

The Committee on Energy and Commerce

Internal Memorandum



September 23, 2011

TO: Members, Subcommittee on Oversight and Investigation

FROM: Subcommittee on Oversight and Investigations Staff

RE: Supplemental Majority Memorandum, September 23, 2011, Hearing
"From DOE Loan Guarantee to Bankruptcy to FBI Raid:
What Solyndra's Executives Knew"

Solyndra's Representations to Congress **and the Committee's Investigation**

In September 2009, Solyndra, Inc. became the first recipient of a Department of Energy loan guarantee under the Energy Policy Act of 2005.

Less than one year after receiving the guarantee, the company began experiencing financial setbacks. In March 2010, in an Amended S-1 Form filed with the Securities and Exchange Commission, Solyndra's own auditors, PricewaterhouseCoopers, noted the company's "recurring losses" and "negative cash flows." Two months later, Solyndra cancelled a planned Initial Public Offering (IPO). By the fall of 2010, Solyndra had closed one plant, laid off 135 temporary or part-time workers and 40 full-time employees, and had postponed a planned expansion of "Fab 2," the new manufacturing facility built using the DOE loan guarantee.

Given the company's financial problems, and the fact that this Committee had failed to conduct any oversight of the DOE Loan Guarantee Program, the Committee initiated an investigation of the Solyndra loan guarantee on February 17, 2011, with a letter to DOE Secretary Steven Chu requesting a briefing and certain documents. The Committee followed that request with a similar document request on March 14, 2011, addressed to Jacob Lew, Director of the Office of Management and Budget (OMB), for information relating to OMB's review of the Solyndra loan guarantee and the restructuring of that deal.

Based on documents produced by DOE and OMB, the Committee now knows that staff at those agencies raised significant concerns during the review of Solyndra's

application in 2009, and during the restructuring of the loan guarantee this year, regarding the company's financial health and such basic questions as whether its technology was sound or whether panels could compete in the market. We also know that OMB staff raised concerns about the time pressures being placed on them by the White House to complete its review of the deal in time for a September 4, 2009, event at Solyndra's manufacturing facilities, which was attended by DOE Secretary Chu and featured a speech by Vice President Joe Biden via satellite. In addition, we have learned that during the review of the Solyndra restructuring in February 2011, OMB staff questioned the viability of the company and whether restructuring would prevent the company's default.¹

These facts paint a different picture of the company's financial position, and the circumstances surrounding the review and issuance of the loan guarantee, than do statements made by representatives of the company, the DOE, and the OMB during the course of the Committee's investigation. For example, DOE Loan Programs Office staff, including the Loan Programs Director Jonathan Silver, met with Committee staff on March 1, 2011. While acknowledging that the company had faced financial difficulties in the past, Mr. Silver repeatedly noted in his presentation that Solyndra's financial problems were behind it: Solyndra's revenue trend was "positive" and that the company's "2011 financial plan [was] revised and on track." With regard to the restructuring of the Solyndra deal, which had occurred on February 23, 2011, but was not announced publicly until the day before the Committee briefing, the DOE presentation stated that it had "[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." A short time after the Committee briefing, DOE Secretary Chu stated in an interview that he was "'confident [Solyndra] can repay the loan.'"² In short, DOE personnel assured the Committee that Solyndra was financially sound, and that there was no need to look behind the curtain.

Similarly, at an April 4, 2011, briefing OMB staff left out significant details about the Solyndra loan guarantee. At that briefing, OMB staff was unable to offer any specifics on OMB's review of Solyndra before the loan guarantee was issued in 2009, including what questions were asked by OMB staff about the deal or what concerns

¹ See The Committee on Energy and Commerce Memorandum, *The Solyndra Story*, September 14, 2011, at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/091411/SolyndraStoryFinalMemo.pdf>.

² March 7, 2011, *Electric Utility Week*, "DOE 'confident' as it given Solyndra more time to repay loan; 'sales have been going up'" Brian Hansen.

were raised by OMB at that time.³ With regard to the Solyndra restructuring, OMB staff indicated that they had asked “standard questions” about DOE’s analysis. Again, they could not offer any details about the substance of OMB’s concerns or questions despite the fact that OMB staff had just reviewed the Solyndra restructuring less than three months before the Committee briefing.

For this reason, Committee staff pressed the OMB for production of the documents requested in the March 14 letter, hoping that they could answer the Committee’s questions about the substance of OMB’s role and review of Solyndra. OMB repeatedly refused to turn over the documents. The Committee was ultimately forced to convene a business meeting on July 14, 2011, to authorize the issuance of a subpoena to OMB for these documents. After statements made by Ranking Member Henry Waxman questioning the basis of the investigation and accusing the Committee of engaging in a “fishing expedition,”⁴ the resolution authorizing the issuance of the subpoena was passed 14 to 8, on a party-line vote.

It was against the backdrop of the subpoena vote that Solyndra first began making representations to the Members of the Committee about its financial health and future prospects. In a three-page document entitled “Exceeding Expectations: Solyndra Today” that was distributed to Committee staff on June 23, Solyndra claimed that it “continues to make excellent progress to the company’s overall annual strategic plan, while meeting the company’s technical, cost and performance milestones.” In particular, the document noted that 2011 revenues were expected to be \$140 million, and its 2011 shipments of panels were expected to double the 2010 shipments. As the date for the subpoena business meeting approached, counsel for Solyndra reached out to Committee staff and asked if the Committee would enter into the record a letter from Solyndra Chief Executive Officer (CEO) Brian Harrison describing the company’s performance. In an email sent to Committee staff on July 13, counsel for the company stated that the letter would “provide current data on Solyndra’s positive economic and job situation. The Committee’s [press] release continues to perpetuate an incorrect picture of Solyndra’s condition, despite consistent staff representations that this is not the Majority’s intent. We believe the update information is critical to balance what has been said.” (Attachment A.) A copy of Mr. Harrison’s letter was entered into the record by unanimous consent at the July 13 business meeting. The letter claimed that

³ At a later briefing in June, OMB staff did explain that OMB asked questions about the competitive pressures in the solar market and how this affected Solyndra as well as the lack of data validating the performance of Solyndra’s panels. OMB’s June briefing, however, made no mention of the time pressures placed on OMB staff to complete its review by a September 4, 2009, groundbreaking event at Solyndra’s manufacturing facility attended by DOE Secretary Chu and featuring a speech by Vice President Joe Biden via satellite. These concerns only came to light after the Committee subpoenaed OMB’s documents and communications relating to the Solyndra guarantee.

⁴ John McArdle, OMB Disclosure of Energy-Loan Emails Not Enough to Avoid Subpoena, E&E Daily, July 13, 2011.

Solyndra's revenues had grown from \$6 million in 2008 to \$100 million in 2010, and that revenues were expected to double again in 2011; that the company had just completed a "record quarter for shipments, with strong demand in the United States"; and that the company was "on track" to meet its "job creation commitments agreed upon with the DOE."

Following the Committee business meeting, Solyndra CEO Harrison met individually with several Members of the Committee during the week of July 18, and even convened a press conference to tout the company's success and financial stability. Reports from that press conference state that CEO Harrison, while acknowledging the Committee's right to investigate the loan guarantee, charged that "in the process [of the investigation], there have been reports that inaccurately characterize the state of Solyndra's business." Mr. Harrison went on to say that "[w]hat I want to do is separate Solyndra's business situation today from that investigation and not paint Solyndra with the same brush."⁵

Just over one month after this press conference, Solyndra announced that it intended to file for bankruptcy. One week later, on September 8, 2011, the company was raided by agents of the Federal Bureau of Investigation (FBI) working with the DOE Office of Inspector General (OIG). On September 8, the Committee sent invitations to Solyndra CEO Harrison and Chief Financial Officer (CFO) W. G. Stover, Jr. for their testimony at a September 14, 2011, hearing before the Subcommittee on Oversight and Investigations. Counsel for Solyndra contacted the Committee and explained that Mr. Harrison and Mr. Stover would be unable to attend the September 14 hearing because they were actively working to sell the company. After receiving assurances from Solyndra's counsel that Mr. Harrison and Mr. Stover would appear voluntarily at any time during the week of September 19 and that Mr. Harrison would answer the Committee's questions about the loan guarantee and the company's financial collapse, the Committee agreed to postpone their appearance until September 23. Formal invitations inviting Mr. Harrison and Mr. Stover to testify at the September 23 hearing were then sent on September 16.

Just three days before the September 23 hearing, counsel for Mr. Harrison and counsel for Mr. Stover informed the Committee in writing that their clients would now decline to answer the Subcommittee's questions based on their rights under the Fifth Amendment to the United States Constitution. (See Attachments B and C.) A press release issued by Solyndra about two hours after the Committee was informed that Mr. Harrison and Mr. Stover would be invoking their Fifth Amendment rights noted that

⁵ Herman Wang, CEO of Calif. Solar Firm Heads to Hill to Defend \$535M in Taxpayer-Backed Aid, Inside Energy With Federal Lands, July 25, 2011.

“[t]he company is not aware of any wrongdoing by Solyndra officers, directors or employees in conjunction with the DOE loan guarantee or otherwise, and the company is cooperating fully with the office of the United States Attorney for the Northern District of California in its investigation.” (Attachment D.)

The Committee had hoped that the September 23 hearing would afford its Members the opportunity to finally resolve the discrepancies between the public statements and private assertions made by DOE, OMB and Solyndra over the last six months regarding Solyndra's improved financial health and what we now know about the events leading up to Solyndra's bankruptcy. At every step of the way, Solyndra and the Administration have attempted to block or [misdirect] the Committee's investigation. The statements by Mr. Harrison's lawyers urging the Committee not to infer that their clients invocation of their Fifth Amendment rights is indicative of any wrongdoing presents another inconsistency. In order to assert these rights, a witness must have a reasonable apprehension that his answer would furnish evidence which would expose the witness to criminal liability. Yet here, letters from their counsel and a press release from the company state plainly that the witnesses have no knowledge of any wrongdoing, and the assertion of Fifth Amendment rights is simply being made in an abundance of caution. This is arguably an improper invocation of the Fifth Amendment privilege.