THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

September 14, 2011

THE SOLYNDRA STORY

How DOE and OMB Ignored Red Flags in Their Rush to Spend Stimulus Dollars

Last week, Solyndra, Inc., the company that received the first loan guarantee issued by the Department of Energy (DOE) under Title XVII of the Energy Policy Act of 2005, shut its doors and filed for bankruptcy. Two days later, on September 8, 2011, the company was raided by agents from the Federal Bureau of Investigation (FBI) and the DOE Office of Inspector General.

It is an unfortunate end for a company that received a $535 million loan guarantee only two years ago from the federal government. The closing of the Solyndra loan guarantee was announced with great fanfare by the Obama Administration on September 4, 2009. DOE Secretary Steven Chu attended a groundbreaking event that day at Solyndra's facilities, and Vice President Joe Biden made a speech via satellite. Eight months later, President Obama visited Solyndra's manufacturing facilities and proclaimed that "the true engine of economic growth will always be companies like Solyndra." The political pressure to approve the Solyndra deal appears to have caused DOE and OMB to miss or disregard numerous shortcomings regarding Solyndra's financial viability.

In papers filed last week in United States Bankruptcy Court, the company's Chief Financial Officer states that the company's financial problems were attributable, in part, to the pricing pressures on solar manufacturers caused by the oversupply of solar panels. According to the affidavit, the oversupply of panels is due to "growing capacity of foreign manufacturers" and the subsidies provided by their governments, as well as the reduction or elimination of solar incentives, particularly in Europe. Although Solyndra had dropped its prices to remain competitive, it still could not attract additional private investment to cover its increased capital requirements. DOE and the Office of Management and Budget (OMB) were aware of these market concerns during their review of the loan guarantee, and approved it anyway.

A preliminary review of documents obtained by the Committee on Energy and Commerce during the course of its investigation of the Solyndra loan guarantee indicates that DOE and OMB did not take adequate steps to protect taxpayer dollars. Emails and communications produced to the Committee show that DOE and OMB staff repeatedly questioned whether the company had the financial resources to support the operations of the loan guarantee project, a 650,000 square foot manufacturing facility for solar panels.

These documents also raise troubling questions about whether OMB staff was rushed to complete its review of the Solyndra loan guarantee by September 4, 2009, in time for a groundbreaking event at Solyndra's facilities organized by the White House. In late August 2009, just prior to that event, OMB staff raised concerns regarding the loan guarantee and pressed DOE Loan Programs staff to produce additional information about the company. OMB ultimately recommended that the deal rating proposed by DOE be reduced by one notch to reflect what OMB perceived to be greater risk in the Solyndra loan guarantee. Communications exchanged during this time period clearly demonstrate that OMB felt pressure to complete its review ahead of the September 4 event. They also show that White House officials were closely following the review of the Solyndra application and had scheduled Vice President Biden's and Secretary Chu's appearances at the groundbreaking event even before DOE had made its final presentation to OMB about the terms of the Solyndra deal.

The restructuring of the Solyndra agreement on February 23, 2011, raises other areas of concern. DOE Loan Programs Office staff represented to Committee staff at a briefing that the restructuring deal would allow "maximum recovery" for the taxpayer, even though the Solyndra restructuring agreement allowed Solyndra's investors to have priority over the government with respect to the first $75 million recovered in the event of a bankruptcy. At least one of those investors was a financial supporter of President Obama. This subordination of the taxpayer's money appears to be in direct violation of the Energy Policy Act of 2005, which states that "the obligation shall be subject to the condition that the obligation is not subordinate to other financing." While DOE counsel, in a legal opinion rendered this year, somehow found that the government's subordination to the investors' was permissible under the Energy Policy Act of 2005, documents reviewed by the Committee question the basis for this decision, and a plain reading of the statute suggests otherwise.

The Committee on Energy and Commerce opened an investigation of the Solyndra loan guarantee on February 17, 2011, with a letter to DOE Secretary Chu requesting a briefing and documents relating to Solyndra. One month later, the Committee sent a letter to OMB Director Jacob Lew requesting documents relating to its review of the guarantee. After four months, the OMB was still refusing to produce a single page of its communications or analyses relating to the Solyndra deal. The Committee, therefore, convened a business meeting on July 14, 2011, to authorize the issuance of a subpoena to OMB in order to obtain these documents. On a 14-8 party-line vote, with all eight subcommittee Democrats voting against, the subpoena was authorized. Less than two months later, Solyndra had filed for bankruptcy and the F.B.I. had raided the company's headquarters.

At a hearing on September 14, 2011, the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, intends to pursue answers to four significant questions presented in this memorandum relating to DOE's decision to issue a loan guarantee to Solyndra. A discussion of each of these questions is set forth below.

1. Should the DOE Loan Programs Office have anticipated the kinds of working capital shortages and liquidity issues that led to Solyndra's bankruptcy?

The loan guarantee for Solyndra was a project finance arrangement. The DOE loan guarantee would be made to the project company, Solyndra Fab 2, LLC, a wholly owned subsidiary of the parent company, Solyndra, Inc. Solyndra Fab 2, LLC is a "special purpose vehicle," created "solely for the purpose of constructing, financing, owning and operating the Project."[1] In Solyndra's case, the project was the construction of a new manufacturing facility that would support six production lines designed for full commercialization of Solyndra's thin-film, photovoltaic panel. The significance of this arrangement is that the DOE loan guarantee project was dependent on its parent company for equipment, sales, supply, and operating contracts.

During Solyndra's due diligence period in early 2009 through the weeks preceding the loan guarantee closing in September 2009, DOE staff repeatedly raised concerns about DOE's understanding of the financial health of the parent company, Solyndra, Inc., and how this would impact the DOE loan guarantee project. As early as December 15, 2008, DOE staff conducting a credit policy review noted that the "interdependency of the proposed project with its corporate parent, Solyndra, Inc., presents challenges in the credit analysis." The email went on to recommend that "the financial health of the parent corporation should be evaluated over the life of the project . . . . [A]nalyzing the project model alone would provide an incomplete picture of the overall creditworthiness of the guaranteed obligation. In short, a financial 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." Just prior to the Credit Committee meeting on January 9, 2009, to review a proposed conditional commitment to Solyndra, a second email indicates that this concern had not been addressed.[2]

On January 9, 2009, in the last days of the Bush Administration, the Credit Committee voted against offering a conditional commitment to Solyndra, and remanded the deal to the Loan Programs Office to develop further information supporting the deal. When the Loan Programs Office restarted the approval process for the Solyndra application in late January, under the Obama Administration, the same DOE staff noted again that the Loan Programs Office had yet to fully evaluate the parent company's financial health. The staff recommended that financial modeling for

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[1] Solyndra Credit Committee Paper, Request for Loan Guarantee Approval, March 11, 2009, at 3.
[2] January 7, 2009, email between DOE staff regarding "Solyndra Analysis."

the loan guarantee be done at the parent level so that DOE could assess the working capital issues presented at the DOE project company.[3]

Documents produced to the Committee suggest that concerns about the financial modeling of the Solyndra deal came to a head in August 2009, just three weeks before the loan guarantee closed. An email between DOE staff dated August 19, 2009, stated that "we still have a major outstanding issue . . . . The issue of working capital assumptions has been a major issue repeatedly raised since December [2008]."[4] **The email noted that the financial model used by the credit rating agency reviewing the Solyndra guarantee showed that the project would run out of cash in September 2011**. An email the following day states that the "issue of working capital remains unresolved. . . . This is a liquidity issue." The DOE staff member went on to ask "how we can advance a project that hasn't funded working capital requirements and that generates a working capital shortfall of $50 [million] when working capital assumptions are entered into the model?"[5]

Communications between DOE staff appear to indicate that the working capital concern was addressed through a provision in the final loan guarantee agreement requiring the parent company to cover all cost overruns of the DOE project until its completion. One Loan Programs Office staff member believed this resolution was sufficient because "[l]iquidity at the project level is simply not relevant during this period, as the duty for the parent to deliver a completed project still applies."[6] That email also noted 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." This faulty analysis, which relied on an assumption that the private investors would continue to pump in as much cash as necessary to complete the project, proved to be wishful thinking. It does raise the question, however, why DOE and OMB later allowed the government to be subordinated to the private investors during the February 2011 restructuring. If the investors were in so deep that they had to provide the funds to keep Solyndra afloat, why did DOE agree to be subordinated to those investors?

OMB staff, however, also raised this issue when they began reviewing the terms of the Solyndra deal in August 2009, and questioned whether the cost overrun provision in the agreement sufficiently addressed the matter. OMB staff noted that the "risk rating for the project sponsor (Solyndra) . . . seems high given that Solyndra is not supporting the debt service. Solyndra is responsible for ensuring the project is completed, but they are not co-sponsor of the debt service and therefore do not ensure

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[3] January 26 and February 17, 2009 emails between DOE staff regarding "Solyndra Analysis."
[4] August 19, 2009, email between DOE staff regarding "Solyndra."
[5] August 20, 2009 email between DOE staff regarding "FW: Solyndra: Responses to Credit Analysis Questions."
[6] August 20, 2009, email between DOE staff, regarding "RE: Solyndra: Responses to Credit Analysis Questions."

repayment. Their guarantee does offset project completion risk" but a lower risk rating "seems more reasonable given that they are not backing the debt service. Future sales are supporting the debt service and these panels are sold at a premium — pricing pressure is the largest challenge. The parent company does nothing to offset that challenge and warrant a higher rating . . . ."

These emails discussing the financial modeling of the Solyndra loan guarantee seem to have identified the same kinds of issues that contributed to Solyndra's bankruptcy two years later: pricing pressures and the lack of working capital. The Committee expects that Wednesday's hearing will provide additional information as to whether DOE, having identified an issue with working capital at Solyndra before the guarantee was closed, took adequate steps to mitigate that risk. In particular, the Committee is interested in learning why DOE was confident that Solyndra's investors would continue to cover its cost overruns, and on what information or assurance DOE based this mistaken belief.

2. Did the deadlines presented by the American Recovery and Reinvestment Act, or stimulus, result in DOE rushing to complete the Solyndra loan deal before it was ready?

On January 12, 2009, a DOE Credit Committee met to consider a proposed conditional commitment to Solyndra. In the Credit Committee Recommendation from that meeting, the committee noted the "apparent haste in recommending the project meant that certain LGPO credit procedures were not adhered to." Although the Credit Committee said the "project appears to have merit," it remanded the proposed conditional commitment to the Loan Programs Office because "the number of issues unresolved makes a recommendation for approval premature at this time." In particular, the Credit Committee specifically identified the lack of an independent market study and sales agreement information for Solyndra, "questions regarding the nature and strength of the parent guarantee for the completion of the project," and concerns about Solyndra's ability to scale up production.

The day after the Credit Committee meeting, a member of that committee sent an email to other committee members and 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."[7] The email does not provide any further information about the reason for this decision or its effect.

Just two weeks later, however, after the change in administration, an email indicates that the DOE Loan Programs Office was again reviewing the Solyndra

[7] January 13, 2009, email between DOE staff regarding "Solyndra Meeting."

guarantee. In a January 26, 2009, email, a DOE staff member states that "we are approaching the beginning of the approval process for Solyndra again," and goes on to list the credit questions that remain unresolved in the deal.

The documents produced to the Committee suggest that the passage of the American Recovery and Reinvestment Act (ARRA), or "stimulus," accelerated the approval of the Solyndra loan guarantee. For example, in mid-February 2009, as several credit policy questions remained unresolved with respect to the Solyndra guarantee, the DOE ARRA advisor stated that "it is very important that the parties be able to close today on the matters at hand and move to the next stage" with the Solyndra guarantee. The advisor also stated that Solyndra was the "litmus test for the loan guarantee program's ability to fund good projects quickly."[8]

It is important to consider the context in which these statements about accelerating Solyndra's approval were made. For example, two weeks after the ARRA advisor urged DOE staff to move forward with Solyndra, the DOE staff were still critiquing the independent engineer's report of the Solyndra deal that was submitted in early January, and requesting additional information.[9] The first draft of the independent market report on Solyndra was submitted to DOE on March 5, 2009, and by the next day, DOE officials had already scheduled the Credit Committee and Credit Review Board meetings for March 12 and March 17, 2009, to approve a conditional commitment to the company.[10] In fact, according to an email exchanged between OMB staff on March 14, 2009, the terms of the deal and the credit subsidy cost calculation were not finalized at the time the Credit Committee voted to approve the conditional commitment to Solyndra.[11]

Public statements and Congressional testimony by DOE officials confirm DOE's intent to speed up the approval of DOE loan guarantees in order to meet stimulus deadlines. In Congressional testimony on March 19, 2009, DOE Senior Advisor Matt Rogers stated 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."[12] A statement released after the DOE Credit Review Board (CRB) voted to offer a loan guarantee to Solyndra stated that these improvements in loan processing "allowed the Department of Energy

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[8] February 9, 2009, email between DOE ARRA and DOE officials regarding "RE: ACTIONS: Loan Program."
[9] February 26, 2009, email between DOE staff regarding "RW Beck/Solyndra Report."
[10] March 6, 2009, email between DOE staff regarding "RE: CALL ME PLEASE."
[11] March 14, 2009, email between OMB staff regarding "FYI – Title 17 LG Announcement.
[12] Testimony of Matthew Rogers, Senior Advisor, U.S. Department of Energy, before the Subcommittee on Investigations and Oversight, Committee on Science and Technology, March 19, 2009.

to offer its first loan guarantee within the first two months of the Obama Administration."[13]

Emails exchanged in the period preceding the March 2009 Credit Committee and Credit Review Board meetings show that the White House carefully monitored the status of the Solyndra guarantee. For example, on March 5, 2009, an email between DOE staff stated that "I need to send to [Secretary Chu's Chief of Staff] the significance of the event so he can send to the WH."[14] On March 10, 2009, the DOE Secretary's Chief of Staff stated that "there is still strong interest" in the Solyndra loan announcement, and asks when the Credit Review Board will meet. The DOE Chief Financial Officer responded that "[o]riginally, the CRB was planned for [March 17], but per our earlier discussion, we will move it up to this Friday now that I know there is still great interest."[15] The DOE ARRA advisor confirmed in an email on that same day, "[w]e will want to try to get to crb this Friday to make sure that we have enough time for the wh folks."[16]

These documents raise questions as to whether the Solyndra loan guarantee was pushed to approval before it was ready in order for the Administration to highlight the stimulus, and whether additional time might have resulted in stronger mitigation of the risks presented by the deal. This question is of particular importance now that Solyndra has filed for bankruptcy, and as DOE nears the September 30, 2011, deadline for closing conditional commitments for Section 1705 loan guarantees. Of the $18 billion in loan guarantees for which stimulus funding is available, sixteen deals totaling $10.4 billion have yet to be finalized by DOE. At a hearing before the Subcommittee on Oversight and Investigations on March 17, 2011, DOE Chief Financial Officer Steven Isakowitz confirmed that DOE intended to close all sixteen of the conditional loan commitments it had made by the September 30 deadline. Given the apparent problems with the due diligence on the Solyndra transaction, the Committee is interested in learning more about the timelines of these deals and the due diligence conducted to close them on such a short timeline.

3. Did OMB have adequate time to complete its review, and did the scheduling of the Solyndra groundbreaking event impact the quality of OMB's review?

Pursuant to its responsibilities under the Federal Credit Reform Act (FCRA), OMB is responsible for reviewing the credit subsidy costs of federal loan guarantees, including the guarantees issued by the DOE Loan Programs Office. The OMB, therefore, was briefed regularly by DOE about the status of the Solyndra loan guarantee

[13] March 17, 2009 email between DOE staff regarding Urgent--- Draft Solyndra press release."
[14] March 5, 2009 email between DOE staff regarding "CALL ME PLEASE."
[15] March 10, 2009, email between DOE staff regarding "RE: Loan announcement?"
[16] March 10, 2009, email between DOE staff regarding "Re: Update: Solyndra."

leading up to its closing in 2009, and again when the deal was restructured in 2011 due to Solyndra's financial problems.

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. 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 Loan Programs Office clarifying or providing additional information on 11 different issues relating to the guarantee.

In early March, OMB staff exchanged an email stating that "DOE staff just told me that there's a 99 percent certainty that President Obama, on **March 19** 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 Secretary will withdraw for any reason."[17] The information about a potential visit from President Obama was then included in a Recovery Act update that was shared among OMB staff.[18] On the same day, Ronald Klain, then-Chief of Staff to Vice President Joe Biden, sent an email to OMB staff and asked "[c]an 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."[19]

The Solyndra board approved the terms of the Solyndra loan guarantee on March 9, 2009. The DOE ARRA advisor emailed Klain again 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 [*sic*] visit to California on the 19th." Klain then forwarded this email to OMB staff to ask their thoughts on the announcement. One OMB staff member 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 the Department of Treasury. [20] Another stated that "this deal is NOT ready for prime time," and explained that the deal could not be finalized by March 19 as OMB approval steps had yet to be completed.[21]

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. Four days after the credit rating was issued, a special assistant to White House Chief of Staff Rahm Emanuel emailed OMB and DOE staff on August 11, 2009, and asked "[a]s the closing

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[17] March 6, 2009, email between OMB staff regarding "Title XVII."
[18] March 7, 2009, email between OMB staff regarding "Solyndra."
[19] March 7, 2009, email between Ronald Klain and OMB staff.
[20] March 10, 2009, email between DOE staff and Ronald A. Klain regarding "Solar co loan announcement in northern California."
[21] March 10, 2009, email between OMB staff regarding "RE: Solar co loan announcement in northern california."

of the Solyndra deal nears, we want to think about the potential announcement value in this. 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."[22] The following day, the same White House assistant emailed the DOE ARRA advisor to ask for "[c]onfirmation that all contracting will be tied up in time" and that "people will be working/lines will be running" in time for an announcement visit to Solyndra by Vice President Biden.

On August 25, 2009, DOE provided a briefing to OMB about the Solyndra loan guarantee. Of the three briefings provided by DOE to OMB, this was the most comprehensive, and included details about the project's financial structure, critical risks and mitigants, the security and collateral in the deal, and the financial modeling supporting the loan guarantee's terms. Following the briefing, OMB staff provided specific follow-up items to DOE staff. Those follow-up items included asking for real world performance data on the Solyndra panels' efficiency when compared to other panel systems and the market capacity for the product, as well as questions about the recovery and risk ratings for the deal and the information underlying those ratings.

On the same day that DOE made its presentation to OMB, the special assistant to the White House Chief of Staff emailed DOE to inform them that "we would want the VP [to] satellite into the event on 9/4. It's the same day the unemployment numbers come out, and we'd want to use this as an example where the Recovery Act is helping create new high tech jobs."[23] DOE responded that they believed the date was incorrect, because "as of last Friday the POTUS was set to satellite in" and the event was scheduled for September 8. The White House special assistant responded 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."[24]

Just as OMB staff began reviewing the details of the Solyndra deal, DOE staff emailed OMB staff to ask them about the timeline of their review, and to "confirm whether there are any issues regarding a closing on Sept. 3 for a Sept. 4 VP event on Solyndra? This implies we will need to wrap up our review/approval by Sept. 1 . . . ."[25] On that same day, an OMB staff member raised a question to a senior OMB staff member about the credit subsidy model for the Solyndra deal. The staff member asked whether the model was based on the correct recovery scenario, but noted that "[g]iven the time pressure we are under to sign-off on Solyndra, we don't have time to change the model."[26] The senior staff member replied that "[a]s 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

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[22] August 11, 2009, email between White House, OMB, and DOE staff regarding "Solyndra."
[23] August 25, 2009, email between White House and DOE staff regarding "Solyndra Update."
[24] *Id.* A later email sent by the Chief of Staff to Secretary Chu on August 31, 2009, confirmed that the date was moved "from the 8th to the 4th (Friday) at the request of the WH."
[25] August 27, 2009, email between DOE and OMB staff regarding "Solyndra Closing Date."
[26] August 27, 2009, email between OMB staff regarding "Final Solyndra Credit Subsidy Cost."

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."

As OMB's review got underway, a White House spokesperson reached out to a number of DOE and White House staff on August 27, 2009, and asked about the OMB timeline. The spokesperson 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."[27] A DOE staffer responded that DOE was working on responding to OMB's follow-up questions, and that "OMB is fully aware of the [September 4] timeline."[28] Three days later, on August 31, 2009, the White House staff member again pressed the issue, stating "[w]e are walking a fine line with Solyndra needing to begin notifying investors to fly in for the [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."[29] The DOE staff member agreed to check with OMB.

Separately, the special assistant to the White House Chief of Staff, who was part of the discussions about the status of OMB's review, proceeded to contact senior OMB staff. In an email dated August 31, the special assistant noted the Vice President's announcement at Solyndra on September 4, and whether "there is anything we can help speed along on OMB side."[30] That email was then forwarded to an OMB senior staff member who was participating in the Solyndra review. That OMB staff member responded that "I would prefer that this announcement be postponed. . . . This is the first loan guarantee and we should have full review with all hands on deck to make sure we get it right." The staff member 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.

OMB staff concerns about the time pressure to review the Solyndra deal appear to have prompted a senior OMB staff member to reach out to Terrell P. McSweeny, Vice President Biden's Domestic Policy Advisor. In an email dated August 31, 2009, the OMB staff member asked McSweeny "if you could tell me who schedules announcements and events with the Department of Energy that you folks are participating in? We have ended up with 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

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[27] August 27, 2009, email between White House and DOE staff regarding "Solyndra update."
[28] August 28, 2009, email between DOE and White House staff regarding "Solyndra update."
[29] August 31, 2009, email between White House and DOE staff regarding "Solyndra update."
[30] August 31, 2009, email between DOE and OMB

approval set the date for the announcement rather than the other way around."[31] McSweeny did pursue the matter with a senior OMB official, who responded that there were "some issues" with Solyndra, but that they were "resolvable."

On September 1, 2009, OMB staff determined that the Solyndra deal should be "notched down." The determination was based on the lack of firm performance data on the Solyndra panels and "the weakening world market prices for solar generally." 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 them before the September 4 event.[32]

OMB concluded its review, and the September 4, 2009, groundbreaking event at Solyndra went ahead, as scheduled, with an appearance via satellite by Vice President Biden and with Secretary Chu's attendance at the event. 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 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. 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.

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 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. 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, and it was the first DOE loan guarantee ever made. The Committee hopes that the September 14, 2009, hearing will shed further light on how time pressures may have impacted OMB's review of the Solyndra loan guarantee.`

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[31] August 31, 2009, email between OMB and Terrell McSweeny of the Office of the Vice President, regarding "DOE Announcement."
[32] September 2, 2009 email between OMB staff regarding "RE: One notch down on Solyndra" and September 2, 2009, email between OMB staff regarding "Question on work priorities."

4. Why did DOE allow Solyndra's investors to have priority over the federal government in the event of a bankruptcy, as set forth in the February 2011 restructuring agreement?

Within one year of the Solyndra closing, the company began to run into severe financial problems. Documents produced to the Committee state that the company would have run out of cash by December 2010 without the injection of additional cash. In late fall of 2010, DOE began negotiations with Solyndra and two of its main investors to restructure the terms of the Solyndra loan guarantee in order to allow Solyndra to continue operating. The restructuring agreement was finalized on February 23, 2011. When DOE Loan Programs Office staff briefed Committee staff about the restructuring on March 1, 2011, DOE claimed that the restructuring agreement "[p]ositioned the DOE and the US taxpayer for maximum recovery by allowing Solyndra to raise the additional working capital that it needed to ensure project completion and execute on its strategic plan."[33]

That restructuring agreement, however, allowed Solyndra's investors to have priority over the government with regard to the first $75 million recovered in the event of Solyndra's liquidation. This was a change from the original agreement, under which DOE had first priority. According to a document reviewed by Committee staff, DOE told OMB that DOE "had to restructure the loan to create a situation whereby investors felt there was value in their investment. Essentially, no investor would put money into a company where the senior debt exceeded the perceived valuation for the company."[34] Without the additional capital from investors, "the parent [company] will run out of cash." The additional $75 million in capital, with the option for a second $75 million, was also intended to help the company "to get to a point where [it] is cashflow positive."[35] In return, DOE represented to OMB that the restructuring agreement had improved its collateral in the company as well as its potential recoveries in the event of a bankruptcy.

The Committee is concerned, however, that DOE's decision to subordinate its interests in Solyndra to the investors violated the Energy Policy Act's provision on subordination. Section 1702(d)(3) of that Act states that "the obligation shall be subject to the condition that the obligation is not subordinate to other financing." Under the Act, obligation is defined as the "loan or other debt obligation that is guaranteed." In what appears to be direct contravention of the plain language of the statute, the Chief Counsel of the DOE Loan Programs Office interpreted the Energy Policy Act's prohibition on subordination as applying only at the time a loan guarantee is issued, and not to subsequent restructuring agreements.

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[33] DOE Powerpoint Presentation, "The Solyndra Project: A Closer Look," March 1, 2011.
[34] February 10, 2011, email between OMB staff regarding "RE: Solyndra Follow Up."
[35] February 10, 2011, email between OMB staff regarding "FW: Solyndra Follow Up."

Documents reviewed by Committee staff during the course of its investigation, however, seem to suggest that the restructuring agreement would not provide a better recovery for the taxpayer. OMB, which was involved in reviewing the Solyndra restructuring agreement, compared the potential recovery to the government under two different scenarios: immediate liquidation under the terms and conditions of the original loan guarantee and restructuring the guarantee with the government subordinated to the investors with regard to the first $75 million recovered in a liquidation. Although OMB's analysis may have been preliminary, OMB staff determined that immediate liquidation of the loan guarantee could result in greater recovery to the government than restructuring the deal by $169 million.[36]

It is important to note that at the time the restructuring agreement was negotiated, DOE had disbursed $460 million of the $535 million loan guarantee to Solyndra. Proceeding with the restructuring as opposed to an immediate liquidation, therefore, would necessarily mean that DOE would continue to make loan guarantee disbursements to the company. Documents reviewed by the Committee suggest that OMB doubted whether a restructuring agreement that would keep Solyndra in business, and therefore eligible to receive the remaining $75 million balance of the loan guarantee, was worth any potential improved recovery to the government in a future bankruptcy.[37] That concern was spelled out in an email between OMB staff in late January 2011. That email noted that "[w]hile the company *may* avoid default with a restructuring, there is also a good chance it will not. . . . At that point, additional funds would have been put at risk, recoveries *may* be lower, and questions will be asked . . . ."[38]

Ultimately, an additional $67 million in taxpayer money was disbursed to Solyndra after DOE restructured the deal in Feburary 2011. Six months later, the company went bankrupt. The downward pricing pressures in the solar market that the Solyndra Chief Financial Officer referenced in the company's bankruptcy filings last week raise doubts that the liquidation value of the company is greater now than it would have been in January. The rapid decline of Solyndra after the restructuring also raises questions about DOE's analysis of the company and the market. At the hearing this week, the Committee intends to examine why DOE had such confidence in Solyndra that it agreed to subordinate its interest in the company to the investors, especially in light of the subordination provision in the Energy Policy Act.

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[36] January 2, 2011, email between OMB staff regarding "RE; Solyndra memo: COMMENTS BY 1:00 PLEASE."
[37] January 4, 2011, email between OMB staff regarding "RE: Solyndra memo: COMMENTS BY 1:00 PLEASE."
[38] January 31, 2011, email between OMB staff regarding "Solyndra Optics" (emphasis in original).