter, "Jan. 14, 2011 DOE Draft Subordination Memorandum"]. *See also* Draft Memorandum of U.S. Dep't of Energy Loan Programs Office (Jan. 18, 2011) [Morrison & Foerster Production at MFHR04858-70] [hereinafter, "Jan. 18, 2011 DOE Draft Subordination Memorandum"], *and* Draft Memorandum of U.S. Dep't of Energy Loan Programs Office (Jan. 19, 2011) [Morrison & Foerster Production at MFHR04839-45] [hereinafter, "Jan. 19, 2011 DOE Draft Subordination Memorandum"].
[647] *See id.*
[648] *See* E-mail from Susan Richardson to Sally Ericsson et al. (Jan. 20, 2011, 6:50 PM).
[649] Colyar Interview, *supra* note 103.
[650] E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 25, 2011, 12:37 PM).
[651] *See id.*
[652] *See id.*
[653] E-mail from Kelly Colyar to Policy Analyst, OMB et al. (Jan. 25, 2011, 12:41 PM).

OMB met with DOE on January 28, 2011, to discuss OMB staff's questions about the second set of financial models for the restructuring.[654] In preparation for this meeting, OMB staff also reviewed the cash flows and the credit subsidy calculations that DOE had submitted to OMB in advance of the Solyndra closing in August 2009. Ms. Colyar explained during her interview with Committee staff that DOE's position was that the original Solyndra model assumed a workout, and by doing so, assumed a number of different outcomes, including subordination.[655] However, after reviewing the relevant materials, OMB staff found that the baseline cash flows and the credit subsidy rate did not include that assumption; instead, they assumed "that DOE would maintain a senior secured position in the event of default."[656] The significance of this fact, as Mr. Saad explained during his interview with Committee staff, is that introducing subordination into the Solyndra model changed the model's original assumptions and therefore reduced recoveries and increases the cost of the loan.[657] Following the meeting, DOE submitted yet another round of financial analyses — a discounted cash flow analysis — to OMB on January 28, 2011.[658]

Three days after the meeting between OMB and DOE staff, Secretary Chu met with OMB Director Lew to discuss the relationship between DOE and OMB. To prepare the Director for the meeting, OMB staff gathered examples of situations where the relationship between OMB and DOE had improved and where further improvement was needed. One example of steps OMB and DOE had taken to improve the program was Solyndra. According to OMB staff, OMB had "[d]eferred to DOE on several 'stretch' interpretations of statutes/rules" including the "Solyndra restructuring, even when OMB analysts suggested different courses of action might be more appropriate."[659]

Based on documents produced by OMB and information provided by OMB staff during interviews with Committee staff, it is not clear whether this example was shared with OMB Director Lew or Secretary Chu. The observation that OMB had deferred to DOE on the Solyndra restructuring was included in an OMB document entitled "Issues for Lew-Chu Meeting,"[660] but was not included in the memorandum that was prepared for Director Lew. The memorandum addressed to Director Lew only stated that "OMB has worked well with the Department on its proposed restructuring of the Solyndra deal[]."[661]

---

[654] *See* E-mail from Kelly Colyar to Frances Nwachuku et al. (Jan. 27, 2011, 4:12) (attaching seven "background questions to help guide the discussion[]" during the Jan. 28 meeting).
[655] Colyar Interview, *supra* note 103.
[656] E-mail from Policy Analyst, OMB, to Kelly Colyar et al. (Jan. 28, 2011, 3:03 PM).
[657] Saad Interview, *supra* note 567.
[658] *See* E-mail from Frances Nwachuku to Portfolio Mgmt. Employee, U.S. Dep't of Energy Loan Programs Office (Jan. 28, 2011, 1:00 PM) (attaching document entitled "Discounted NPV CalculationA").
[659] E-mail from Fouad Saad to Kelly Colyar et al. (Jan. 31, 2011, 11:12 AM).
[660] *See* E-mail from Richard Mertens to Kevin Carroll et al. (Jan. 31, 2011, 4:25 PM) (attaching a document entitled "Issues for Lew-Chu Meeting").
[661] *See* E-mail from Confidential Assistant, OMB, to Richard Mertens & Kevin Carroll (Jan. 31, 2011, 6:13 PM) (attaching a document entitled "Memo for the Director – Chu Meeting 2.1.11").

Even so, Mr. Saad, one of the primary reviewers of the Solyndra restructuring, attempted to convince his Branch Chief just prior to the meeting between Director Lew and Secretary Chu that the Solyndra restructuring should be discussed.[662] In an email to Mr. Carroll, Mr. Saad noted that although "the decision has already been made for OMB not to play an active role in determining what to do with Solyndra" he believed that the meeting with the DOE Secretary might "present an opportunity to flag to DOE at the highest level the stakes involved[.]"[663] Mr. Saad stated that while Solyndra "*may* avoid default with a restructuring, there is also a good chance it will not."[664] Restructuring the Solyndra loan guarantee, Mr. Saad explained, would put additional funds at risk and may lower recoveries "and questions will be asked as to why the Administration made a bad investment, not just once . . . but twice . . . ."[665] During his interview with Committee staff, Mr. Saad explained that while he believed the issue needed to be "flagged" for OMB leadership, the comments in his email were "out of his lane" in terms of OMB's statutory role in the restructuring and his responsibilities as an analyst to review DOE's analyses.[666]

On the same day as the meeting between Secretary Chu and Director Lew, documents produced by OMB indicate that OMB had determined that the restructuring was a modification. Sally Ericsson, the OMB Associate Director for Natural Resources Programs, emailed Courtney Timberlake, Assistant Director of the Budget Review Division, and stated that they needed to meet with OMB Deputy Director Zients on February 1 to "discuss how best to communicate the . . . Solyndra decision[] to OMB."[667] On the afternoon of January 30, 2011, OMB staff assembled a "Credit Issues Update" which stated "OMB staff have reviewed the documentation for Solyndra, and confirmed that the baseline cashflows assume that DOE would maintain a senior secured position in the event of a default. Therefore, the restructuring would result in a modification. After meeting with DOE on Friday [January 28] to discuss DOE's analysis, OMB intends to let DOE know this week of the modification determination."[668]

On February 1, 2011, Ms. Ericsson emailed Deputy Director Zients and Ms. Timberlake and stated that OMB needed to inform DOE on February 2 of "our views on the modifications of Solyndra . . . ."[669] That same day, when Ms. Timberlake's staff asked her if OMB could "get[] back to DOE on Solyndra regarding the modification determination,"[670] Ms. Timberlake informed them that she was "the one that has to convey the modification."[671] On February 2, Ms. Ericsson emailed Jonathan Silver, the Executive Director of the DOE Loan Guarantee Program, and asked to schedule a call for

---

[662] *See* E-mail from Fouad Saad to Kevin Carroll & Kelly Colyar (Jan. 31, 2011, 1:39 PM).
[663] *Id.*
[664] *Id.*
[665] *Id.*
[666] Saad Interview, *supra* note 567.
[667] E-mail from Sally Ericsson to Courtney Timberlake et al. (Jan. 31, 2011, 1:42 PM).
[668] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB, et al. (Jan. 30, 2011, 8:23 PM).
[669] E-mail from Sally Ericsson to Jeffrey Zients, Deputy Dir., OMB & Courtney Timberlake (Feb. 1, 2011, 9:49 PM).
[670] E-mail from Policy Analyst, OMB, to Courtney Timberlake et al. (Feb. 1, 2011, 6:45 PM).
[671] E-mail from Courtney Timberlake to Policy Analyst, OMB et al. (Feb. 1, 2011, 7:01 PM).

that afternoon to discuss Solyndra.[672] By this time, DOE was very anxious to learn OMB's determination on the restructuring as it had moved up the Solyndra closing.[673]

Committee staff asked each OMB staff member during their interviews about the decision-making process that determined that the Solyndra restructuring was a modification. Despite the statements in the documents that OMB had concluded that the restructuring was a modification and that the agency planned to communicate this to DOE, and that Ms. Ericsson had contacted Mr. Silver to set up a call to discuss Solyndra, each OMB staff member interviewed by Committee staff either could not recall whether a decision had been made on the modification on or about February 2 or maintained that OMB had not in fact reached a final decision. Ms. Ericsson told Committee staff that she could not remember whether her staff had informed her that their analysis showed that the restructuring was a modification.[674] When asked whether she would have involved the Deputy Director in their discussion about informing DOE that the transaction was a modification absent a final determination, Ms. Ericsson stated that she talked to Mr. Zients often and didn't remember whether they discussed the modification.[675] As for her call with Mr. Silver, Ms. Ericsson did not recall what was discussed or whether she had informed him of the modification.[676]

Although Ms. Ericsson could not recall her conversation with Mr. Silver, or whether she had informed him of the modification, an email from Mr. Silver to his staff clearly demonstrates that OMB communicated the modification decision to DOE. Mr. Silver stated in an email that he had spoken to Secretary Chu's Chief of Staff, Rod O'Connor, about "the call yesterday on modification."[677] Mr. Silver said that Mr. O'Connor was "puzzled" about the determination "because that was not his understanding of what he and Jeff [Zients] had agreed to."[678] Mr. Silver requested more information on OMB's conclusion, and DOE's view of the OMB circulars on modification and work-outs, because Mr. O'Connor was "going to weigh in."[679] The information DOE staff prepared for Mr. Silver stated that OMB "deemed" the restructuring to be a modification "because the act of subordinating a portion of the DOE debt was not expressly contemplated in the original cost estimate."[680] In addition, DOE staff said that OMB "indicated on the call . . . that any change in the term of a DOE

---

[672] *See* Email from Sally Ericsson to Jonathan Silver et al. (Feb. 2, 2011, 1:09 PM) (stating that "[w]e had a very productive meeting with your folks on Friday on Solyndra" and asking, "Can we set up a time this afternoon to discuss?").
[673] *See* E-mail from Susan Richardson to William Richardson (Feb. 2, 2011, 9:03 AM) (asking about OMB's schedule for making a determination, as DOE had not heard anything from OMB since the January 28, 2011, meeting).
[674] Interview with Sally Ericsson, Assoc. Program Dir., OMB, in Washington, D.C. (Nov. 8, 2011) [hereinafter, "Ericsson Interview"].
[675] *Id.*
[676] *Id.*
[677] E-mail from Jonathan Silver to Frances Nwachuku et al. (Feb. 4, 2011, 1:15 PM).
[678] *Id.*
[679] *Id.*
[680] E-mail from Susan Richardson to Jonathan Silver et al. (Feb. 4, 2011, 5:04 PM) (attaching a document entitled "OMB Restructuring vs Modification (2)").

facility, including an extension of maturity, would be treated as a modification by OMB."[681]

In addition to Mr. Silver's email, Ms. Ericsson's own email shows that OMB had communicated the modification decision and DOE had objected to it. On February 3, 2011, Ms. Ericsson and Ms. Timberlake drafted a "Solyndra update" for Mr. Zients.[682] In their update, Ms. Timberlake stated that "[t]he DOE crew does not believe this constitutes a modification since under their read of Circular A-11, it would be considered a workout if the loan is in imminent default. Last week they were talking about it being in technical default . . . but in this call, they were adamant that the borrower is in imminent default, and thus is not a modification."[683] Ms. Timberlake noted that DOE would send OMB subsidy estimate cash flows, and that the staffs would meet the following week "so that we can come to agreement on the restructuring issues . . . ."[684] This switch seemed to take Deputy Director Zients by surprise. In response to the "Solyndra update," Mr. Zients asked Ms. Ericsson "[a]re we agreeing with them on this deal or do we still believe it is a modification?"[685] Ms. Ericsson responded that DOE had claimed at the January 28 meeting that "they were not in imminent default, so it seemed like a major switch to avoid the modification."[686]

E. After DOE Objects to OMB's Decision that the Restructuring Is a Modification, OMB Changes Its Position and Determines that the Restructuring Is a Workout

While Mr. Silver's email on February 4 indicates that Secretary Chu's Chief of Staff, Mr. O'Connor, was going to "weigh in" with OMB, the emails produced by OMB and DOE do not indicate whether he ultimately contacted OMB. Nonetheless, after Ms. Ericsson's call with Mr. Silver, DOE again submitted additional information to OMB on the restructuring. Specifically, on February 4, 2011, DOE sent a "weekly dashboard" that showed the company's cash position and Accounts Payable balance[687] and an analysis of "Present Value Differentials" between an immediate liquidation and a restructuring on February 8, 2011.[688] DOE also sent an "Imminent Default Roadmap" presentation to OMB on February 7, 2011.[689] Although Ms. Ericsson told Mr. Zients that, prior to

---

[681] *Id.*
[682] *See* E-mail from Sally Ericsson to Courtney Timberlake et al. (Feb. 3, 2011, 6:50 PM). *See also* E-mail from Courtney Timberlake to Sally Ericsson et al. (Feb. 3, 2011, 6:54 PM). After agreeing on the language with Ms. Timberlake, Ms. Ericsson transmitted the update to Mr. Zients. *See* E-mail from Sally Ericsson to Jeffrey Zients et al. (Feb. 3, 2011, 7:07 PM).
[683] *Id.*
[684] *Id.*
[685] E-mail from Jeffrey Zients to Sally Ericsson (Feb. 4, 2011, 8:17 AM).
[686] E-mail from Sally Ericsson to Jeffrey Zients (Feb. 4, 2011, 11:31 AM).
[687] *See* E-mail from Frances Nwachuku to Kelly Colyar (Feb. 4, 2011, 5:25 PM) ("Attached is the year end weekly dashboard received from Solyndra showing the cash position and AP balance.").
[688] *See* E-mail from Consultant, U.S. Dep't of Energy Loan Programs Office, to Kelly Colyar et al. (Feb. 8, 2011, 3:57 PM) ("Attached please find the analysis results in Present Value (PV) differentials between a liquidation in December and the restructuring proposed for Solyndra.").
[689] *See* E-mail from Frances Nwachuku to Kelly Colyar et al. (Feb. 7, 2011, 4:12 PM) (attaching a DOE presentation entitled Solyndra Imminent Default Roadmap").

February 2, DOE had not told or demonstrated to OMB that Solyndra was in imminent default, the Imminent Default Roadmap stated that "DOE concluded, in the fall of 2010, that the default of FAB 2, LLC was imminent" based on certain financial data, including the November 2010 balance sheets and the fact that the parent and project companies were so closely integrated.[690] DOE also noted that, as of November 10, Solyndra had only four weeks' worth of available liquidity.[691]

Even though it appears that OMB had provided DOE with another opportunity to demonstrate that the restructuring was a workout and that it maximized the government's recoveries, a February 9, 2011, email from Ms. Colyar to Ms. Nwachuku of DOE demonstrates that OMB still was not convinced by DOE's analysis.[692] Ms. Colyar explained that OMB was still having problems tying the numbers in the information DOE had recently provided to the financial analyses DOE had previously submitted to OMB. More importantly, Ms. Colyar explained that OMB was "under the impression DOE had developed cashflows that would identify the potential cost of the modification[,]" but that this information was not included in the cashflows.[693]

Despite the fact that OMB and DOE had not reached an agreement on DOE's financial analysis, or whether that analysis supported the restructuring, DOE informed OMB on February 10 that it planned to close the restructuring either on February 11 or February 13, and therefore needed OMB's determination on the "modification vs. workout question."[694] OMB staff informed Ms. Timberlake that it still had "technical and conceptual concerns with [DOE's] cash flow analysis."[695] Even though DOE was supposed to send additional revised cashflows to OMB, OMB staff did not "expect any new information, and it is highly unlikely we will be able to come to consensus with the agency on the cash flow analysis before closing."[696] OMB explained that the cashflows DOE had submitted did not demonstrate either the cost of the modification or that the restructuring was less costly than a liquidation. For example, DOE's analyses "ignore[d] the cost of continued disbursements to Solyndra after determination of imminent default,"[697] in reference to the disbursements to Solyndra in November and December 2010 and January 2011. In addition, OMB staff believed the cashflows were a "potentially significantly overstatement of recoveries in the restructuring scenario, which effectively would show DOE recovering more than the estimated enterprise value of Solyndra."[698]

Although DOE's analysis had not demonstrated that the restructuring was less costly than a liquidation, OMB staff asked Ms. Timberlake whether the agency could nonetheless determine that the restructuring was a workout based on DOE's "imminent

---

[690] *Id.*
[691] *See id.*
[692] *See* E-mail from Kelly Colyar to Frances Nwachuku et al. (Feb. 9, 2011, 2:49 PM).
[693] *Id.*
[694] E-mail from Policy Analyst, OMB, to Courtney Timberlake et al. (Feb. 10, 2011, 1:35 PM).
[695] *Id.*
[696] *Id.*
[697] *Id.*
[698] *Id.*

default rationale," so long as DOE agreed that the Solyndra restructuring did not set a precedent and agreed to work with OMB on a process for restructurings.[699] Ms. Timberlake concurred, and on February 11, 2011, wrote a draft email to DOE stating that, "[b]ased on the information you have provided to support DOE's stated position that Solyndra is in 'imminent default' and the reasonableness of DOE's analysis that the restructuring would leave DOE in a better position if the borrower does ultimately default, OMB has concluded that the restructuring constitutes a workout, rather than a modification . . . ." [700] OMB's conclusion that DOE's analysis that the restructuring would leave DOE in a "better position" seems remarkable, in light of the email OMB staff sent Ms. Timberlake only the day before that explained that DOE's own cashflows showed the opposite: that the restructuring would be more costly than an immediately liquidation. Perhaps this is the reason one OMB staffer responded to Ms. Timberlake's draft email to OMB, stating that "I'm not comfortable with the language that deems DOE's analysis reasonable."[701]

While Ms. Timberlake had drafted an email to inform DOE of OMB's determination, Ms. Timberlake did not immediately send the email to DOE. While waiting for OMB's response, DOE forwarded an "updated re-estimate memo and Cash Flows" to DOE on February 16.[702] Even though OMB had not informed DOE of its decision, Secretary Chu signed the Action Memorandum authorizing the Solyndra restructuring on February 18, 2011. On February 22, 2011, the LPO Chief Counsel's office contacted Mr. Silver and asked whether he or "someone at a senior DOE level confirmed (with OMB) that the restructuring is a 'workout' and not a 'modification'?"[703] Mr. Silver responded that he thought DOE staff had resolved the matter,[704] but Ms. Nwachuku explained that she had "sent emails and placed calls" to OMB, and that during DOE's most recent conversation, OMB had "concluded that a modification scoring was not required . . . ."[705]

In addition to Ms. Nwachuku contacting Ms. Colyar on February 22 to inquire about the status of OMB's determination,[706] DOE's Chief Operating Officer, Owen

---

[699] *Id.*

[700] E-mail from Courtney Timberlake to Richard Mertens et al. (Feb. 11, 2011, 5:05 PM) ("Below is an email I've drafted on the Solyndra restructuring, letting DOE know that their determination of imminent default, along with the analysis they've provided, is what will qualify as a workout.").

[701] E-mail from Policy Analyst, OMB, to Policy Analyst, OMB et al. (Feb. 11, 2011, 6:31 PM).

[702] *See* E-mail from Consultant, U.S. Dep't of Energy Loan Programs Office, to Frances Nwachuku et al. (Feb. 16, 2011, 3:00 PM) (attaching the "updated re-estimate memo and the Cash Flows"). Ms. Nwachuku approved the documents and requested that they be forwarded to Ms. Colyar at OMB. *See* E-mail from Frances Nwachuku to Consultant, U.S. Dep't of Energy Loan Programs Office et al. (Feb. 16, 2011, 4:11 PM).

[703] E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Jonathan Silver et al. (Feb. 22, 2011, 7:21 PM).

[704] *See* E-mail from Jonathan Silver to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Feb. 22, 2011, 7:36 PM).

[705] E-mail from Frances Nwachuku to Jonathan Silver et al. (Feb. 22, 2011, 8:20 PM).

[706] *See* E-mail from Frances Nwachuku to Kelly Colyar (Feb. 22, 2011, 5:54 PM) ("We are done with review of the documentation for the Solyndra restructuring and are prepared to close . . . Where are you in your process?").

Barwell, emailed Richard Mertens on February 23 to ask whether there were "[a]ny issues" because DOE "plan[ned] to close the restructuring" that day.[707] Finally, Ms. Timberlake emailed Mr. Silver, Ms. Richardson, Ms. Nwachuku, and other DOE staff to inform them that OMB had determined the restructuring was a workout. Ms. Timberlake explained, though, that "[i]n the future . . . DOE will be required to demonstrate that the borrower is in 'imminent default' and provide reasonable analysis that any actions taken will produce a better return to the Government than those actions assumed in the baseline cashflows in order for the action to qualify as a workout, rather than a modification."[708]

VIII. ROLE OF THE DEPARTMENT OF THE TREASURY IN THE RESTRUCTURING OF THE SOLYNDRA LOAN GUARANTEE

As discussed in Part III(G) of this report, the Energy Policy Act and its implementing regulations require that "[c]oncurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee."[709] Neither the statute nor the rule directly addresses a restructuring of a loan guarantee, but a separate section of the rule, 10 C.F.R. § 609.9(d)(4), addresses a "deviation" from the terms and conditions of a loan guarantee. The rule provides that "DOE will consult with OMB and the Secretary of the Treasury before DOE grants a deviation that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents."[710] Whether the definition of "deviation" would have applied to the Solyndra restructuring is not clear; in an interview with Committee staff, LPO Chief Counsel Susan Richardson maintained that it did not.[711] In its Audit Report dated April 3, 2012, the Inspector General for the Department of the Treasury found that DOE had not consulted with Treasury on the restructuring, but it was "uncertain" whether the rule required it.[712] According to the IG, Treasury officials told him that it was "unclear if Solyndra's restructure was considered a deviation."[713]

Although it is uncertain whether Treasury had a role under the regulation, documents produced to the Committee show that OMB staff periodically updated Treasury staff about the status of the Solyndra restructuring by forwarding reports and other information. By February 9, 2011, just two weeks before DOE closed the restructuring, Treasury staff had become concerned about the proposed terms and conditions of the deal, in particular, the subordination of DOE's interest in the loan guarantee to two of Solyndra's investors. Treasury staff concluded that the matter should

[707] E-mail from Owen Barwell, Chief Operations Officer, U.S. Dep't of Energy Loan Programs Office, to Richard Mertens (Feb. 23, 2011, 11:43 AM).
[708] E-mail from Courtney Timberlake to Jonathan Silver et al. (Feb. 23, 2011, 1:55 PM).
[709] 10 C.F.R. § 609.7(a).
[710] 10 C.F.R. § 609.9(d)(4).
[711] Richardson Interview, *supra* note 529.
[712] *See* OFFICE OF INSPECTOR GENERAL SOLYNDRA AUDIT REPORT, *supra* note XX, at 8.
[713] *Id.* at 9.

be raised directly in an email to LPO Chief Counsel Ms. Richardson and Frances Nwachuku, the LPO Director of Portfolio Management.[714]

On February 10, 2011, the CFO of the FFB, Gary Burner, emailed Ms. Richardson and Ms. Nwachuku about the Solyndra restructuring. Mr. Burner stated that Treasury understood that the terms of the restructuring included a subordination of DOE's interest, and advised that "[u]nless DOE has other authorities, these adjustments may require approval of the Department of Justice pursuant to 31 USC 3711 and 31 CFR Part 902."[715] According to Mr. Burner, "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."[716] Mr. Burner concluded his email by asking if DOE would refer the restructuring to DOJ or whether there were "other authorities that DOE is using to compromise this debt?"[717]

Ms. Nwachuku responded shortly after receiving Mr. Burner's email and stated that "I believe there is a gross misunderstanding of the outcome of the negotiated restructuring of the Solyndra obligation to DOE."[718] Mr. Burner, Ms. Richardson, and Ms. Nwachuku agreed to schedule a conference call to discuss the issue. During a hearing before the Subcommittee on Oversight and Investigations, Mr. Burner testified that the "primary purpose" of the call was to "make sure that DOE was aware that they may have an obligation to consult with the Department of Justice."[719] According to Mr. Burner, DOE disagreed, telling him that they believed that the "results" of the restructuring did not constitute a compromise of a claim and DOE "had not reached a point where they needed to take it to the Department of Justice."[720] Mr. Burner stated that, at the time of his conversation with DOE in February 2011, he believed "it would have been wise" for DOE to go to Justice.[721] When asked at the hearing whether he still believed that DOE should have sought DOJ's opinion on the Solyndra restructuring, Mr. Burner stated, "Yeah. I have said that I believe . . . that it would have been wise for them to seek Department of Justice approval."[722] Committee Members also asked Mr. Burner whether in his "28 years" with FFB he had "ever seen the taxpayer's money being subordinate to outside commercial firms."[723] Mr. Burner responded that he had not.[724]

---

[714] *See* E-mail from Domestic Policy Advisor, U.S. Dep't of Treasury, to Gary Burner (Feb. 9, 2011, 4:22 PM) [Treasury Production at 336-37].
[715] E-mail from Gary Burner to Susan Richardson & Frances Nwachuku (Feb. 10, 2011, 2:05 PM) [Treasury Production at 000005].
[716] *Id.*
[717] *Id.*
[718] E-mail from Frances Nwachukwu to Gary Burner et al. (Feb. 10, 2011, 4:44 PM).
[719] *Continuing Developments Regarding the Solyndra Loan Guarantee: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy &* Commerce, 112th Cong. 72 (2011) (testimony of Gary H. Burner, Chief Fin. Officer, Fed. Fin. Bank, U.S. Dep't of Treasury), *available at* http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=9000.
[720] *Id.* at 73.
[721] *Id.*
[722] *Id.*
[723] *Id.*
[724] *Id.*

Ultimately, DOE rebuffed Treasury's recommendation, and did not seek DOJ's opinion or approval of the restructuring. When Secretary Chu testified before the Subcommittee on Oversight and Investigations on November 17, 2011, he stated that the DOE General Counsel and LPO Chief Counsel believed the changes made by the restructuring were "within the confines of the original agreement,"[725] and therefore, DOE concluded that they did not need to seek consultation with the Department of Justice.

DOE's decision not to involve Treasury in the restructuring, and to reject its advice to consult with the Justice Department, was raised in August 2011 during discussions about a possible second Solyndra restructuring among DOE, OMB, Treasury, and White House officials. Shortly after DOE had begun to discuss a second Solyndra restructuring, Treasury's Assistant Secretary for Financial Markets, Mary Miller, contacted OMB Deputy Director Zients to clarify Treasury's involvement in the restructuring. Assistant Secretary Miller stated that she wrote to "correct any impression" that Treasury had "acquiesced in the steps to date" regarding the Solyndra restructuring.[726] According to Assistant Secretary Miller, since July 2010, Treasury staff had asked DOE staff for updates on Solyndra's financial condition, but "DOE has not responded to any requests for information about Solyndra."[727] In addition, she stated that "[o]ur 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."[728] Assistant Secretary Miller also informed Mr. Zients that Treasury had recommended that DOE seek DOJ's opinion on the restructuring.[729]

IX. THE ROLE OF THE WHITE HOUSE IN THE RESTRUCTURING OF THE SOLYNDRA LOAN GUARANTEE

Given the disagreement among the Executive Branch agencies about DOE's decision to restructure the Solyndra loan guarantee and subordinate the taxpayers' interest, the Committee has attempted to determine what role the White House played in the decision.

Emails and documents produced by the White House and OMB confirm that the White House was involved in discussions about the Solyndra restructuring and agreed to allow DOE to proceed with the restructuring even after concerns about the transaction had been raised by OMB with the White House. For example, Ms. Zichal sent an email to other White House staff on August 11, 2011, that summarized the Administration's decision to restructure Solyndra in February 2011. In that email, Ms. Zichal stated "at the time, WH (our shop, OMB, NEC) reluctantly went with DOE cause of action to embrace

[725] Chu Testimony, *supra* note 308.
[726] E-mail from Mary Miller, Assistant Sec'y for Fin. Mkts., U.S. Dep't of Treasury, to Jeffrey Zients et al. (Aug. 17, 2011, 8:24 AM) [Treasury Production at 000002].
[727] *Id.*
[728] *Id.*
[729] *See id.*

restructuring."[730] A second email exchanged among White House staff confirms the NEC's involvement, stating that NEC staff member Brian Deese "was part of convo about 8 mos ago when DOE agreed to restructuring of Solyndra."[731] It appears that the White House Chief of Staff was also involved, as an email among OMB staff states that "prior to [the] restructuring, OMB staff expressed reservations about the prospects of the company and DOE's proposal. This issue was discussed with the NEC and the Chief of Staff." [732]

The documents produced by the White House in response to the Committee's November 3, 2011, subpoenas do not provide any substantive information about the White House's "reluctant" decision to accept DOE's "cause of action to embrace restructuring." In fact, the White House provided only a handful of documents from the period during which the Solyndra loan guarantee was being restructured. The White House's production did not include any emails, calendar notices, or briefing materials relating to the discussions with the NEC and White House Chief of Staff referenced in Ms. Zichal's email or the email from OMB staff.

During an interview on July 17, 2012, Committee staff pressed Ms. Zichal to explain the White House's involvement in the restructuring. Ms. Zichal explained that it was the responsibility of the White House Office of Energy and Climate Change Policy, where she worked, to monitor issues related to the DOE Loan Guarantee Program, and it was her specific responsibility to raise or flag issues or "pros and cons" relating to certain issues with the White House communications staff and other White House staff so they were informed.[733] While she told Committee staff that she knew there was a "decision-making process" around the restructuring decision, she stated that she played "next to no role" in the restructuring. Ms. Zichal explained that the statement she included in her August 2011 email that the White House "reluctantly went with the DOE cause of action to embrace restructuring" was based on conversations she had with other White House staff.[734] According to Ms. Zichal, OMB raised some concerns about the restructuring and whether it was the "best path forward." Ms. Zichal stated that there was ultimately an "EOP discussion" about the Solyndra restructuring, but she claimed that she did not participate in the discussion and did not know who did or when the discussion took place.[735] Ms. Zichal also did not know whether that discussion took place during a meeting or a conference call, but she explained that the matter was "elevated" by OMB and a "decision was made" and DOE went forward with the restructuring.[736] She stated

[730] E-mail from Heather Zichal to Nancy-Ann DeParle, Deputy Chief of Staff for Policy, The White House & Melody Barnes, Dir. Domestic Policy Council, The White House (August 11, 2011) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 00001061-62].
[731] E-mail from Jason Miller, Special Assistant to the President for Mfg. Policy, the White House to Nat'l Econ. Council Staff (Aug. 26, 2011) (reviewed *in camera* by Committee staff) [White House Production at WH SOL 002169].
[732] E-mail from Kelly Colyar to Richard Mertens et al. (Aug. 11, 2011, 1:48 PM) [OMB Production at 0000002].
[733] Zichal Interview, *supra* note 239.
[734] *Id.*
[735] *Id.*
[736] *Id.*

that she did not know when she was made aware of DOE's decision to subordinate its interest in the Solyndra loan guarantee.

X. SOLYNDRA'S FINANCIAL STATUS AFTER RESTRUCTURING

A. Issues with Working Capital Remain

Following the closing of the restructuring agreement in February 2011, DOE continued to fund the Solyndra loan guarantee. At the time the restructuring agreement was finalized, $468 million of the $535 million loan guarantee had been disbursed. From March through August 2011, DOE authorized an additional $40 million in disbursements to Solyndra. Concurrently, DOE put into place enhanced monitoring required under the restructuring agreement, including weekly cash flow monitoring, and the participation of LPO staff, in particular, the LPO Director of Portfolio Management, as an observer in Solyndra's board meetings.

Documents produced to the Committee show that Solyndra continued to have significant cash flow issues in the months following the restructuring. According to an email from Steve Mitchell of Argonaut to George Kaiser on April 23, "The financial situation of the company remains unchanged — they continue to need an additional $75 million (and in reality we all believe it is a $100 million amount). As we have discussed, this additional capital is for working capital . . . . The company will need the first installment of additional capital in the first half of June (app. $15 million) and will need access to the entire $75 million by the end of the summer or September at the latest."[737] In May 2011, DOE staff discussed whether DOE could force an involuntary bankruptcy of the company.[738] Solyndra executives acknowledged that the company was again running out of cash in a May 5, 2011, presentation to its board, explaining that they had retained bankruptcy counsel and had prepared a filing in the event that additional financing was not arranged.[739]

To address the working capital shortage, Solyndra's investors agreed to finance the company's accounts receivable. Under this arrangement, Argonaut agreed to purchase Solyndra's accounts receivable for a reduced price. When a Solyndra buyer paid its bill, Argonaut would be paid back and Solyndra would keep the difference between Argonaut's purchase price and the customer's purchase price. The purchase agreement had a $75 million cap, which could be increased to $100 million upon the agreement of the parties.[740] This purchase arrangement, however, would not obviate the

[737] E-mail from Steve Mitchell to George Kaiser et al. (Apr. 23, 2011, 4:09 AM) [Argonaut Production at AVI-HCEC-0088348-55].
[738] *See* E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Partner, Morrison & Foerster LLP et al. (May 10, 2011, 8:59 AM).
[739] E-mail from Financial Advisor, U.S. Dep't of Energy Loan Programs Office, to Frances Nwachuku et al. (May 7, 2011, 7:38 AM).
[740] *See* E-mail from Loan Programs Office Staff to Frances Nwachuku (May 19, 2011, 11:07 AM) (attaching a document entitled "Argonaut Purchase AR Analysis_051611").

need for additional working capital to be injected into Solyndra in August 2011, as anticipated by the February restructuring agreement with DOE. At the time Argonaut and Solyndra were negotiating the accounts receivable transaction, the parties anticipated that Solyndra would still need $46 million in funding in August in order to "maintain a workable minimum balance."[741]

As Mr. Mitchell explained to Mr. Kaiser on May 19, 2011, in order to address these ongoing issues, "we are working with Solyndra, the DOE and the other investors to create the best investment structure possible that fits within the DOE's limitations."[742] He went on to note, "[DOE] ha[s] been crystal clear that they have no ability to 'open up' the documents in any manner. They don't have the appetite to go through a loan modification again and even if the DOE was willing to try they assured us that OMB would not approve a modification. Having said that, the DOE has been incredibly supportive and creative in its attempt to help us craft an investment that gets Solyndra the working capital it needs to survive."[743] By August, however, documents produced to the Committee indicate that DOE's willingness to help remedy the company's working capital problems had changed.

Despite DOE's ongoing participating in discussions about how to keep Solyndra afloat on a monthly basis, the agency continued to make public statements touting Solyndra's prospects. For example, on July 21, 2011, a DOE spokesman explained that "DOE invested in Solyndra because it developed an innovative solar panel . . . . Innovative projects are, by definition, riskier than mature technologies. There are likely to be bumps in the road in the future. However, the Solyndra story is one of a company that continues to grow by bringing important new solar technologies to the market."[744]

On July 28, 2011, Solyndra met with its board, including the DOE board observer. At that meeting, Solyndra announced that it planned to revise its Annual Plan to reflect a 19 percent drop in shipments, a 23 percent drop in revenue, and a 10 percent decline in Average Sales Price (ASP).[745] Following this board meeting, Ms. Nwachuku, DOE's Director of Portfolio Management, sent an email on August 4, 2011, to Ms. Silver explaining that Solyndra's "[c]ash position is very low and investors appear unwilling to provide $20 million required within the next 10 days."[746] Mr. Silver then forwarded the email to Secretary Chu's new Chief of Staff, Brandon Hurlbut.[747]

---

[741] *Id.*
[742] E-mail from Steve Mitchell to George Kaiser et al. (May 19, 2011, 5:11 AM) [Argonaut Production at AVI-HCEC-0088324-29].
[743] *Id.* at AVI-HCEC-0088327.
[744] Wang, *supra* note 4 (quoting U.S. Dep't of Energy spokesman Damien LaVera).
[745] *See* E-mail from [*Redacted*], U.S. Dep't of Energy Loan Programs Office, to [*Redacted*], U.S. Dep't of Energy Loan Programs Office et al. (July 31, 2011, 3:18 PM).
[746] E-mail from Frances Nwachuku to Jonathan Silver et al. (Aug. 4, 2011, 3:23 PM).
[747] *See* E-mail from Jonathan Silver to Brandon Hurlbut et al. (Aug. 4, 2011, 3:46 PM).

B. DOE Begins Negotiating a Second Restructuring with Solyndra's Investors

On August 11, 2011, Steve Mitchell and others met with DOE "to discuss the restructuring proposal that I outlined for Frances [Nwachuku] (DOE counterpart) last night."[748] According to Mr. Mitchell in an update he sent to Mr. Kaiser and others at the George Kaiser Family Foundation, "DOE clearly wants to try and find an outcome that provides a politically viable option for the company to continue operations. We had a good discussion regarding the risks of a reorganization (from a business perspective for the company and a political perspective for the administration)."[749] Mr. Mitchell supplemented his update after receiving a phone call from Ms. Nwachuku on which she "indicated that Jonathan – head of DOE program and direct report to Scty Chu – was going to reach out to George (they had a number – so perhaps you have met him George)."[750] Mr. Mitchell stated, "I cautioned that George is not as close to this as me or [the GKFF's Chief Investment Officer] and that he would not be in a position to negotiate specifics. She said she fully understood but th[at] he just wanted to have a quick conversation and seemed to not know anything more about the topic of the call."[751]

According to the documents, at 6:40 p.m. on August 11, 2011, Mr. Silver left a voicemail on Mr. Kaiser's assistant's telephone leaving his cell phone number. Mr. Kaiser forwarded the message from his assistant to Mr. Mitchell and others at the GKFF asking, "Isn't this after the report that he understood the reasons for the communication channels? Do we need to re-emphasize? I do not plan to call him back."[752] Mr. Mitchell responded, "I checked my phone log and I spoke to her at 6:48pm so probably not. Either way he know [*sic*] understands that this is not the correct communication channel."[753] It is not known what report is being discussed. No such report or record of related conversations was produced to the Committee. This, however, would not be the last time Mr. Silver attempted to speak with Mr. Kaiser.

On the morning of August 18, 2011, Mr. Silver left another voicemail for Mr. Kaiser's assistant. At 9:52 a.m., Mr. Kaiser's assistant forwarded him Mr. Silver's office and cell phone numbers and noted, "'It is of some urgency and he'd like to talk to you this morning.'"[754] On August 17, Brad Carson, Director of the GKFF-funded National Energy Policy Institute, who had accompanied Mr. Kaiser and Mr. Levit on several visits to the White House, had emailed Mr. Kaiser stating, "The Obama folks called saying that

---

[748] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Aug. 11, 2011, 4:27 PM) [Argonaut Production at AVI-HCEC-0088038-39].
[749] *Id.*
[750] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Aug. 11, 2011, 4:40 PM) [Argonaut Production at AVI-HCEC-0088037-38].
[751] *Id.* at AVI-HCEC-0088038.
[752] E-mail from George Kaiser to Steve Mitchell et al. (Aug. 12, 2011, 11:42 AM) [Argonaut Production at AVI-HCEC-0089233].
[753] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 12, 2011, 10:41 PM) [Argonaut Production at AVI-HCEC-0089233].
[754] E-mail from Assistant to the President, Kaiser-Francis Oil Co., to George Kaiser (Aug. 18, 2011, 9:52 AM) (quoting Jonathan Silver, U.S. Dep't of Energy Loan Programs Office) [Argonaut Production at AVI-HCEC-0077575].

the White House Liaison for the Department of Energy wanted your contact information. Usually these people handle appointments and the like."[755] No response to Mr. Carson was provided to the Committee, however, Mr. Kaiser forwarded Mr. Carson's email to Mr. Mitchell, Mr. Levit, and others at the GKFF at first simply stating, "Whoops"[756] and then clarifying separately to Mr. Levit, "Solyndra, of course. Coming through the political arm."[757]

These emails initiated a debate within the GKFF. As Mr. Levit described it, "This is going to be very big. We need to think through PR even if the answer is to do nothing[.]"[758] Mr. Kaiser asked, "Should Steve reflect back that GKFF is the decision maker, advised by Argonaut, and that I want to continue the policy of having no discussions re Solyndra with anyone in government? We may have to work with them in the reorganization and it makes no sense to irritate them."[759] He went on to state, "Just ignoring him, I think, would be the worst option."[760] After others seemed to agree but noted that Mr. Kaiser "taking a call and saying 1) it isn't your call on whether or not to make a loan and 2) from what you understand, there is no believable workable business plan would not be out of line,"[761] Mr. Mitchell added, "I agree with you that George should probably call him. This is certainly not us trying to influence the government, it is obviously the other way around. I'm curious what Jonathan will say as well."[762] However, it appears from the documents that Mr. Kaiser was firm in his decision not to communicate with Mr. Silver when telling Mr. Levit at 4:55 p.m., "I have refused the call and Steve is explaining why."[763] This timing is important to note, as significant decisions were made just before 6:00 p.m. on August 18, as will be detailed below. Mr. Silver testified before the Subcommittee on Oversight and Investigations on September 12, 2012, and stated that with respect to George Kaiser, "I have never met or spoken to the man."[764] While this may be true, it was not for lack of effort.

Documents produced to the Committee indicate that Mr. Silver's decision to call Mr. Kaiser for the second time on August 18, 2011, was not made on a whim. On August 18, DOE's Acting General Counsel, Eric Fygi, wrote Mr. Silver an email with the subject

---

[755] E-mail from Brad Carson, Dir., Nat'l Energy Policy Inst., to George Kaiser (Aug. 17, 2011, 4:05 PM) [Argonaut Production at AVI-HCEC-0091414].
[756] E-mail from George Kaiser to Steve Mitchell et al. (Aug. 18, 2011, 1:27 AM) [Argonaut Production at AVI-HCEC-0091414].
[757] E-mail from George Kaiser to Kenneth Levit (Aug. 18, 2011, 11:54 AM) [Argonaut Production at AVI-HCEC-0068211-12].
[758] E-mail from Kenneth Levit to Chief Fin. Advisor, Kaiser-Francis Oil Co. (Aug. 18, 2011, 1:24 PM) [Argonaut Production at AVI-HCEC-0068211].
[759] E-mail from George Kaiser to Steve Mitchell et al. (Aug. 18, 2011, 9:44 AM) [Argonaut Production at AVI-HCEC-0091388].
[760] E-mail from George Kaiser to Steve Mitchell et al. (Aug. 18, 2011, 10:44 AM) [Argonaut Production at AVI-HCEC-0091387].
[761] E-mail from Chief Fin. Advisor, Kaiser-Francis Oil Co., to George Kaiser et al. (Aug. 18, 2011, 10:32 AM) [Argonaut Production at AVI-HCEC-0091387].
[762] E-mail from Steve Mitchell to Chief Fin. Advisor, Kaiser-Francis Oil Co. (Aug. 18, 2011, 3:51 PM) [Argonaut Production at AVI-HCEC-0091387].
[763] E-mail from George Kaiser to Kenneth Levit (Aug. 18, 2011, 4:55 PM) [Argonaut Production at AVI-HCEC-0075590].
[764] Silver Testimony, *supra* note 40, at 58.

line "Meeting Regarding Solyndra." It stated as follows: "Jonathan, This note will memorialize that yesterday afternoon, at your request, we met to consider the potential need for you directly to approach the principal equity owner of this firm in the furtherance of your responsibilities as Executive Director of the Loans Program Office…After considering the course of action that you described orally, it became apparent that there was no legal impediment to the course that you described and we so advised you."[765] No such approval email was reviewed by Committee staff related to Mr. Silver's first call to Mr. Kaiser on August 1, 2011, nor is the course of action he was contemplating known.

C. OMB, Treasury, and the White House Join the Negotiations About a Second Solyndra Restructuring

Meanwhile, conversations between Steve Mitchell and the DOE LPO about the framework of a second restructuring continued. On August 11, 2011, Kelly Colyar, a program analyst in OMB's Energy Branch, informed her boss, Kevin Carroll, and others at OMB that "DOE told OMB and other EOP staff today that Solyndra is experiencing difficulties and that a bankruptcy or restructuring is imminent (potentially in the next few days). At this point, $526.8 million of the $535 million loan guarantee has been disbursed. Due to the restructuring this past March in which DOE subordinated its debt to Solyndra's investors, recoveries for the U.S. government in the event of a default are likely to be minimal."[766] She reminded them of OMB's role in the previous restructuring stating, "Prior to this restructuring, OMB staff expressed reservations about the prospects of the company and DOE's proposal. This issue was discussed with the NEC and the [White House] Chief of Staff.[[767]] In the end, citing DOE's expertise in the transaction, OMB deferred to DOE's determination that the proposed restructuring would result in better recoveries for U.S. taxpayers than had DOE called [for] default and taken over the asset immediately. OMB staff specifically cited concerns about the company's ability to meet their projections, subordination of the DOE loan, and the likelihood that Solyndra's investors may not ultimately provide the additional capital the company required to continue operations. Unfortunately, the scenario which OMB staff had feared has materialized."[768]

On August 14, 2011, Mr. Mitchell sent Mr. Kaiser and others another update, noting that he was working with outside counsel "to finalize a term sheet that we would

---

[765] E-mail from Eric Fygi, Acting Gen. Counsel, U.S. Dep't of Energy, to Jonathan Silver et al. (Aug. 18, 2011, 5:25 PM).
[766] E-mail from Kelly Colyar to Kevin Carroll et al. (Aug. 11, 2011, 1:48 PM) [OMB Production at SOL0000002].
[767] No documents or communications related to any discussion or briefing with NEC or the White House Chief of Staff were produced to the Committee. In an interview with Committee staff, Ms. Colyar confirmed that she was referring to the White House Chief of Staff in her email. Colyar Interview, *supra* note 103.
[768] E-mail from Kelly Colyar to Kevin Carroll et al. (Aug. 11, 2011, 1:49 PM) [OMB Production at SOL0000002].

submit to the DOE."[769] However, he informed them that when he told Mr. Silver about their plans to send DOE a restructuring proposal, Mr. Silver "immediately asked that we not submit a term sheet as that would be very problematic for DOE (I get the impression they are damned if they do and damned if they don't – if they cut a deal with us they will be second guessed. If the company fails and the existence of a term sheet that could have saved the company is discovered then that is a bad fact as well). He finally agreed to verbally convey a framework of a deal that DOE would support to me (this was supposed to happen today [Sunday] and he pushed it back until Monday)."[770] However, the documents indicate that this discussion did not ultimately occur until Wednesday, August 17, 2011.[771]

On August 12, 2011, Mary Miller, Assistant Secretary of the Treasury for Financial Markets, emailed Secretary Chu's Chief of Staff, Brandon Hurlbut, copying OMB Deputy Director Zients, and stated, "I understand there may be a briefing around [Solyndra's] prospects early next week. Please make sure that Treasury is involved in that discussion."[772] Assistant Secretary Miller then emailed Deputy Secretary of Energy, Daniel Poneman, on August 16, 2011: "We are hearing increasingly dire news about Solyndra and have asked DOE for information on this with no response. I do not believe that a restructuring of the loan guarantee terms can occur without Treasury consultation."[773]

In addition to notifying her staff and OMB of Treasury's intent to participate in the review of a second Solyndra restructuring, Ms. Miller emailed Mr. Zients in order to "clarify an important point" about Treasury's prior involvement in Solyndra.[774] She stated, "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."[775] She concluded, "While I expect that DOE has a view about why loan

[769] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 14, 2011, 11:23 PM) [Argonaut Production at AVI-HCEC-0091309].
[770] *Id.*
[771] *See* E-mail from Steve Mitchell to George Kaiser et al. (Aug. 17, 2011, 2:34 PM) [Argonaut Production at AVI-HCEC-0091417-19].
[772] E-mail from Mary Miller to Brandon Hurlbut & Jeffrey Zients (Aug. 12, 2011, 3:22 PM] [OMB Production at SOL0000008].
[773] E-mail from Mary Miller to Daniel Poneman, Deputy Sec'y, U.S. Dep't of Energy et al. (Aug. 16, 2011, 6:44 PM) [OMB Production at SOL0001489].
[774] *See* E-mail from Mary Miller to Jeffrey Zients et al. (Aug. 17, 2011, 8:24 AM) [OMB Production at 000002].
[775] *Id.*

subordination can occur without DOJ approval or Treasury consultation, I wanted to correct any impression that we have acquiesced in the steps to date."[776]

D. The Lazard Proposal for a Second Restructuring

On August 17, 2011, a briefing for DOE, OMB, and Treasury officials and staff was held to discuss an analysis prepared by the investment bank Lazard Ltd. (Lazard), which had been retained by DOE to analyze a potential second Solyndra restructuring. The report noted that Solyndra's investors were unwilling to put additional capital into the company under the current restructuring agreement, and "[a]bsent new funding in the near-term, the Company will be forced to begin an orderly wind-down of the business, which in Lazard's best judgment, will likely result in little recovery to the DOE[.]"[777] Copies of Lazard's plan were sent to Jeffrey Zients, Mary Miller, Jonathan Silver, Daniel Poneman, Brandon Hurlbut, and staff in the White House Office for Energy and Climate Change Policy. [778]

Soon after this briefing occurred on August 17, 2011, DOE's proposal was shared with Steve Mitchell and Solyndra. Mr. Mitchell forwarded it to Mr. Kaiser and others at the GKFF and informed them that "DOE did brief the OMB and White House on this proposal. Making this proposal to us was approved BUT closing on this proposal is still not approved."[779] Mr. Mitchell laid out the terms of the DOE's proposal which called for $100 million in new capital that would come in subordinate to $150 million in Argonaut and DOE debt but superior to a much larger portion of the DOE debt, which would be converted to equity.[780] In Mr. Mitchell's opinion, "the proposal undervalues the security that the Tranche A currently has (which is senior secured and, we believe, in the money in a liquidation scenario)" and it "does not provide sufficient upside for the new invested

---

[776] *Id.*

[777] Lazard, Ltd., *Discussion Materials*, Aug. 17, 2011, at 3 [hereinafter, "Lazard Discussion Materials"] [OMB Production at SOL0001491-501].

[778] *See* E-mail from Dir. of Strategic Initiatives, U.S. Dep't of Energy Loan Programs Office, to Jeffrey Zients et al. (Aug. 16, 2011, 10:01 PM) ("[A]ttached 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.").

[779] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 17, 2011, 2:34 PM) [Argonaut Production at AVI-HCEC-0091396-98].

[780] *See id.* The DOE proposal on August 17, 2011, included the following arrangement: (1) Tranche A is increased to $150 million that is senior secured. This new Tranche A would be made up of Argonaut's current Tranche A loan of $75 million, agreed to under the first restructuring, and $75 million of the DOE's capital that is currently in Tranche B. The new $150 million Tranche A would be pari passu in a liquidation scenario. (2) New capital of $100 million is either committed or funded into the company. This new capital would be funded into the company as debt junior to the new Tranche A of $150 million. (3) The remaining $75 million of the DOE's current Tranche B would be moved down the capital structure to be junior to the new Tranche A of $150 million and the new capital of $100 million. (4) The DOE's Tranche D of $385 million of capital would be converted into 35% to 40% of equity in Solyndra. The DOE would only receive 35% if the $100 million is funded up-front. If the $100 million is subject to milestones and funded over time then the DOE would receive 40% of the company and the conversion would occur on a pro-rate basis as the $100 million was funded (i.e. for every $1 million of new capital invested $2.85 million of Tranche D debt would convert into .4% of Solyndra.). *Id.*

capital in a positive outcome."[781] The GKFF's Chief Investment Officer agreed: "I do not want to do this deal."[782] Therefore, even though DOE offered to further subordinate its debt to outside investment after discussing the proposal with OMB and the White House, Argonaut did not accept. At this point, it appears as though Solyndra was "holding out hope" but seemed resigned to its fate as "management [was] preparing for a wind down of operations this Friday and a Chapter 11 filing next week[.]"[783]

While Mr. Silver, then-Executive Director of the LPO, continued to push, as is subsequently discussed, others at DOE seemed accepting of the fact that Mr. Mitchell's and the GKFF's position would not change. Dan Utech, Senior Advisor to Secretary Chu, sent Ms. Zichal, Mr. Zients, and others an update on August 17, 2011, after the proposal was shared with Mr. Mitchell. Mr. Utech informed them that "Brandon [Hurlbut] 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…DOE communications will be reaching out to WH comms shortly to coordinate."[784] Mr. Zients forwarded this update to then-Director of OMB Jack Lew, noting, "Solyndra update from DOE COS via Zichal's team."[785]

On August 17, 2011, this update was also forwarded to David Plouffe, Dan Pfeiffer, and others in the White House to which Pfeiffer first replied, "This is going to be a real pain, solyndra is about to go under apparently"[786] and then subsequently, "And there is an additional complication I will explain tomorrow."[787] It is not apparent from the documents what additional complication Mr. Pfeiffer was referencing. In addition, on August 18, 2011, at 4:29 p.m., Nancy-Ann DeParle, Deputy Chief of Staff for Policy, received an email from her assistant stating, "The Chief of Staff at Department of Energy Brandon Hurlbut called to give you an update on Solyndra. He said Heather Zichal and Chris Lu were going to send around an email tonight and he called to say if you want any more info he is happy to walk you through everything tonight."[788] However, documents produced to the Committee from the late afternoon of August 18, 2011, indicate that this update would change in a material way, though it is not entirely clear why.

---

[781] *Id.* at AVI-HCEC-0091396.
[782] E-mail from Chief Inv. Officer, George Kaiser Family Found., to Steve Mitchell et al. (Aug. 17, 2011, 2:43 PM) [Argonaut Production at AVI-HCEC-0091396].
[783] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 17, 2011, 2:34 PM) [Argonaut Production at AVI-HCEC-0091396-98].
[784] E-mail from Dan Utech, Senior Advisor to the Sec'y, U.S. Dep't of Energy, to Heather Zichal et al. (Aug. 17, 2011, 5:47 PM) [OMB Production at SOL0001546].
[785] E-mail from Jeffrey Zients to Jacob Lew (Aug. 18, 2011, 6:53 AM) [OMB Production at SOL0001551].
[786] E-mail from Dan Pfeiffer, Dir. of Commc'n, The White House, to David Plouffe, Senior Advisor to the President, The White House & Stephanie Cutter, Deputy Senior Advisor, The White House (Aug. 17, 2011, 5:55 PM) [White House Production at WH SOL 002103].
[787] E-mail from Dan Pfeiffer to David Plouffe & Stephanie Cutter (Aug. 17, 2011, 6:27 PM) [White House Production at WH SOL 002103].
[788] E-mail from Special Assistant to the Deputy Chief of Staff, The White House, to Nancy-Ann DeParle (Aug. 18, 2011, 4:29 PM). [White House Production at WH SOL 002106].

After hearing back from DOE on the night of August 17, 2011, Mr. Mitchell relayed to Mr. Kaiser and others at the foundation that "the DOE was back pedaling from their offer and offering up essentially all points up to negotiation."[789] Communications among Mr. Mitchell, Mr. Kaiser, and others at the GKFF throughout the day on August 18 make it clear that, while they were determining whether it was appropriate for Mr. Kaiser to return Jonathan Silver's phone call, they remained "focused on the path of winding down the company."[790] At 10:33 a.m., Mr. Mitchell stated, "I have made it very clear that we are currently unable to underwrite the plan and it is not our intention to fund the business. I get the feeling that DOE still thinks we are playing some level of brinksmanship which I have assured them we are not. I would like to be stronger in my assertions that we are definitively not providing operating capital for Solyndra…If we are unanimously certain that we will not fund Solyndra to continue operations I would like to communicate this definitively to the DOE and the company."[791] At 3:53 p.m., Mr. Kaiser responded resolutely about the options going forward as well as Mr. Silver's attempt to discuss them with him directly: "I think we should tell them that GKFF/Argonaut has carefully considered all options and decided they cannot fund the plan. George Kaiser is not the decision maker and believes he should continue his policy of having no communication with the DOE or anyone else in government. It is our understanding that no other equity owner has an appetite for it either. The remaining option is bankruptcy."[792] No further communications were produced to the Committee between any individuals connected to Argonaut and the DOE that indicate Argonaut was in any way willing to change its position with respect to providing operating capital or additional funding going forward.

Two hours later, however, Argonaut changed its mind and decided to again fund the company. At 6:04 p.m., Andrei Greenawalt, Deputy Director of Cabinet Affairs at the White House, emailed Mr. Zients, Mr. Zichal, and others, and stated that "Brandon [Hurlbut] and I were just on phone and he mentioned that as of a few mins ago, investors decided to put forward money to allow the company to continue operating for another week while they try to figure out a path forward."[793] Within minutes, Rachana Bhowmik, Special Assistant to the President and Policy Advisor to the Office of the Chief of Staff, forwarded this update to Nancy-Ann DeParle.[794] At 6:13 p.m., Ms. Bhowmik asked Mr. Greenawalt in an email titled "With no solyndra news[,]" whether there was "Anything for the nightly note?"[795] Mr. Greenawalt replied, "You might just leave Solyndra out

---

[789] E-mail from Steve Mitchell to Chief Inv. Officer, George Kaiser Family Found. et al. (Aug. 18, 2011, 1:19 AM) [Argonaut production at AVI-HCEC-0091415].
[790] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 18, 2011, 10:33 AM) [Argonaut Production at AVI-HCEC-0091381-82].
[791] *Id.*
[792] E-mail from George Kaiser to Steve Mitchell et al. (Aug. 18, 2011, 3:53 PM) [Argonaut Production at AVI-HCEC-0091381].
[793] E-mail from Andrei Greenawalt, Deputy Dir. of Cabinet Affairs, The White House, to Jeffrey Zients et al. (Aug. 18, 2011, 6:04 PM) [White House Production at WH SOL 002107].
[794] *See* E-mail from Rachana Bhowmik, Special Assistant to the President & Policy Advisor to the Office of the Chief of Staff, The White, to Nancy-Ann DeParle et al. (Aug. 18, 2011, 6:07 PM) [White House Production at WH SOL 002107].
[795] E-mail from Rachana Bhowmik to Andrei Greenawalt (Aug. 18, 2011, 6:13 PM) [White House Production at WH SOL 002108].

but…," and included a section on Solyndra which read: "Earlier today it was looking as if Solyndra Solar, which received a $535 million loan guarantee from Energy in 2009, might declare bankruptcy as early as tomorrow after having trouble raising the private capital that it needs to continue operations. If this happens at any point, it is unclear that the government would be able to recover any of the $535 million. Late today, however, investors decided to put forward money to allow the company to continue operating for another week while they try to figure out a path forward. Energy continues [to] coordinate with various White House offices."[796] The documents indicate that Ms. Bhowmik did not ultimately include the update.[797]

While it is not clear what changed between 4:00 p.m. and 6:00 p.m. on August 18, 2011, that convinced Argonaut to agree to provide Solyndra with the necessary operating capital to get the company through another week, documents produced to the Committee indicate that Solyndra's involvement in the first phase of Project Amp, another DOE loan guarantee project, was influential in Argonaut's decision, as well as its decision whether to continue to fund the company going forward.

E. The Relationship Between Project Amp and Solyndra

Project Amp is a multi-phase, multi-state installation of approximately 733MW of photovoltaic solar panels on commercial facility rooftops owned by Prologis. It is the intent that the electricity generated from these panels will be sold to utilities and other power purchasers. The loan guarantee application was submitted by Bank of America Merrill Lynch (BAML) under the Financial Institution Partnership Program. DOE announced a conditional commitment for a partial loan guarantee of $1.4 billion to Project Amp on June 22, 2011, and the commitment was finalized on September 30, 2011—the deadline under the Recovery Act for awarding stimulus-funded loan guarantees.[798] Based on a contract executed prior to DOE's consideration of the Project Amp loan guarantee application, the solar panels for the first phase of Project Amp, previously known as "Project Photon," were to be supplied by Solyndra.[799]

Solyndra's inclusion in Project Amp caused increased anxiety within the Administration throughout the summer of 2011, both before and after the conditional commitment was issued. According to notes from a DOE briefing to OMB in mid-May 2011, in addition to questioning whether Project Amp could meet the stimulus deadline for commencement of construction, Ms. Colyar "expressed concern about the selection of

---

[796] E-mail from Andrei Greenawalt to Rachana Bhowmik (Aug. 18, 2011, 6:16 PM) [White House Production at WH SOL 002109].
[797] *See* E-mail from Rachana Bhowmik to Andrei Greenawalt (Aug. 18, 2011, 6:26 PM) [White House Production at WH SOL 002111].
[798] *See* U.S. Dep't of Energy, *Department of Energy Commits Support for Landmark Rooftop Solar Project* (June 22, 2011), *available at* http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=560.
[799] Interview with Jonathan Plowe, Managing Dir., Bank of America Merrill Lynch, in Washington, D.C. (Apr. 17, 2011) [hereinafter, "Plowe Interview"].

Solyndra as manufacturer of the panels for Phase 1."[800] It is evident from documents produced to the Committee that these concerns were shared with individuals in the White House. On May 17, 2011, Jason Miller in the White House Office of Energy and Climate Change Policy emailed DOE, Treasury, and OMB staff a number of "topics and questions for Project Amp," including "how Project Photon and Project Amp became one project" and "why phases to be conceived and developed after September 2011 should be considered to have begun construction prior to September 2011."[801]

Documents produced to the Committee show that DOE attempted to address the concerns about Project Amp's ability to meet the September 30, 2011 construction deadline during the weeks leading up to the Credit Review Board meeting to consider a conditional commitment for the project. The documents also indicate, however, that DOE staff was highlighting the importance of the project to Solyndra as a way of securing White House support. On June 3, 2011, after Mr. Silver learned of an upcoming discussion between Secretary Chu's Chief of Staff Brandon Hurlbut, Deputy Secretary of Energy Daniel Poneman, and Ms. Zichal, Mr. Silver emailed Mr. Hurlbut asking him to "[m]ake sure she knows that the first phase of the amp project, which is already locked in, uses Solyndra panels, which would be a huge help to a company that already has a loan. The longer this stays in limbo, the more likely the project is too [*sic*] miss out on the deadline for that. I estimate that we have less than a week to ensure that the first phase remains viable."[802] While Mr. Hurlbut did not see Mr. Silver's email before speaking with Ms. Zichal, he forwarded it to her after their conversation noting that "it is another consequence."[803] Ms. Zichal responded to Mr. Hurlbut's email asking, "How is it locked in?"[804] Based on a subsequent email from Deputy Secretary Poneman to Secretary Chu, Ms. Zichal was informed that "there is an urgency related to the Solyndra Phase I of the project, and if that part falls away we will be unable to commence construction by September 30."[805] According to Deputy Secretary Poneman, "Heather was receptive and said she will try to schedule such a briefing for Monday."[806] It appears that Jeff Navin, Brandon Hurlbut's Deputy—both of whom were copied on Poneman's email to Secretary Chu—viewed the White House involvement as a significant step as he replied to Mr. Hurlbut stating, "Blackhawk not-yet-down!"[807]

Documents produced to the Committee indicate that this briefing did not occur the following Monday;[808] however, on June 14, 2011, a briefing was held with Secretary Chu and White House Chief of Staff, Bill Daley. A PowerPoint presentation and talking

---

[800] E-mail from Contractor, U.S. Dep't of Energy Loan Programs Office, to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (May 13, 2011, 10:05 AM) (attaching notes from DOE's briefing of OMB on Project Amp).
[801] E-mail from Jason Miller to Kelly Colyar et al. (May 17, 2011, 12:45 PM) (attaching "discussion topics and questions for Project Amp.").
[802] E-mail from Jonathan Silver to Brandon Hurlbut (June 3, 2011, 9:26 AM).
[803] E-mail from Brandon Hurlbut to Heather Zichal (June 3, 2011, 11:02 AM).
[804] E-mail from Heather Zichal to Brandon Hurlbut (June 3, 2011, 11:16 AM).
[805] E-mail from Daniel Poneman to Steven Chu (June 4, 2011, 2:55 PM).
[806] *Id.*
[807] E-mail from Jeff Navin, Deputy Chief of Staff, U.S. Dep't of Energy, to Brandon Hurlbut (June 4, 2011, 5:30 PM).
[808] *See* E-mail from Daniel Poneman to Jeff Navin (June 6, 2011, 10:55 AM).

points were prepared for Secretary Chu in advance of the briefing. The talking points stated "If Amp doesn't make payments on the PPA [Power Purchase Agreement] soon, the PPAs will begin to die (and it will hurt Solyndra)."[809] No additional communications or notes related to this briefing were produced to the Committee. Despite the concerns that had been raised about Solyndra's inclusion due to the company's financial condition, the White House allowed Project Amp to go forward and Secretary Chu played a leading role in making sure that was the case. In fact, documents indicate that the conditional commitment was approved three days after the meeting with Mr. Daley, though the announcement was delayed until June 22.

On June 17, Prologis and Bank of America officials who were parties to the negotiations with DOE "confirmed [to Solyndra] that DOE has approved the conditional commitment for Project Amp."[810] According to Solyndra's Vice President of Business Development in an email sent to Solyndra CEO Brian Harrison and others at the company, he spoke to one BAML official who "stated that on three occasions this week he thought that the deal was dead, but Secretary Chu personally pulled it off. Chu shared with the team that this deal went to higher levels in the Obama Administration to gain approval than any other transaction in the Loan Guarantee Program, and that he is personally committed to seeing it through to a successful conclusion…The news of the approval is confidential until announced by DOE, and DOE is very sensitive on this point—please be careful to maintain this confidentiality. Secretary Chu plans to announce the conditional commitment late next week in conjunction with an event at which he will speak."[811] Once Mr. Harrison forwarded the email to Mr. Mitchell and other Solyndra investors, Mr. Mitchell informed Mr. Kaiser, "This needs to be held in strict confidence until Chu makes his announcement next week. But this is very good news for Solyndra. The 16 MW represents 20% of our 3rd and 4th quarter volumes and is at good pricing. In addition, the entire 800MW Amp program is 100% rooftops only – Solyndra has the right to bid on each deal."[812]

After the conditional commitment, Solyndra's financial condition continued to deteriorate and DOE was soon scrambling to ensure that this would not derail Project Amp, which needed to commence construction and close by the September 30 stimulus deadline. This situation became increasingly dire by the end of August, when Solyndra and its investors were at the height of their negotiations with DOE about a second restructuring. It was at this point when DOE became directly involved in contract negotiations between Solyndra and Prologis to ensure that Argonaut would continue to fund Solyndra and that Project Amp could close.

---

[809] U.S. Dep't of Energy, *Project Amp Slide Deck Talking Points June 13, 2011 Briefing*, at 10 (June 14, 2011). For the e-mail transmitting the talking points and slide deck to DOE and OMB officials, *see* E-mail from Contractor, U.S. Dep't of Energy, to Daniel Poneman et al. (June 13, 2011, 4:03 PM). The title of the email is "Amp – Proposed Slides for June 14 Mtg w/ Daley."

[810] E-mail from Vice President of Bus. Dev., Solyndra, Inc., to Brian Harrison et al. (June 17, 2011, 3:00 PM) [Argonaut Production at AVI-HCEC-0067854-56].

[811] *Id.* at AVI-HCEC-0067855].

[812] E-mail from Steve Mitchell to George Kaiser et al. (June 17, 2011, 10:57 PM) [Argonaut Production at AVI-HCEC-0067854].

On August 18, 2011, at 3:10 p.m., Mr. Harrison emailed Mr. Mitchell after speaking with the DOE LPO Director of Strategic Initiatives. He stated, "At some point this week, the DOE will inform ProLogis that they need to 'over purchase' panels from Solyndra for Photon. The vague, general reason is that they are buying from a distressed company and to get the entire AMP loan approved they need to buy some extra panels to protect for warranty issues should the panel provider (Solyndra) fail for Phase 1 which is Photon."[813] He noted that the LPO Director of Strategic Initiatives "repeated several times that Solyndra should not to [*sic*] call ProLogis until Monday and not to tell them of DOE conversations."[814] At 5:21 p.m., without having heard back from Mr. Mitchell, Mr. Harrison added, "One more point . . . This is in the conspiracy theory space but I believe has factual basis: I believe DOE is desperate to get AMP to happen. I think they have linked Phase 1 of AMP (which is Photon) to the project success. Solyndra asked for this several months ago to ensure Photon happens. If we don't ship to Photon then I think there may be some negative implications to AMP that the DOE is urgently trying to avoid. They are strong arming ProLogis [to] take panels to get Photon done before Solyndra fails . . . ."[815] Mr. Mitchell replied at 11:11 p.m., after changing course around 6:00 p.m. and agreeing to provide Solyndra with additional operating capital. He stated, "I agree 100% with your photon point. [The LPO Director of Strategic Initiatives] just called me and confirmed the order on monday would be firm for 15 MW."[816] According to Mr. Harrison's original email to Mr. Mitchell at 3:10 p.m., however, he had explained to the LPO Director of Strategic Initiatives that the first phase of Project Amp was reduced from 15 MW to "11.7MW (or something close to that)[.]"[817]

On the morning of Monday, August 22, 2011, an Argonaut employee emailed Mr. Mitchell "to confirm before I send around the documentation, we're okay with releasing additional Tranche A tomorrow in the amount of 4,364,941.40?"[818] Mr. Mitchell replied, "Not until we have certainty that the DOE is also releasing. I also want to see this ProLogis order come through as well."[819] However, Prologis reached out to Solyndra soon after noon on the 22nd informing them that they wanted to make several modifications to its letter of intent and sales agreement, including a request to "negotiate a new lower price per watt" and a "[m]utual right to cancel the Agreement and all purchases if either party becomes insolvent or if Project Photon does not close."[820]

---

[813] E-mail from Brian Harrison to Steve Mitchell et al. (Aug. 18, 2011, 3:10 PM) [Argonaut Production at AVI-HCEC-0086975-76].
[814] *Id.* at AVI-HCEC-0086976.
[815] E-mail from Brian Harrison to Steve Mitchell et al. (Aug. 18, 2011, 5:21 PM) [Argonaut Production at AVI-HCEC-0086975].
[816] E-mail from Steve Mitchell to Brian Harrison et al. (Aug. 18, 2011, 11:11 PM) [Argonaut Production at AVI-HCEC-0086975].
[817] E-mail from Brian Harrison to Steve Mitchell et al. (Aug. 18, 2011, 3:10 PM) [Argonaut Production at AVI-HCEC-0086975-76].
[818] E-mail from Dir. of Fin., Argonaut Private Equity, to Steve Mitchell et al. (Aug. 22, 2011, 10:15 AM) [Argonaut Production at AVI-HCEC-0077399].
[819] E-mail from Steve Mitchell to Dir. of Fin., Argonaut Private Equity et al. (Aug., 22, 2011, 10:17 AM) [Argonaut Production at AVI-HCEC-0077399].
[820] E-mail from Dir. of Bus. Legal, Solyndra, Inc., to Brian Harrison et al. (Aug. 22, 2011, 12:56 PM) (underline in original) [Argonaut Production at AVI-HCEC-0077404-05].

Later that afternoon, during a layover en route to Solyndra's Fremont headquarters, Mr. Mitchell emailed Mr. Nwachuku in the LPO copying the LPO Director of Strategic Initiatives about these changes. Mr. Mitchell had spoken to Solyndra CFO, Bill Stover, who "indicated that no order had been received from ProLogis yet, but that ProLogis had called requesting a list of contract modifications" which "included the right to return all panels in the event the company files bankruptcy."[821] Mr. Mitchell stated, "Let's discuss but this is certainly unacceptable. We are taking off again soon but hopefully we will know more about these modifications by the time I get to Solyndra and we can all discuss. This is a critical go forward item for us beyond the inventory purchase."[822] It is clear from a subsequent exchange in this document that Mr. Mitchell and the LPO Director of Strategic Initiatives had a conversation that evening, though the content of their discussion is not known.[823]

On August 25, 2011, after negotiating pricing and several additional details with Prologis, Brian Harrison appeared optimistic that the deal would close. He emailed Solyndra's primary investors, Steve Mitchell, Jamie McJunkin, and David Prend, informing them that "[w]e are agreed on all major elements and these are being 'papered' now."[824] However, it is apparent that they thought DOE would provide additional funding under the restructuring framework being proposed so long as the Prologis deal closed. Mr. Prend replied asking, "What is up on the Tranche B funding?"[825] Mr. Mitchell stated, "Not good. [T]he DOE changed their story (though they are claiming no change) and are requiring the Prologis deal to close and to have a fully committed and funded plan prior to closing the Tranche B. I don't see that happening over the next 48 to 72 hours."[826]

F. DOE Decides Not to Fund Solyndra and the Company Files for Bankruptcy

On August 26, 2011, Mr. Mitchell provided additional details about the situation to Mr. Kaiser and others at the GKFF: "As discussed, I spent the first half of this week in Fremont with Solyndra management and the team from Lazard working on business plan alternatives that we could potentially get comfortable underwriting for a continued investment. We were unable to reach agreement on a plan that I feel comfortable recommending for investment . . . We did not fund Tranche A as was discussed last Friday, nor did the DOE fund Tranche B. This was dependent on the ProLogis order coming in which has still not been finalized (ProLogis keeps trying to re-trade the deal

[821] E-mail from Steve Mitchell to Frances Nwachuku et al. (Aug. 22, 2011, 4:17 PM) [Argonaut Production at AVI-HCEC-0077534].
[822] *Id.*
[823] *See* E-mail from Dir. of Strategic Initiatives, U.S. Dep't of Energy Loan Programs Office, to Steve Mitchell (Aug. 23, 2011, 4:38 PM) (stating that he "[w]ould like to catch up on our conversation from yesterday evening.") [Argonaut Production at AVI-HCEC-0077534].
[824] E-mail from Brian Harrison to Steve Mitchell et al. (Aug. 25, 2011, 11:05 AM) [Argonaut Production at AVI-HCEC-0077504].
[825] E-mail from David Prend, Managing Gen. Partner, Rockport Capital Partners, to Brian Harrison et al. (Aug. 25, 2011, 1:30 PM) [Argonaut Production at AVI-HCEC-0077503-04].
[826] E-mail from Steve Mitchell to David Prend (Aug. 25, 2011, 11:35 AM) [Argonaut Production at AVI-HCEC-0077503].

with the company – I think the ProLogis deal will be signed today but this may not occur in light of the state of the company). As of yesterday, the DOE has indicated that it will not fund Tranche B even if the ProLogis deal is executed unless there is also a broader commitment to fund the company going forward. In light of the current headwinds in the macro solar market (pricing, over-supply, Chinese irrational manufacturing decisions, etc.), I cannot recommend investing another $75 to $100 million in Solyndra and am not comfortable stating with certainty that $75 to $100 million will fully fund the company to cash flow break even.[827]

This assessment appears to be validated by an exchange between Morrison & Foerster attorneys and DOE attorneys in the LPO on August 26, 2011. After participating in a phone call with Solyndra, one Morrison & Foerster attorney concluded, "Short story, in their view they are at crises mode again because . . . DOE is not prepared to fund anything additional absent a fully funded plan and DOE will not agree to fund anything additional on the B tranche to allow the process to continue (i.e., they can't fund into a bankruptcy filing'). As a result…Argonaut will not fund anything additional on the A piece. There was some noise about how this was not the understanding with going forward last week (I sensed some DOE finger pointing), but in any event, unless there was movement on this issue, Solyndra felt constrained to shut down next week to be followed by a prompt bankruptcy."[828] One attorney in the LPO forwarded this update to Susan Richardson noting that discussions were still ongoing within the administration: "I just spoke with [the LPO Director of Strategic Initiatives] who told me that JS [Jonathan Silver], S2 [Deputy Secretary of Energy Daniel Poneman] and the WH are discussing whether to further fund the company with another advance. The Prologis PO has a price differential of .18 per watt which is why the PO has not been signed yet. Prologis and [Solyndra] continue to negotiate."[829]

On August 26, 2011, at 12:30 p.m., a conference call was organized by Deputy Secretary Poneman, with invitees including Jonathan Silver and Heather Zichal, who forwarded the invitation to Dan Utech, Deputy Director for Energy and Climate Change Policy.[830] Mr. Utech forwarded the invitation to Jason Miller, Special Assistant to the President for Manufacturing Policy in the National Economic Council.[831] Mr. Utech also emailed Ms. Zichal after the call noting that there would be a follow-up call at 2:00 p.m. and stating, "U need to be on[.]"[832] Mr. Utech organized the follow-up call also inviting

[827] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 26, 2011, 1:30 PM) [Argonaut Production at AVI-HCEC-0088722-23].
[828] E-mail from Partner, Morrison & Foerster LLP, to Partner, Morrison & Foerster LLP et al. (Aug. 26, 2011, 12:54 PM).
[829] E-mail from Attorney Advisor, U.S. Dep't of Energy Loan Programs Office, to Susan Richardson et al. (Aug. 26, 2011, 1:42 PM).
[830] *See* E-mail from Heather Zichal to Dan Utech (Aug. 26, 2011, 11:27 AM) [White House Production at WH SOL 002112].
[831] *See* E-mail from Dan Utech to Jason Miller (Aug. 26, 2011, 12:36 PM) [White House Production at WH SOL 002114].
[832] E-mail from Dan Utech to Heather Zichal (Aug. 26, 2011, 1:16 PM) [White House Production at WH SOL 002119].

Assistant Secretary of the Treasury Mary Miller to join.[833] Mr. Silver then forwarded the latest Lazard presentation summarizing its analysis of Solyndra's most recent revised business model to Mr. Poneman, Mr. Zients, Ms. Miller, and Mr. Utech,[834] who forwarded it to Ms. Zichal.[835] Later that Friday afternoon, August 26, 2011, a conference call was scheduled for the following Monday morning, August 29, 2011, with invitees limited to: Ms. Zichal; Melody Barnes, Director of the Domestic Policy Council; Ms. DeParle; Gene Sperling, Director of the NEC; Mr. Lew; and Mr. Zients. The subject of the invite was "MTG on Future of Solyndra" and the description stated, "Heather Zichal and Jeff Zients will be briefing WH officials about the future of Solyndra."[836] On Saturday, August 27, Deputy Secretary Poneman asked Secretary Chu to join a call with Mr. Silver stating, "There have been developments [with Solyndra] and as you know decisions need to be made imminently"[837] to which Secretary Chu responded, "Yes. Tell me when and where to dial in."[838]

On Friday afternoon, in preparation for Monday's meeting, Jason Miller in the NEC agreed to draft a memorandum providing background on the Solyndra loan guarantee.[839] The final version of this memorandum would serve as the framework for the Zichal and Zients briefing. Mr. Miller stated to the NEC Chief of Staff Christine Koronides, "I will send a write up. We are getting briefed by doe's financial advisors on sunday. Company may be filing for bankruptcy. [Brian] Deese was part of convo about 8 mos ago when doe agreed to restructuring of solyndra."[840] At this time, Brian Deese was Special Assistant to the President and Deputy Director of the NEC.

The briefing Mr. Miller referred to was another conference call with Lazard on Sunday, August 28, involving White House, OMB, DOE, and Treasury officials.[841] Secretary Chu, "listened to the last half hour of the loan conversation" and informed Deputy Secretary Poneman, "[u]nfortunately nothing new was revealed. The probability of finding a buyer and dramatically cutting costs to make to through seems small."[842] After the call, Dan Utech made changes to the background memorandum and shared the current draft with Ms. Zichal and Mr. Zients. He thought that it was "worth checking w

---

[833] *See* Meeting Request from Dan Utech to Mary Miller (Aug. 26, 2011, 2:00 PM) [White House Production at WH SOL 002122].
[834] *See* E-mail from Jonathan Silver to Daniel Poneman et al. (Aug. 26, 2011, 4:01 PM) (attaching the "Lazard deck summarizing the impact of a revised business model.") [White House Production at WH SOL 002129-37].
[835] *See* E-mail from Dan Utech to Heather Zichal (Aug. 26, 2011, 4:02 PM) (attaching "Solyndra Discussion Materials") [White House Production at WH SOL 002129].
[836] *See* Meeting Request from Special Assistant to the Dir. of the Nat'l Econ. Council, The White House, to Senior Policy Advisor, The White House et al. (Aug. 26, 2011, 4:10 PM) (organizing a meeting to discuss the "Future of Solyndra" for Aug. 29, 2011 at 10:30 AM) [White House Production at WH SOL 002142].
[837] E-mail from Daniel Poneman to Steven Chu (Aug. 27, 2011, 1:46 PM).
[838] E-mail from Steven Chu to Daniel Poneman (Aug. 27, 2011, 1:47 PM).
[839] *See* E-mail from Jason Miller to Christine Koronides, Chief of Staff of the Nat'l Econ. Council, The White House et al. (Aug. 26, 2011, 5:14 PM) [White House Production at WH SOL 002169].
[840] *Id.*
[841] *See* E-mail from Matthew Winters, Senior Advisor, U.S. Dep't of Energy Loan Programs Office, to Heather Zichal et al. (Aug. 27, 2011, 2:20 PM) [White House Production at WH SOL 002186-87].
[842] E-mail from Steven Chu to Daniel Poneman & Jeff Navin (Aug. 28, 2011, 5:57 PM).

DOE to see if they still are for extending the $5 MM. If not we can present a unified position."[843] He asked Zichal whether she could reach out to Deputy Secretary Poneman.[844] According to the draft memorandum, the "$5 MM" he mentioned was "an additional $5.4 million of credit to entice the investor [Argonaut] to continue to work toward a second restructuring."[845] It noted that "[f]or several weeks, Solyndra has operated on funds loaned in advance of receivables from customer orders" and "the investor [Argonaut] has offered to extend additional $10 million cash against future inventory orders to keep the company operating for a few weeks while a second restructuring is developed, perhaps with new investors as well."[846]

On August 26, 2011, Steve Mitchell had sent an update to Mr. Kaiser and others at the GKFF stating, "The company's current cash position will require the board to move toward a wind down over the weekend."[847] When Mr. Kaiser asked whether anything else would be required of the GKFF financially,[848] Mr. Mitchell responded that "GKFF may need to fund another inventory purchase or fund $1 or $2 million of Tranche A still remaining to enable the company to have enough capital to liquidate the business."[849] However, on August 27, Solyndra CFO, Bill Stover, informed Mr. Mitchell that "a $3 Million inventory sale is necessary tomorrow . . . ."[850] Mr. Mitchell replied, "I've got a note out to Jonathan Silver and lazard but never heard back from Silver. Let's plan as if we are moving forward."[851] Mr. Stover clarified, "Moving forward…meaning funding an inventory purchase to give folks back East [DOE] several days to fund Tranche B??"[852] to which Mr. Mitchell replied affirmatively.[853] While the $10 million figure cited in the White House draft memorandum cannot be confirmed by documents reviewed by Committee staff, it does appear that Argonaut continued to fund inventory purchases to keep the company operating in hopes that DOE would come through.

With regard to Ms. Zichal's outreach to Deputy Secretary Poneman on the additional $5.4 under Tranche B, she informed Mr. Utech after the Lazard call on Sunday, August 28, that "Poneman is speaking w folks there but I believe we're all in

---

[843] E-mail from Dan Utech to Heather Zichal et al. (Aug. 28, 2011, 6:37 PM) (attaching a [r]evised memo . . . to reflect [the] call with Lazard.") [White House Production at WH SOL 002193-97].
[844] *See id.*
[845] Draft Memorandum from Dan Utech, Senior Advisor to the Sec'y, U.S. Dep't of Energy, *Solyndra Loan Guarantee* (Aug. 28, 2011) [White House Production at WH SOL 002194-97].
[846] *Id.* at WH SOL 002195.
[847] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 26, 2011, 1:30 PM) [Argonaut Production at AVI-HCEC-0091285-86].
[848] *See* E-mail from George Kaiser to Steve Mitchell et al. (Aug. 26, 2011, 2:52 PM) [Argonaut Production at AVI-HCEC-0091284-85].
[849] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 26, 2011, 1:04 PM) [Argonaut Production at AVI-HCEC-0091284].
[850] E-mail from Wilbur G. "Bill" Stover to Brian Harrison & Steve Mitchell (Aug. 27, 2011, 4:55 PM) [Argonaut Production at AVI-HCEC-0086857-58].
[851] E-mail from Steve Mitchell to Wilbur G. "Bill" Stover & Brian Harrison (Aug. 27, 2011, 4:02 PM) [Argonaut Production at AVI-HCEC-0086857].
[852] E-mail from Wilbur G. "Bill" Stover to Brian Harrison & Steve Mitchell (Aug. 27, 2011, 6:09 PM) [Argonaut Production at AVI-HCEC-0086857].
[853] *See* E-mail from Steve Mitchell to Wilbur G. "Bill" Stover & Brian Harrison (Aug. 27, 2011, 11:25 PM) [Argonaut Production at AVI-HCEC-0086857].

agreement on next steps."[854] When Deputy Secretary Poneman informed Secretary Chu that Ms. Zichal had called in preparation for her briefing with "WH principles tomorrow morning,"[855] Secretary Chu replied, "I will take the call. When is it? I presume it is on Solendra [*sic*]. My view has not changed. There are too many uncertainties if we take the path of 'measured liquidation'."[856] When Secretary Chu later questioned whether he actually needed to be on the call or whether it was just a "re-hash" of the earlier Lazard call,[857] Deputy Secretary Poneman replied that "what you did not hear was what our proposed path forward is, relative not only to solyndra but how it relates to Amp and the rest of the 1705 queue. I don't think we need much time but want to make sure we address the variables consistently w your views."[858] When Secretary Chu heard that Project Amp and the additional loan guarantees that needed to close by September 30 would be discussed, he appeared to be more receptive to participating. He responded, "I am very concerned with Amp and the rest of the queue. When is the call?"[859]

At Deputy Secretary Poneman's request, Mr. Silver also joined this call with Ms. Zichal, which occurred just before 9:00 p.m. on August 28 and appears to have continued for well over an hour.[860] When hearing confirmation from Ms. Zichal, Dan Utech informed Mr. Miller and Mr. Zients at 10:48 p.m. that he "revised [the memorandum] substantially and cut a bunch of things to reflect the fact that DOE's view is that the additional funds should not be extended."[861] The memorandum now concluded: "DOE believes that they should not extend any additional funds, though they plan to stay engaged with the company during the liquidation. OMB, Treasury, DPC [Domestic Policy Council], and NEC agree, as there is a near-zero chance that the company will become a going concern, and any new deal developed during the next several weeks would be materially worse for the U.S. government, reducing the likelihood of an improved recovery. If an acceptable deal is not achievable, the U.S. government would have been better off from not having extended those funds."[862]

While Ms. Zichal's phone call with Secretary Chu, Deputy Secretary Poneman, and Mr. Silver on the night of Sunday, August 28, concluded with an agreement that "DOE's view is that the additional funds should not be extended,"[863] additional documents indicate that throughout the weekend, Mr. Silver had been determined in his

---

[854] E-mail from Heather Zichal to Dan Utech et al. (Aug. 28, 7:18 PM) [OMB Production at SOL000167].
[855] E-mail from Daniel Poneman to Steven Chu (Aug. 28, 2011, 7:22 PM).
[856] E-mail from Steven Chu to Daniel Poneman et al. (Aug. 28, 2011, 7:30 PM).
[857] *See* E-mail from Steven Chu to Daniel Poneman et al. (Aug. 28, 2011, 7:59 PM).
[858] E-mail from Daniel Poneman to Steven Chu et al. (Aug. 28, 2011, 8:21 PM).
[859] E-mail from Steven Chu to Daniel Poneman et al. (Aug. 28, 2011, 8:31 PM).
[860] *See* E-mail from Daniel Poneman to Steven Chu et al. (Aug. 28, 2011, 8:38 PM) (noting that "Silver just called me so I gave him the dial-in and we are calling now."). *See also* E-mail from Heather Zichal to Jeffrey Zients (Aug. 28, 2011, 10:31 PM) (stating that "We're good. Same page. Spoke w Chu too. Memo going out momentarily."). [OMB Production at SOL000167].
[861] E-mail from Dan Utech to Jeffrey Zients et al. (Aug. 28, 2011, 10:48 PM) (attaching revised "Updated on Solyndra Loan Guarantee") [OMB Production at SOL0001678-80].
[862] Memorandum from Dan Utech, Senior Advisor to the Sec'y, U.S. Dep't of Energy, *Update on Solyndra Loan Guarantee,* at 2 (Aug. 28, 2011) (internal citations omitted) [OMB Production at SOL0001679-80].
[863] E-mail from Dan Utech to Jeffrey Zients et al. (Aug. 28, 2011, 10:48 PM) [OMB Production at SOL0001678].

efforts to access the additional $5.4 million in Tranche B. According to an email from Mr. Mitchell on August 29, 2011, at 1:51 a.m., "I have had extensive conversations over the weekend with the DOE, Lazard (DOE's advisor) and the company. Jonathan Silver is attempting to get access to the Tranche B funds in an effort to give the company 3 weeks to try and effect a fund raise or trade sale. I see this as highly unrealistic but the DOE wants to give it a shot. We have been very clear with the DOE that we cannot raise outside money if the balance sheet isn't dramatically revised to make this interesting as a going concern . . . ."[864] After Mr. Mitchell described the fact that DOE was willing to revise the company's balance sheet to "essentially wipe out all debt but Tranche A's senior secured $75 million and $75 million of Tranche B in the junior secured position," he stated, "[w]ith this framework of a structure the DOE (with company and our assistance) will be looking to attract a strategic . . . or a financial investor . . . to come in for all or at least half of the capital required to continue operations. I see this as a very low likelihood for success, however the DOE is willing to make the calls directly – one can only assume that they (and the Treasury) have built up some substantial good will over the past 2 or 3 years so I'm not completely counting this out."[865]

Based on the documents, Mr. Silver appears to have wasted little time in his efforts to do just that and more. In addition, the documents indicate that he continued to seek approval for the additional Tranche B funding and attract new investors as well as new business for the company. For instance, August 29—the day after his call with Secretary Chu, Deputy Secretary Poneman, and Ms. Zichal—was when Mr. Silver reached out to Commissioner Peck at the GSA for a second time informing him that "a California company that manufactures solar panels is looking for business."[866] In addition, using his personal email address, Mr. Silver let Steve Mitchell know that he had "made a few calls [to investment bankers] to begin to elicit interest."[867] He stated, "As folks respond, I will explain our flexibility, connect them with you and step back."[868]

On August 30, 2011, in response to Mr. Mitchell notifying him that Solyndra finally agreed to terms with Prologis, Mr. Silver responded to Mr. Mitchell — again using his personal email address — thanking him for the update and informing him that he sent the Senior Managing Partner at a Silicon Valley venture capital firm his contact information.[869] Later that day, Mr. Mitchell responded that Brian Harrison would be meeting with the firm the next day, on August 31.[870] When asked whether he would be

---

[864] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 29, 2011, 1:51 AM) [Argonaut Production at AVI-HCEC-0091283].
[865] *Id.*
[866] E-mail from Robert Peck to Dir., Pub. Bldgs. Serv., U.S. Gen. Serv. Admin. & Assistant Comm'r for Project Delivery, Pub. Bldgs. Serv., U.S. Gen. Serv. Admin. (Aug. 29, 2011, 12:50 PM) [Argonaut Production at AVI-HCEC-0077061].
[867] E-mail from Jonathan Silver to Steve Mitchell (Aug. 29, 2011, 3:58 PM) [Argonaut Production at AVI-HCEC-0077048].
[868] *Id.*
[869] *See* E-mail from Jonathan Silver to Steve Mitchell (Aug. 30, 2011, 11:55 AM) [Argonaut Production at AVI-HCEC-0086759-60].
[870] *See* E-mail from Steve Mitchell to Jonathan Silver (Aug. 30, 2011, 2:10 PM) [Argonaut Production at AVI-HCEC-0086759].

attending,[871] Mr. Mitchell responded that he could not but that he "[h]ad a couple of good calls with potential investors today as well."[872] In addition, he asked Mr. Silver, "When do you think we will have feedback on the Tranche B?"[873] Apparently Mr. Silver failed to inform Mr. Mitchell that two days earlier, he was on a call with Secretary Chu, Deputy Secretary Poneman, and Ms. Zichal, on which they confirmed that DOE was of the position that they should not extend any additional funds to the company. No subsequent communications between Mr. Silver and Mr. Mitchell were produced to the Committee.

Throughout the day on August 30, 2011, Solyndra officials were also unsuccessfully attempting to get answers from the LPO about Tranche B. That afternoon, Bill Stover reached out to Frances Nwachuku asking, "Are we to understand that deliberations are still going on?" and noting, "Our team is assembling to finish termination packages and prepare for notification of team members in the morning. We have no cash to allow continuing payroll accrual. I trust you will give us an indication within the hour."[874] After three hours, without having heard back from Ms. Nwachuku, Mr. Stover reached out to another member of the LPO team pleading, "Someone needs to give us an update[,]"[875] after which, he was informed, "I just spoke with Frances and she should follow up with you directly."[876]

At 5:00 p.m. Pacific Time, the Solyndra board voted to move forward with the bankruptcy. According to Mr. Mitchell it was "[a]n incredible evening with some bombs dropped by the DOE."[877] In an update to Mr. Kaiser and others at the GKFF, he detailed what had transpired: "Unfortunately the various federal agencies have determined that they cannot release the remaining tranche B funds into a possible bankruptcy situation. They would most likely fund if we committed to fund some portion of the revised business plan to give the company a greater time period to raise outside capital. Apparently their decision was primarily driven by the fact that (as of yesterday) the government had agreed to write off $460 million of debt and right-size the balance sheet with $150 million of debt. To them, this should have been a significant enough action to get current investors to fund $20 or $30 million to give Solyndra through the end of the year to raise the remaining capital necessary to cash flow break even . . . . Obviously a disappointing outcome and I'm surprised that DOE came back without the Tranche B

[871] *See* E-mail from Jonathan Silver to Steve Mitchell (Aug. 30, 2011, 2:56 PM) [Argonaut Production at AVI-HCEC-0086759].
[872] E-mail from Steve Mitchell to Jonathan Silver (Aug. 30, 2011, 3:26 PM) [Argonaut Production at AVI-HCEC-0086759].
[873] E-mail from Steve Mitchell to Jonathan Silver (Aug. 30, 2011, 8:35 PM) [Argonaut Production at AVI-HCEC-0086759].
[874] E-mail from Wilbur G. "Bill" Stover to Frances Nwachuku (Aug. 30, 2011, 2:37 PM) [Argonaut Production at AVI-HCEC-0076884].
[875] E-mail from Wilbur G. "Bill" Stover to Employee, U.S. Dep't of Energy Loan Programs Office (Aug. 30, 2011, 5:43 PM) [Argonaut Production at AVI-HCEC-0076884].
[876] E-mail from Employee, U.S. Dep't of Energy Loan Programs Office, to Wilbur G. "Bill" Stover (Aug. 30, 2011, 5:59 PM) [Argonaut Production at AVI-HCEC-0076884].
[877] E-mail from Steve Mitchell to Managing Partner, Greentech Capital Advisors (Aug. 31, 2011, 2:41 AM) [Argonaut Production at AVI-HCEC-0086720].

funding that they had essentially proposed."[878] The company publicly announced its decision on August 31, 2011.[879]

Soon after Solyndra's bankruptcy announcement on August 31, 2011, DOE and OMB began to confer about the impact it would have on Project Amp's ability to close by September 30, 2011. On September 2[880] and September 8,[881] Ms. Colyar sent DOE a number of questions about Project Amp's status including, "Please outline the criteria for approval of Phase I and how the project satisfied these criteria[]"[882] and "If Phase I is not approved, what activities will have satisfied the commencement of construction requirement?"[883] DOE responded to OMB on September 12 by stating in part, "Once Phase 1 is submitted for approval, both DOE and BAML will determine whether or not Phase 1 meets or does not meet the Phase Parameters . . . . The Basic Phase Parameters require that solar panel vendors be reasonably acceptable, based on consultation with the IE [Independent Engineer] and other technical experts and by reference to certain risk underwriting criteria."[884] With respect to the commencement of construction activities, DOE asserted that they were already underway. The agency replied, "[W]e know that Prologis has expended considerable funds (our estimate is well more than $5 million) to commence the build-out of Phase 1 and has paid a significant amount in interconnection fees under the Phase 1 PPAs."[885]

On September 15, 2011, Prologis informed DOE that it would not use Solyndra panels for Phase I due in part to "1) uncertainty that Solyndra has a sufficient number of panels available in order to build out Phase 1; 2) uncertainty that if sufficient panels are available that they can be purchased and delivered to Prologis in any reasonable period of time; [and] 3) increased costs associated with using Solyndra panels (e.g., insurance costs, 'synthetic' warranties to replace manufacturer warranty)."[886] Regardless of the lack of supplier for Phase I, Project Amp ultimately moved to a Credit Review Board meeting and closed on September 30, 2011. On July 12, 2012, David Frantz, currently the Acting Executive Director of the LPO, testified in front of the Subcommittee on Oversight and Investigations that Project Amp has yet to draw any funds.[887]

---

[878] E-mail from Steve Mitchell to George Kaiser et al. (Aug. 30, 2011, 9:17 PM) [Argonaut Production at AVI-HCEC-0091492-93].
[879] *See* E-mail from Jeff Navin to Rachana Bhowmik et al. (Aug. 31, 2011, 8:44 PM) ("One of our loan guarantee recipients, Solyndra, will announce today that it is going out of business.") [White House Production at WH SOL 002214].
[880] *See* E-mail from Kelly Colyar to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Sept. 2, 2011, 6:48 PM).
[881] *See* E-mail from Kelly Colyar to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Sept. 8, 2011, 6:19 PM).
[882] E-mail from Kelly Colyar to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Sept. 2, 2011, 6:48 PM).
[883] *Id.*
[884] E-mail from Contractor, U.S. Dep't of Energy, to Kelly Colyar et al. (Sept. 12, 2011, 3:00 PM).
[885] *Id.*
[886] E-mail from Senior Inv. Officer, U.S. Dep't of Energy, to Attorney Advisor, U.S. Dep't of Energy Loan Programs Office et al. (Sept. 18, 2011) (attaching document entitled "Project Amp Change of Panel Supplier for Phase 1" dated Sept. 16, 2011).
[887] *The American Energy Initiative: J. Hearing Before the Subcomm. on Energy & Power and the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. (2012)

XI. FINDINGS

Pursuant to the information set forth above, the key findings of the Subcommittee's investigation are set forth below.

A. The timing of the Solyndra Conditional Commitment was coordinated with the White House, and scheduled before DOE had reached an agreement with the company on key terms.

While then-LPO Executive Director Jonathan Silver testified that the Loan Program Office's review of the Solyndra loan guarantee was not rushed, and that the Loan Programs Office staff had "established a goal of, and timeline for, issuing the company a conditional loan guarantee commitment in March 2009,"[888] documents produced to the Committee show that the President's March 19 speech was a key factor influencing the timing of the conditional commitment.

Department of Energy emails show that the Solyndra conditional commitment was scheduled during a March 5, 2009, phone call between DOE ARRA Advisor Matt Rogers and the White House. Whether or not the Loan Programs Office staff had initially planned a Solyndra conditional commitment for March 2009, the fact remains that by the time the call between Mr. Rogers and the White House took place, key terms of the Solyndra deal were still not settled, in particular, the debt-to-equity ratio of the loan guarantee. In addition, DOE had not yet received a draft of the independent market report, which the first Credit Committee to review the Solyndra loan guarantee in January 2009 had indicated was a critical factor in the Solyndra application's due diligence.

By scheduling the dates for the DOE Credit Committee and Credit Review Board meetings before key deal terms had been negotiated, and by making clear that the reason for doing so was a speech by the President, political pressure was placed on the DOE Loan Programs Office staff to finalize an agreement with the company. Although DOE was able to achieve a 73 to 27 debt-to-equity ratio when Solyndra had pushed for an 80 to 20 split, even the negotiated ratio raised concerns for the Treasury Department, whose staff believed that Solyndra should have been required to raise even more equity for the loan guarantee, preferably a 65 to 35 ratio.[889] The amount of equity required to obtain a loan guarantee under Section 1705 of the Recovery Act is a significant issue. Before the stimulus, the Energy Policy Act required that applicants pay for the credit subsidy costs of the loan guarantee, which can total tens of millions of dollars. With the funding for these costs provided by the stimulus, the only way for DOE to force the applicants to put "skin in the game" was through the applicant's equity contribution.

(testimony of David G. Frantz, Acting Executive Dir., U.S. Dep't of Energy Loan Programs Office), *available at* http://test.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=9668.

[888] Silver Statement, *supra* note 40, at 2.

[889] *See supra* note 150.

Timing the conditional commitment approval to coincide with the President's speech seemed to be DOE's primary concern in setting the schedule for the Credit Committee and Credit Review Board meetings on Solyndra, rather than first completing the due diligence and negotiations on the loan guarantee. The fact that the first draft of the market report did not include sufficient information on Solyndra's competitors supports this conclusion. The first DOE Credit Committee had specifically required information about the "current state of the competitive market," finding that a loan guarantee to Solyndra was "premature" absent this information.[890] This data still had not been provided by the time the second Credit Committee convened on Solyndra in March, as the March Credit Committee noted that "very little competitor information" was ultimately provided in the draft market report.[891] In its follow-up questions, the March 2009 Credit Committee specifically requested that the Loan Programs Office obtain additional information on Solyndra's competitors.[892] Even though two DOE Credit Committees noted the absence of this data, DOE pushed forward with a conditional commitment for Solyndra. As this report discussed in Part III(F), DOE never obtained this information, as DOE's independent market consultant, R.W. Beck, was unable to find adequate information in existing studies about the market share of Solyndra's competitors.[893] Committee staff's comparison of the first draft of the independent market report submitted on March 6, 2009, and the second draft dated April 27, 2009, reveals no changes or additions to the report's analysis of market competitors.

What, then, changed between the remand by the first DOE Credit Committee in January 2009 and the decision to re-submit the Solyndra application to a DOE Credit Committee in March 2009? A first draft of an independent market report was available on March 6, but it was submitted after the decision was made on March 5 to schedule the Credit Committee and Credit Review Board meetings and still did not include the competitor analysis requested by the January Credit Committee. DOE did not have an understanding of Solyndra's working capital situation or the "nature and strength" of the parent company's guarantee for the project, as demonstrated in Kelly Colyar's emails to her colleagues in August 2009 discussing the "major outstanding issue" of working capital.[894] The only thing that seemed to have changed substantially between January and March 2009 was the passage of the stimulus, and the urgency on the part of the Administration to meet the stimulus deadlines and make announcements highlighting stimulus projects.

B. DOE failed to consult with the Department of the Treasury during the course of it review of Solyndra's application, as required by the Energy Policy Act of 2005, and the consultation that did occur was rushed.

The documents reviewed by Committee staff confirm the findings of the Audit Report issued by the Department of the Treasury Office of Inspector General: DOE failed

---

[890] *See supra* note 47.
[891] *See supra* note 94.
[892] *Id.*
[893] *See supra* notes 106, 108.
[894] *See supra* note 188.

to consult with Treasury concurrent with DOE's review of Solyndra, and the consultation that occurred was rushed.

DOE only briefed Treasury after it had reached an agreement with Solyndra on the terms and conditions of the loan guarantee and after the Credit Committee and Credit Review Board had approved the conditional commitment. In fact, based on the Audit Report and the documents reviewed by Committee staff, the "consultation" that occurred was clearly an afterthought and not intended to gain Treasury's insight or advice about the terms and conditions of the Solyndra conditional commitment. As the conditional commitment had already been approved by the DOE Credit Review Board, it seems unlikely that DOE would not have been able to incorporate anything other than technical or minor suggestions by Treasury without re-submitting the loan guarantee to the Credit Review Board. Instead, DOE did the bare minimum to meet the letter, but not the spirit, of the statute's consultation requirement so that it could include a statement in its press release announcing the Solyndra conditional commitment that Treasury had been consulted.

DOE's failure to consult with Treasury during its review of the Solyndra application raises the same concerns as DOE's scheduling of the Solyndra conditional commitment: the timing of critical events in the review of the Solyndra application was driven more by the White House's desire to issue press releases and public announcements than by the completion of DOE's due diligence.

C. The Department of Energy should have anticipated the market challenges that contributed to Solyndra's financial condition.

DOE, Solyndra, and Solyndra's investors have all pointed to China, and the subsidies the Chinese government has provided to its solar manufacturers, as the principal reason why Solyndra's financial condition rapidly deteriorated in 2010. According to DOE, Solyndra was "well-positioned to compete and succeed in the global marketplace" in 2009 and neither the company nor DOE could have anticipated the billions in subsidies from China.[895] While it is possible that DOE and Solyndra could not have envisioned the extent of Chinese subsidies, information about China's influence on the solar market and other market issues was available to DOE in 2009 and should have raised red flags about Solyndra's market plan.

As set forth in this report, both DOE Credit Committees noted the lack of due diligence and analysis of the market for Solyndra's products.[896] Even after the first draft of the independent market report was submitted in early March, the second DOE Credit Committee on Solyndra noted that the report did not contain sufficient information about Solyndra's competitors. For this reason, the Credit Committee specifically requested that the DOE Loan Programs Office provide additional information on Solyndra's competitors.[897] This report demonstrates, however, this information was never compiled

[895] Silver Testimony, *supra* note 40, at 29.
[896] *See supra* notes 47, 94.
[897] *See supra* note 94.

or included in the report. This is especially troubling given the fact that Solyndra's panels — a new technology that could only be installed on a white, flat roof top — were a niche product and had a higher price per watt than those of other manufacturers.

While Solyndra's application, incredibly, listed China as a potential market for its products, and the independent market report did not even mention China, OMB staff was aware prior to the Solyndra closing in September 2009 that Chinese solar manufacturers, and their efforts to penetrate the U.S. market, could potentially impact Solyndra. In fact, Energy Branch Chief Kevin Carroll specifically cited China as a concern when he emailed his superior, Richard Mertens, on August 31, 2009, to request that Solyndra's closing be postponed.[898] Mr. Carroll stated that "Solyndra claims to have a pricing advantage based on performance and lower costs of installation (sometimes referred to as balance of plant). Recent developments in the solar market, in particular, pricing pressure from China from silicon wafer plants scheduled to come on line (and that also may or may not be due to dumping; see articles below), raise concerns about how strong Solyndra's position will be in the face of rising competition."[899]

In his email, Mr. Carroll included links to four articles on the solar market.[900] The first article, entitled "China Racing Ahead of U.S. in the Drive to Go Solar," noted that China had "stepped on the gas in an effort to become the dominant player in green energy — especially in solar power."[901] The article also noted the link between China's efforts and the dropping price of solar panels, stating that China had "already played a leading role in pushing down the price of solar panels by almost half over the last year" and observed that the CEO of Suntech Power Holdings, China's biggest solar panel manufacturer, said "that Suntech, to build market share, is selling solar panels on the American market for less than the cost of the materials, assembly and shipping."[902] The second article noted the "emerging overcapacity in the output of polysilicon" from China[903] – Solyndra's business model was based, in part, on the high price of polysilicon – and the third article noted the steep drop in solar panel prices.[904] The final article listed by Mr. Carroll also noted the decreasing price of polysilicon.[905]

---

[898] *See* E-mail from Kevin Carroll to Richard Mertens et al. (Aug. 31, 2009, 4:27 PM).
[899] *Id.*
[900] *See id.*
[901] Keith Bradsher, *China Racing Ahead of U.S. in the Drive to Go Solar*, N.Y. TIMES (Aug. 24, 2009), *available at* http://www.nytimes.com/2009/08/25/business/energy-environment/25solar.html?_r=2.
[902] *Id.*
[903] Keith Bradsher, *Chinese Solar Firm Revises Price Remark*, N.Y. TIMES (Aug. 26, 2009), *available at* http://www.nytimes.com/2009/08/27/business/energy-environment/27panel.html?_r=1.
[904] *See* Kate Galbraith, *As Prices Slump, Solar Industry Suffers*, N.Y TIMES GREEN BLOG (Aug. 13, 2009, 6:02 PM), http://green.blogs.nytimes.com/2009/08/13/as-prices-slump-solar-industry-suffers/ (noting that "Panel prices have fallen by nearly 40 percent from their peak last spring," and quoting the president of U.S. Solar Finance, as stating that a "'a ton of production, mostly Chinese, has come online in the last year and year and a half.'").
[905] *See* Kate Galbraith, *More Sun for Less: Solar Panels Drop in Price*, N.Y TIMES (Aug. 26, 2009), *available at* http://www.nytimes.com/2009/08/27/business/energy-environment/27solar.html (stating that "Until recently, panel makers had been constrained by limited production of polysilicon, which goes into most types of panels. But more factories making the material have opened, as have more plants churning out the panels themselves — especially in China.").

Contrary to DOE's claims, there were numerous warning signs in 2009 of the impending turbulence in the solar market. The lack of available competitor information for Solyndra and the rapidly dropping price of polysilicon and panel prices[906] should have prompted DOE to reconsider the Solyndra loan guarantee or, at the least, postpone the Solyndra closing so it could examine how the Solyndra loan guarantee would be impacted by the Chinese pricing pressures.

D. The Department of Energy ignored critical red flags about Solyndra's financial condition prior to closing the loan guarantee in September 2009.

A review of Solyndra's financial models and DOE documents by a Certified Public Accountant detailed to the Committee reveals a number of problems and irregularities with Solyndra's financial information that DOE either ignored or did not recognize in its push to award a loan guarantee to the company.

Solyndra submitted seven versions of financial models or projections as part of its DOE loan guarantee application. According to DOE, the Loan Programs Office "requested several revisions of the financial model before Solyndra's application was deemed complete in the summer of 2008."[907] DOE produced to the Committee seven financial models that were part of Solyndra's application to the Committee.[908] Some of the assumptions and other estimates in Solyndra's financial models appear to be incorrect, incomplete, or unrealistic. For example, in each of the models Solyndra submitted as part of its application, the company assumed that all panels would be sold as they were produced. The result of this assumption is that Solyndra would hold no finished goods in inventory and that sales would keep pace with production. Given Solyndra's status as a new company, and the fluctuations in polysilicon prices that the solar market experienced between 2005 and 2010, this assumption does not seem to be supportable and was overly optimistic. Ultimately, Solyndra held a considerable amount of finished goods in inventory, a situation that finally resulted in Argonaut purchasing the company's inventory and Accounts Receivable in the summer of 2011 in order to inject cash into Solyndra.

In addition, the revenue and profitability projections contained in Solyndra's application were also unrealistic. In the last three financial models submitted as part of Solyndra's financial application, the company projected that gross profit margins would increase to 48 to 54 percent of revenue for the years 2011 through 2015. This increase in gross profit margins as a percentage of revenue is far in excess of the average percentage for U.S. manufacturing companies of 33 percent.[909] Solyndra's models also appeared to have understated some projected expenses, such as Selling, General, and Administrative

---

[906] *See supra* note 27.
[907] June 15, 2012 Letter from DOE Deputy General Counsel, *supra* note 26.
[908] *See id.* (stating that "[t]his response contains the financial models referenced as Exhibit D1(a) in the Business Plan submitted as part of Solyndra's application.") (attached financial information on file with author).
[909] *See* LEO TROY, ALMANAC OF BUSINESS AND INDUSTRIAL FINANCIAL RATIOS 150 (2011).

(SGA) expenses. In its models, Solyndra estimated that these expenses would remain at $26 million for the years 2012 through 2019. This projected expense, however, is not sufficient to support what Solyndra estimated would be a growth in its revenue to over $500 million plus inflation. Further, Solyndra's models appear to have inflated the projections for net income as a percentage of revenue. The company estimated net income at a high of 23 percent of revenue for 2011 and at 30 to 33 percent of revenue for the years 2012 through 2016. These numbers, like other projections in Solyndra's models, were unrealistic: Solyndra's estimates were over double the U.S. manufacturing net income of 10 to 15 percent. Solyndra nonetheless used these projected net income figures to demonstrate that the Fab 2 loan guarantee project company could generate a sufficient profit to repay the DOE loan guarantee.

After DOE entered due diligence in late 2008, DOE staff raised significant concerns about Solyndra's working capital. As explained above, Ms. Colyar, Director of Credit Policy for the Loan Programs Office, raised the issue of working capital in writing in December 2008 and August 2009. Ms. Colyar was concerned that DOE did not have an adequate understanding of the financial relationship between Solyndra, Inc., and the DOE project company, Fab 2. Ms. Colyar believed that DOE's proposed solution to address the working capital issue — that the parent company would guarantee to cover the project overrun costs — was inadequate, as DOE did not understand whether the parent company had the resources to make the guarantee. Despite repeatedly raising this concern during DOE's review of the Solyndra application, DOE did not model the parent company and the project company as an integrated entity, even though the parent company, Solyndra, Inc., was the counterparty to the project company for all sales, supplies, and other contracts.

A closer look at the financial information of the Solyndra parent and project companies should have revealed or, at the least, prompted further due diligence of the company's financial models and whether Solyndra would be able to repay the loan guarantee.

E. The White House and the Department of Energy scheduled a public announcement event to commemorate the closing of the Solyndra loan guarantee before OMB had reviewed the transaction, impacting the length and quality of OMB's review.

It is clear that the date for the Solyndra closing was not determined by OMB's review and approval of the Solyndra credit subsidy cost. The closing date had been set by the White House and DOE even before OMB's substantive review had begun. The documents reviewed by the Committee and described in this report also show that OMB staff working on the Solyndra deal was aware of the White House interest and the time pressure to complete the review in time for the September 4 groundbreaking event. One OMB staff member, Energy Branch Chief Kevin Carroll, went so far as to contact his immediate superior and a policy advisor to Vice President Biden to ask them to postpone the Solyndra closing event so that OMB would have time to complete its work.[910] The

[910] *See supra* note 276.

documents also show that this pressure may have had a tangible impact on the Solyndra credit subsidy cost calculations, as OMB staff stated that they did not have time to adjust the factors in their modeling due to the time constraints.[911]

In addition, it is interesting to note the amount of time OMB spent reviewing the Solyndra deal compared to other DOE loan guarantees. An October 25, 2010, White House Memorandum addressed to President Obama from Carol Browner, then-Director of the White House Office of Energy and Climate Change Policy; Ron Klain, then-Chief of Staff to Vice President Joe Biden; and Dr. Lawrence Summers, then-Director of the National Economic Council; states that the average OMB review time for DOE loan guarantees processed after September 1, 2009, was 28 calendar days.[912] If the review time is measured from the time DOE makes its presentation to OMB, OMB's review of Solyndra took a mere 9 days, even though it was the first DOE loan guarantee ever made, and thus should have been given more review time, not less.

F. DOE closed the Solyndra loan guarantee and moved forward with Solyndra's second loan guarantee application before DOE had the capability to monitor the first loan guarantee.

After DOE closed the loan guarantee in September 2009, DOE began to authorize the disbursement of loan guarantee funds to Solyndra to pay for the construction of the new Fab 2 facility. In the one-year period after DOE closed the loan, DOE disbursed the bulk of the loan guarantee funds, $408 million of the $535 million loan guarantee. A review of documents produced to the Committee shows that these disbursements were approved even though DOE failed to monitor the financial condition of the company or grasp Solyndra's deteriorating financial condition.

As detailed in this report, almost immediately after receiving the loan guarantee, Solyndra's financial condition began to worsen. In an amended S-1 statement filed on March 16, 2010, Solyndra's auditor stated that the "Company has suffered recurring losses from operations, negative cash flows since inception and has a net stockholders' deficit that, among other factors, raise substantial doubt about its ability to continue as a going concern." The S-1 also listed several troubling financial statistics. The company listed net losses of $232.1 million in Fiscal Year 2009 and $172.5 million in Fiscal Year 2010, and accumulated deficits of $557.7 million.[913] The amended S-1 also revealed that Solyndra was struggling to compete in the market place. According to the statement, Solyndra's "average sales price was $3.24 per watt, which was $1.29 per watt, or approximately 66%, higher than the $1.95 average sales price per watt of leading crystalline silicon photovoltaic manufacturers during the same period."[914] Industry analysis from 2010 suggests that Solyndra's position was unsustainable, as the company

[911] *See supra* notes 258-59.
[912] *See supra* note 293.
[913] *See* Solyndra Registration Statement Amendment*, supra* note 296.
[914] *Id.*

was selling its panels at a huge loss. Using the financial information presented in the amended S-1, one analyst pegged Solyndra's costs at $6.29 per watt.[915]

Despite these clear statements about the company's severe financial problems, DOE continued to stand by the company, disbursing a total of $121.9 million to Solyndra from April through September 2010. In response to OMB's questions about DOE's monitoring of the company in the wake of the amended S-1 statement, DOE presented a thin, three-page analysis that primarily focused on the construction schedule and boasted that the project was "on schedule" and "under budget."[916] DOE's update on Solyndra failed to mention or otherwise address the troubling financial data included in the amended S-1 filing. Instead, DOE merely stated that Solyndra's auditor's statements should not be viewed as unusual given the company's status as a start-up. Similarly, when the White House questioned DOE about Solyndra's status ahead of President Obama's visit to the company in May 2010, DOE once again issued its stock line: Solyndra's troubled financial situation was not unusual for a start-up company.

Solyndra's financial problems continued to trouble DOE and OMB throughout the summer of 2010. The agencies worked together to analyze what little financial information they had about the company and develop questions for DOE in order to obtain additional information about Solyndra's status. Committee staff's review indicates, however, that DOE largely ignored OMB and Treasury efforts to understand Solyndra's financial condition. For example, on July 26, 2010, OMB sent DOE a list of five specific questions relating to Solyndra's financial status, including requests for updated financial models, statements, and information about Solyndra's current market price and productivity.[917] Although OMB pressed DOE for answers to these questions on a number of occasions, documents produced to the Committee indicate that DOE never responded to OMB's questions.[918] Treasury's efforts were similarly unsuccessful. Treasury Assistant Secretary for Financial Markets Mary Miller informed OMB Deputy Director Zients in August 2011, when DOE was considering a second restructuring of Solyndra, that DOE had rebuffed every one of Treasury's requests for information about the company.[919]

DOE's failure to grasp Solyndra's financial problems in 2010 may be attributable, in part, to the fact that the Loan Programs Office did not hire anyone to lead its portfolio management and monitoring efforts until August 2010. During 2010, the LPO's work was focused on issuing additional solicitations for applications and reviewing and finalizing pending loan guarantee applications rather than on the monitoring of Solyndra – the only loan guarantee that the LPO had closed until Kahuku Wind Power closed in August 2010. The September 30, 2011, deadline under the stimulus for closing Section

---

[915] *See* Shyam Mehta, *Solyndra: 1.9 MW Project Installed, But Story Remains Fraught With Uncertainty*, GREEN TECH MEDIA (Feb. 1, 2010), http://www.greentechmedia.com/articles/read/solyndra-1.9-mw-project-installed-but-story-remains-fraught-with-uncertaint/.
[916] *See supra* note 301
[917] *See supra* note 305.
[918] *See supra* note 307.
[919] *See supra* note 726.

1705 loan guarantees necessarily contributed to DOE's preoccupation with processing and closing loan guarantee applications.

Establishing a rigorous monitoring function, therefore, seemed to be a secondary concern for DOE. Despite numerous warning signs, DOE never fully understood the degree to which Solyndra's financial position had deteriorated in 2010 until the company approached DOE in October to inform the agency that it was out of cash.

G. Solyndra's financial strategy was dependent on additional government support in the form of sales contracts and a second loan guarantee.

Documents and emails produced to the Committee by OMB and DOE and by Solyndra's largest investor, Argonaut, show that Solyndra's survival was dependent on obtaining further support from, and contracts with, the Federal government.

Immediately after closing its loan guarantee in September 2009, Solyndra filed a second DOE loan guarantee application to finance the next phase of the Fab 2 manufacturing facility. Receiving a second loan guarantee was critical to Solyndra's plans for an Initial Public Offering. Emails exchanged among Argonaut advisors show that a second loan guarantee would affect Solyndra's valuation and therefore impact its ability to go public.[920] Going public was critical to Solyndra because of its overwhelming capital need, which the emails discussed in this report indicate was as high as $300 to $350 million. When Solyndra finally cancelled its IPO in June 2010, the company again turned to its existing investors to raise $175 million through convertible promissory notes.

With its IPO cancellation, Solyndra redoubled its efforts to obtain new contracts for the installation of its panels on government building rooftops. Solyndra was chiefly focused on the General Services Administration and the Department of Defense. According to an email from Solyndra investor Tom Baruch, who was present when President Obama visited Solyndra's facility in May 2010, then-Solyndra CEO Christian Gronet "spoke very openly" to the President about the "need" for Solyndra to install its panels on government rooftops.[921] In addition, during the summer of 2010, Solyndra's investors referenced the company's "government procurement strategy."[922] Just before Solyndra ran out of cash and proposed a restructuring plan to DOE, Solyndra's investors even discussed whether they should approach the White House Chief of Staff's office and ask about DoD contracts. Solyndra also sought to get business from the General Services Administration.

The Committee's investigation establishes that Solyndra's cash needs in late 2009 and in 2010 were huge and immediate. Initially, Solyndra planned an Initial Public Offering to raise capital, and its application for a second loan guarantee was an important part of this plan. When Solyndra decided to cancel its IPO, and the $175 million raised

[920] *See supra* Part V(B).
[921] *See supra* note 366.
[922] *See supra* notes 379-80.

from existing investors in June 2010 only addressed half of the company's expected capital need, Solyndra's plan to meet its capital needs was reliant on obtaining additional government business. The Administration's numerous attempts to help Solyndra obtain government contracts, and the Administration's attempts to help Solyndra obtain contracts from other projects that were themselves being subsidized by 1705 loan guarantees, provides an insight into the Administration's economic philosophy: an entire industry sector can be supported by government subsidies. This inevitably doomed proposition led to many of the erroneous decisions regarding Solyndra.

H. DOE agreed to subordinate its interest to Solyndra's investors in the restructuring before determining whether such a restructuring was legal. In fact, the plain language of the Energy Policy Act clearly outlawed subordination.

Documents and communications produced to the Committee convincingly demonstrate that DOE agreed to subordinate its interest to Solyndra's investors before determining whether the Energy Policy Act even permitted subordination. In fact, DOE's own financial model for the Solyndra loan guarantee suggests that, prior to the restructuring, DOE itself did not believe that subordination was a legal option.

In August 2009, when DOE closed the Solyndra loan guarantee, it constructed a financial model of the deal. That model included factors and assumptions about the company's financial performance, its likelihood of default, and its projected recoveries in the event of default. As explained in Part VII(D) of this report, the Solyndra model assumed that DOE would have the senior position in the loan guarantee. The model did not assume or include a scenario for subordination in the event that the loan guarantee became distressed.[923] If DOE believed it could subordinate its interest after the issuance of a loan guarantee — which eventually was the conclusion of the Chief Counsel's faulty legal opinion — Solyndra's model would have included that assumption. The fact that Solyndra's model did not, and instead assumed that DOE would maintain a senior position, proves that DOE did not believe it had the authority under the statute to subordinate. In her interview with Committee staff, Ms. Colyar acknowledged that OMB changed the loan guarantee models only after the Solyndra restructuring to include an assumption for subordination.[924] The fact that OMB did so effectively proves that the agencies understood that the Energy Policy Act prohibited subordination.

The manner in which DOE drafted its legal opinion also raises questions about its decision to subordinate its interest to Solyndra's investors. DOE did not begin its legal analysis of the statute until after it had already reached a desperate last-minute agreement

---

[923] *See, e.g.,* E-mail from Policy Analyst, OMB to Policy Analyst, OMB (Jan. 26, 2011, 11:28 AM) (stating that "I saw nothing in the Solyndra closing documentation sent to OMB to indicate that the liquidation value would be further decreased as a result of DOE taking a subordinate position."). *See also* E-mail from Policy Analyst, OMB, to Policy Analyst, OMB, et al. (Jan. 30, 2011, 8:23 PM). (stating that "OMB staff have reviewed the documentation for Solyndra, and confirmed that the baseline cashflows assume that DOE would maintain a senior secured position in the event of default. Therefore, the restructuring would result in a modification.").

[924] Colyar Interview, *supra* note 103. *See also supra* notes 654-58.

with Solyndra's investors on the restructuring and subordination. As soon as the Chief Counsel of the Loan Programs Office learned of the agreement, and the subordination, the Chief Counsel immediately contacted the DOE General Counsel to discuss the matter.[925] The emails discussed in this report show that the LPO Chief Counsel also contacted DOE's outside legal counsel for Solyndra to discuss the Energy Policy Act's prohibition on subordination. DOE's outside counsel generated a legal memorandum shortly thereafter which outlined the Energy Policy Act's provisions.[926] This memorandum plainly stated that the "Subordination of DOE-Guaranteed Loans is Prohibited," and beneath that statement, "[t]he Act and the Applicable Regulations prohibit subordination of the DOE-Guaranteed Loans."[927]

The reactions of Treasury and OMB staff upon learning of DOE's decision to subordinate its interest in Solyndra to the company's investors shows that they, too, believed that subordination violated the provisions of the Energy Policy Act. Upon being informed of the subordination in December 2010, the OMB Energy Branch Chief stated in an email that DOE had "stretched" the Act's provision on subordination "beyond its limits."[928] As set forth in this report, OMB asked for DOE's legal opinion on subordination on several occasions in December 2010 and January 2011. It was only after OMB insisted on a written opinion following a conference call between OMB and DOE staff on January 11, 2011, that DOE committed its opinion to paper. Emails exchanged among OMB staff after receiving DOE's memorandum on subordination demonstrate that they remained unconvinced by DOE's legal argument.[929] Similarly, Treasury Department staff, including Assistant Secretary Mary Miller, also questioned DOE's authority to subordinate.[930] As this report discussed in Part VII, Assistant Secretary Miller informed OMB in August 2011, when a second restructuring was being discussed, that it was the opinion of Treasury's "legal counsel that the statute and the DOE regulations both require that the guaranteed loan should not be subordinate to any loan or other debt obligation."[931] As noted in this report, DOE declined to properly consult Treasury regarding the Solyndra loan guarantee.

DOE's drafts of this legal memorandum also were submitted to its outside counsel at Morrison & Foerster for review. Although Secretary Chu testified at the Oversight and Investigation Subcommittee's November 17, 2011, hearing that DOE's outside counsel had "specifically reviewed" the LPO Chief Counsel's legal memorandum and "approved her analysis," it appears that this endorsement was rather tepid, at best.[932] An email from Morrison & Foerster that DOE produced to the Committee as proof of the outside counsel's endorsement of the DOE legal opinion reads that the memorandum "makes the best case possible based on a reasonable interpretation supported by the restructuring

[925] *See supra* note 528.
[926] *See supra* note 539.
[927] *Id.*
[928] *See supra* note 578.
[929] *See supra* notes 640-42.
[930] *See supra* notes 715, 726.
[931] *See supra* note 726.
[932] Chu Testimony, *supra* note 308, at 60.

policy arguments."[933] A counsel in the DOE Office of General Counsel observed that the memorandum "is the right level of detail to support the contemplated action to be taken by the Secretary."[934]

DOE's financial model for Solyndra, the fact that DOE's legal analysis of the statute was only performed after DOE had already agreed to subordinate, the reactions of Treasury and OMB to the decision, and the Morrison & Foerster analysis of the statute all confirm that DOE knew that the Energy Policy Act prohibited subordination and casts further doubt on the conclusions of the DOE legal memorandum.

I. DOE's financial analysis of the restructuring was flawed.

DOE submitted financial models and other data to OMB in December 2010 and January and February 2011 as support for its determination that a Solyndra restructuring would result in greater recoveries for the government than an immediate liquidation. A Certified Public Accountant detailed to Committee staff from the Government Accountability Office reviewed each of DOE's submissions to OMB.[935] This review revealed that the analyses DOE submitted included several gaps in the data and questionable assumptions that appear to have been made to show that the restructuring would improve recoveries.

The first financial model submitted by DOE to OMB on December 20, 2010, provides three separate pieces of information.[936] The first was financial metrics, stated on a dollars per watt basis, for the years 2009 through 2020. The second was operating statements for the years 2009 through 2020. The third piece was a balance sheet and cash flow statements for the years 2009 through 2020.

Committee staff's review of DOE's December 20, 2010, financial model revealed unusual projections. For example, in the financial metrics, the annual summaries for years 2009 through 2020 show that, after the restructuring and completion of the Fab 2 facility, a gross loss per watt is forecasted for 2011 and a net loss per watt for 2010. Solyndra's gross margin emerges from the negative to a forecasted low of 16 percent of revenue for 2010, then jumps to a forecasted normal of 32 to 34 percent for years 2014 through 2020. This projection — that Solyndra would have a sudden increase in gross margin in 2014 from 16 percent to a forecasted normal of 32 to 34 percent, and then maintain that number for the next six years — should have raised a red flag for DOE and OMB. Solyndra was a start-up company with major financial problems in a market that was experiencing dropping prices. The Almanac of Business and Industrial Financial Ratios for 2011[937] states that for corporations that deal in electrical equipment or other components — the industry most similar to Solyndra's for which the Almanac maintains

[933] *See supra* note 644.
[934] E-mail from Deputy Gen. Counsel for Energy Policy, U.S. Dep't of Energy, to Susan Richardson et al. (Jan. 18, 2011, 5:25 PM).
[935] The GAO staff member also is a Certified Government Financial Manager and Chartered Global Management Accountant.
[936] *See supra* note 585 (attached financial information on file with author).
[937] *See* TROY, *supra* note 909, at 150.

financial data — gross margins as a percentage of revenue for all U.S. corporations ranged from 30.6 to 33.3 percent. It was highly unlikely that Solyndra would have been able to achieve this margin so quickly, given its financial history.

The financial metric data for the number of panels forecasted for shipment also contained questionable projections. In 2012, the number of panels forecasted for shipment increased significantly by 64 percent to 943,904 panels and then remained at 1,187,533 panels for the years 2014 through 2020. The fact that this number did not change for the years 2014 through 2020 does not make sense. It could mean that projecting beyond year 2014 was difficult, that projections were moot if the company would be out of business, or that DOE did not feel that it needed to project beyond 2014 in order to show that a restructuring was preferable to immediate liquidation.

The operating statements that DOE provided to OMB on December 20, 2010, contained similar flaws. The operating statements, which present actual monthly amounts, had results from January 2008 through July 2010. The forecast had not been updated to include actual results for the months August through November 2010. The operating statements had unusual projected revenue for April through December 2010; revenue in the second month of each quarter drops and the third month of each quarter was unusually high, increasing approximately 60 percent over the average of the first and second month of each quarter. The revenue model submitted by DOE in December 2010 showed that the panels forecasted for shipment remained flat from 2014 through 2010, at about $600 million per year. However, the cost of manufacturing the panels was shown as decreasing, resulting in a higher gross margin. This may have been a questionable assumption given the direct material and labor costs to produce the panels.

The Solyndra cash flow model submitted by DOE in December 2010 also included questionable assumptions about the company. The model assumed that the rest of the funding available under the DOE loan guarantee would be disbursed, but without further equity investment. As of December 31, 2011, the financial model projected that Solyndra's cash deficit would be $130 million, which the model assumed would be covered by $150 million of additional investment. The loan guarantee restructuring agreement, however, provided that the investors would contribute only $75 million. The agreement had a placeholder for another $75 million investment, but it was the investors' decision not to contribute that $75 million that precipitated Solyndra's bankruptcy. Like the operating statements, the cash flow model also predicted increasing cash flow from operations, which was dependent on meeting revenue projections while decreasing costs. The model also projected decreasing capital investment – a questionable assumption, as the company would need to spend money to maintain its plant assets. The cash model also assumed no further financing, either by debt or equity, and outflows in 2014 and 2014 projected a reduction of long-term debt. Finally, the cash flow model assumed that the business would continue to operate in an ending cash deficit, which is not possible without further financing.

As discussed in this report, OMB staff was highly skeptical of the December 2010 financial data and did not believe that it showed that a Solyndra restructuring would

result in better recoveries for the government than an immediate liquidation. DOE, therefore, submitted additional financial information with the loan subordination memorandum it forwarded to OMB on January 19, 2011, as well as a present value analysis on February 8, 2011, that was performed by an outside consultant to DOE. [938] In interviews with Committee staff, OMB staff maintained that the additional information DOE provided eventually convinced them that the restructuring would result in better recoveries, and that it was a workout.

Committee staff's review of the January and February 2011 submissions, however, finds that they included the same gaps and questionable assumptions as DOE's other submissions and do not show that restructuring the Solyndra loan guarantee would result in better recoveries. Overall, both submissions presented two scenarios: an immediate liquidation, where DOE as preferred creditor to the company's assets, and a restructuring scenario, where Solyndra's investors having first priority over the first $75 million recovered in a liquidation. Under the immediate liquidation scenario in the January submission, DOE assumed that the recovery rate on the $455 million in loan guarantee funding that DOE had already disbursed to the company would be 20 to 22 percent, or a $93 to $99 million recovery for DOE. If the loan were restructured, the remaining loan guarantee funds would be disbursed to the company. Under that scenario, DOE predicted a 61 percent recovery rate on $480 million, the value that DOE assigned to the company based on forward trading multiples. The restructuring scenario also assumed Solyndra would continue in business for seven years. Under this restructuring model, DOE estimated that the government would recover $200 million more than it would in an immediate liquidation. The February submission used a cash-flow present value method to calculate an immediate liquidation value of 21 percent, or $104 million, and a restructured value of 60 percent, or $438 million

On its face, DOE's submissions would appear to support a restructuring, as recoveries for the government would be significantly higher than in an immediate liquidation. However, DOE's analysis ignored entirely the value of the remaining $75 million in loan guarantee funds that would be disbursed if the loan were restructured. It also assumed a restructured Solyndra would be viable – an optimistic assumption given the company's history. Even then, DOE's recovery estimate under a restructuring meant that millions of the loan guarantee would be lost. If DOE had factored in the subordination, the analysis would have shown that recoveries would have been almost nothing, as DOE's estimated value for the company was based on Solyndra continuing as a going concern and generating cash flow and earnings. The immediate liquidation, therefore, was the preferred route.

J. OMB's oversight and review of restructuring failed.

At the beginning of its review of the Solyndra restructuring, OMB debated what role it should play in the review of the Solyndra restructuring. As discussed in this report, OMB Director Lew determined that OMB should assume its traditional role of examiner, rather than engage in what an OMB staff member described as a more "active"

[938] *See supra* notes 648, 688 (attached financial information on file with author).

review of the Solyndra loan guarantee.[939] OMB emails and documents from the restructuring, as well as Committee staff's interviews of OMB staff, show that OMB failed to carry out its traditional examiner role.

As detailed in this report, OMB staff had long been skeptical of Solyndra. In August 2009, OMB staff found it "disturbing" that Solyndra could not produce data to substantiate its claims about panel performance.[940] After the loan guarantee closed, and particularly after Solyndra filed its Amended S-1 statement in March 2010, OMB staff questioned the viability of the company and DOE's ability to monitor it. Following the S-1 filing, OMB staff pressed DOE to provide financial data about the company. DOE never provided the information.

As soon as DOE briefed OMB staff in December 2010 about the proposed terms for the Solyndra restructuring and the subordination of DOE's interest in the guarantee, OMB staff were skeptical about both DOE's decision to restructure and the legality of the subordination. That skepticism continued after DOE submitted the financial models and data to support its decision to restructure. Simply put, OMB staff's analysis of this data showed that the restructuring would not improve recoveries over an immediate liquidation of Solyndra.[941] OMB staff also doubted DOE's analysis of the Energy Policy Act, and DOE's claim that its decision to subordinate its interest did not violate the Act.[942]

For these reasons, OMB determined that the Solyndra restructuring was a modification — meaning, that the restructuring would pose a cost to the government — and they communicated this decision to DOE in early February 2011.[943] Just days later, however, OMB appears to have reversed course, and agreed to allow DOE to submit additional financial data to support its decision to restructure.[944] DOE submitted another round of financial data on February 8, 2011.[945] OMB staff who reviewed that data found that it potentially overstated recoveries under a restructuring, and did not take into account the value of the continued disbursements to Solyndra under the loan guarantee.[946]

As discussed in this report, the emails exchanged between OMB staff after February 8, 2011, plainly show that DOE still had not demonstrated that a restructuring would result in improved recoveries. Nonetheless, OMB changed its mind and concluded that the restructuring was now a workout and informed DOE on February 22 that it could go forward with the restructuring.[947] During interviews of OMB staff, Committee staff pressed them to explain why OMB changed its decision that the restructuring was a modification. Other than explaining that DOE continued to provide additional

---

[939] *See supra* note 600.
[940] *See supra* note 280.
[941] *See supra* Part VII(E).
[942] *See supra* notes 640-42.
[943] *See supra* Part VII(D).
[944] *See supra* Part VII(E).
[945] *See supra* note 688.
[946] *See supra* note 694.
[947] *See supra* note 708.

information and that OMB somehow finally determined that DOE's analysis was "reasonable," OMB staff were not able to explain what had changed between early February 2 and February 22 that allowed OMB to determine that the restructuring would improve recoveries and therefore was a workout.

OMB staff has explained that, in performing its examiner function, it is the responsibility of DOE to interpret its own statutes and conduct its own analyses. According to OMB staff, it is not OMB's role as examiners to redo DOE's work, but to review it and conclude if DOE's decisions are reasonable. With regard to Solyndra, it is plain that OMB had found problems with DOE's analysis and determined that DOE's claim that the restructuring would improve recoveries was not supported by DOE's own financial data. Aside from the financial data, OMB staff had serious questions about the viability of the company given the pressures in the solar market and Solyndra's cost structure. In signing off on the Solyndra restructuring, OMB failed to fulfill its role as an examiner. With the taxpayers bearing the risk of DOE's decision to subordinate and restructure the loan of a company whose continued viability was in doubt, OMB should have done more to ensure that the government's rights to recoveries were protected.

K. DOE approved the conditional commitment for Project Amp while knowing Solyndra—the sole supplier for the project's first phase—was in desperate financial shape. The relationship between Solyndra and Project Amp was understood by the White House and became a critical bargaining piece of the second restructuring negotiations with Solyndra and its investors.

From March through August 2011, despite DOE repeatedly authorizing disbursements to Solyndra, the company's significant cashflow issues continued. In May, Solyndra executives informed their board that without additional capital, they would need to commence bankruptcy proceedings.[948] Concurrently, DOE staff was discussing whether the agency could force an involuntary bankruptcy of the company.[949] By May 19, Argonaut had agreed to purchase Solyndra's accounts receivable for a reduced price in order to give the company access to near-term operating capital.[950]

Solyndra's inclusion in Project Amp caused anxiety throughout the Administration in advance of the conditional commitment. OMB staff expressed concern about the selection of Solyndra for the first phase of the project — the only phase that could meet the commencement of construction deadline under the stimulus. In early June, Secretary Chu was informed that if the first phase failed, the project would be "unable to commence construction by September 30."[951] On June 14, Heather Zichal convened a briefing with White House Chief of Staff Bill Daley to discuss the loan guarantee.[952] Jonathan Silver had already attempted to garner White House staff support for the project by ensuring the White House knew it would be a "huge help" to

[948] *See supra* note 739.
[949] *See supra* note 738.
[950] *See supra* note 740.
[951] *See supra* note 805.
[952] *See supra* note 809.

Solyndra.[953] Documents produced to the Committee indicate that Secretary Chu played a leading role in ensuring that Project Amp moved forward, despite these significant issues. The conditional commitment was approved a few days after his briefing with Mr. Daley and, on June 22, Secretary Chu announced the decision.

After the conditional commitment, Solyndra's financial condition continued to deteriorate and DOE was again scrambling to ensure that it would not derail Project Amp. In August, the White House took the lead in negotiations over a second proposed restructuring of the Solyndra loan guarantee. It was at this point that DOE became directly involved in contract negotiations between Solyndra and Prologis to ensure that Argonaut would continue to fund Solyndra and that Project Amp would close. While the DOE LPO's Director of Strategic Initiatives was attempting to expedite Prologis' first order of panels,[954] the negotiations between DOE and Argonaut were at a standstill over both sides' willingness to fund Solyndra, which seemed to be contingent on the first Project Amp order coming through. Ultimately, the issue became moot due to the White House's decision not to restructure the Solyndra loan guarantee again.

After Solyndra filed for bankruptcy, Prologis informed DOE that it would not be using Solyndra panels for the first phase. Despite the agency's prior assertion that the commencement of construction deadline would be missed if the first phase faltered, on September 12, 2011, DOE claimed to OMB that sufficient activities were already underway. Regardless of the lack of a supplier for the first phase, DOE approved Project Amp on September 30—the last day the Secretary had authority to do so under the stimulus. Project Amp has yet to draw any funds.

L. George Kaiser was closely involved in important decisions related to Solyndra throughout the life of the loan guarantee.

George Kaiser is the sole donor to the George Kaiser Family Foundation. Argonaut — the primary investment arm of the GKFF — was Solyndra's largest investor, ultimately investing approximately $430 million and amassing a 39 percent stake in the company.[955]

Documents produced to the Committee establish that Mr. Kaiser was closely involved in Argonaut's investment decisions related to Solyndra as well as key decisions to continue funding the company's operating capital. From 2009 forward, documents show that Mr. Kaiser was continually informed of the status of both the first and second loan guarantee applications, the first and second set of restructuring negotiations, and the company's lobbying, public relations, and government procurement strategies in Washington, DC. In addition to authorizing certain disbursements and restructuring proposals, Mr. Kaiser approved or disapproved of a variety of political tactics being proposed.

---

[953] *See supra* note 802.
[954] *See supra* notes 816-17.
[955] Mitchell Interview, *supra* note 178.

Prior to the Committee's investigation establishing otherwise, the White House and the GKFF denied that Mr. Kaiser ever discussed Solyndra with anyone in the White House.[956] Since at least August 2009, however, the White House Chief of Staff's Office was aware of Mr. Kaiser's investment in the company. In February 2010, Mr. Kaiser actually discussed Solyndra with White House staff in Vice President Biden's office.[957] Since this conversation was revealed, the GKFF amended its statement, asserting that Mr. Kaiser had no conversations with anyone in the government about the actual loan to Solyndra and that he was never directly involved in the deal.[958] The White House maintained that the "loan was a decision made on the merits at the Department of Energy."[959]

In addition to individuals in the Chief of Staff's and Vice President's offices in the White House knowing about Mr. Kaiser's connection to Solyndra, senior officials at DOE not only knew about the connection, but attempted to leverage his influence on critical funding decisions. In August 2011, while Argonaut was in negotiations with DOE about a second restructuring, the White House Liaison for the Department of Energy reached out to one of Mr. Kaiser's contacts asking for his phone number.[960] Then-Executive Director of the LPO, Jonathan Silver, attempted to speak with Mr. Kaiser on two separate occasions during this time period — on August 11 and August 18, 2011. The documents indicate that "communication channels" had been established between Argonaut and DOE.[961] On the evening of August 18, after Mr. Kaiser "refused the call" noting that "Steve [Mitchell] is explaining why," Argonaut fundamentally changed course from the decision Mr. Mitchell reiterated to DOE hours earlier and agreed to keep the company afloat for another week and continue negotiations.[962]

---

[956] *See* Matthew Mosk, *Obama: Solyndra Got Loan 'On the Merits'*, ABC NEWS (Oct. 6, 2011), http://abcnews.go.com/Blotter/white-house-donor-george-kaiser-lobby-solyndra/story?id=14676071. ("Kaiser has 'said publicly that Solyndra was not discussed at these meetings, and we have no reason to dispute that,' the White House official said, speaking on the condition of anonymity because he had not been given approval to discuss the matter. 'We understand that the conversations in these meetings were focused on the general policy priorities of the George Kaiser Family Foundation, including early childhood education and poverty, health care policy and energy policy.'").

[957] *See supra* note 322.

[958] *See* Carol D. Leonnig & Joe Stephens, *Solyndra E-mails Show Obama Fundraiser Discussed Lobbying White House*, WASH. POST (Nov. 9, 2011), http://www.washingtonpost.com/politics/solyndra-e-mails-show-obama-fundraiser-discussed-lobbying-white-house/2011/11/09/gIQAqPsq5M_story.html. ("On Wednesday, Kaiser spokesman Renzi Stone responded to the new documents in an e-mail: 'To reaffirm our previous public statements, George Kaiser had no discussions with the government regarding the loan to Solyndra.'"). *See also* Chad Pergram, *Solyndra Emails Claim Biden Team 'About Had an Orgasm' About Energy Loans to Firm*, FOX NEWS (Nov. 9, 2011), http://www.foxnews.com/politics/2011/11/09/solyndra-emails-claim-bidens-staff-about-had-orgasm-about-energy-loans-to-firm/ ("GKFF spokeswoman Renzi Stone on Wednesday told Fox News that Kaiser never was directly involved in the deal.").

[959] Mosk, *supra* note 956.

[960] *See supra* note 755.

[961] *See supra* notes 752-53.

[962] *See supra* notes 793, 796.

XII. CONCLUSION

Solyndra should serve as a cautionary tale on how political pressures and an Administration's desire to create political events to highlight its policies can result in poor decision-making. The red flags about Solyndra's financial condition and the turbulence in the solar market were there for DOE to see when it reviewed Solyndra's application in 2009. DOE staff and OMB staff noted these concerns at the time the loan guarantee was under consideration. This report conclusively shows that DOE pushed forward with the guarantee despite these warnings because of the Obama Administration's desire to use the Solyndra guarantee to highlight its stimulus.

Unfortunately, Solyndra is not the only failed DOE loan guarantee issued with stimulus funding. Since Solyndra announced its bankruptcy in September 2011, two other solar manufacturing companies that received loan guarantees under Section 1705 have also filed for bankruptcy. Beacon Power Corporation, which received a $43.1 million loan guarantee, filed for bankruptcy on October 30, 2011. Abound Solar received a $400 million loan guarantee in December 2010 and filed for bankruptcy in early July 2012. Some of the other companies that received loan guarantees have made little progress with their projects. For example, Project Amp, which received a $1.4 billion partial loan guarantee does not yet have Power Purchase Agreement in place for its solar installations and therefore has yet to receive any funding under its loan guarantee.

Administration officials regularly touted the jobs that would be created by the DOE Loan Guarantee Program. For example, in September 2010, then-LPO Executive Director Silver testified before the Senate Committee on Energy and Natural Resources that the loan guarantee projects would create 13,000 construction jobs and 4,000 operating jobs. With failures like Solyndra, Beacon, and Abound, it is clear that the Administration's jobs predictions will never be met. The Administration's advertisement of the Loan Guarantee Program as a job creator was always questionable, as the kinds of projects DOE was funding typically resulted in temporary construction jobs but very few permanent jobs. Even if the Loan Guarantee Program had produced the 4,000 jobs that Mr. Silver said it would in 2010 using the $2.5 billion provided the stimulus, those jobs came at a cost of $625,000 per job.

The Loan Guarantee Program was clearly a poor fit for the stimulus — a point apparently recognized by White House staff in October 2010, when senior White House officials drafted a Memorandum for the President, listing a number of problems with the administration of the Loan Guarantee Program. That memorandum cited a lack of project sponsor "skin in the game," and the fact that some of the DOE funding was going to projects that would have likely gone forward even without the funding.[963] That tension — trying to identify projects that needed the funding to go forward but that also were likely to repay the loan — was acknowledged by Vice President Biden's Chief of Staff Ron Klain, and the President's own Director of the National Economic Council. Mr. Klain even noted Solyndra as an example of this tension, that funding companies that are engaged in newer and riskier technologies meant that there was a chance the loan would

[963] *See supra* notes 293, 486.

not be repaid. Dr. Summers, in an email to a Solyndra investor in December 2010, noted that the Federal government was a "crappy vc," or venture capitalist.[964]

Solyndra is a prime example of the perils that come when the Federal government plays investor, tries to keep a company and industry afloat with subsidies and attempts to pick the winners and losers in a particular marketplace. Policy and political pressures inevitably come into play to the detriment of taxpayers, as it did with Solyndra.

[964] *See supra* note 318.