Footnote 609

[redacted]

From: [redacted]
Sent: Tuesday, January 04, 2011 7:14 PM
To: Colyer, Kelly T.; Saad, Fouad P.
Cc: [redacted]
Subject: OMB's role in determining workout/modification
Attachments: OMB's role under FCRA.docx

I'm getting ready to circulate this (attached and below) to the broader group. Anything Solyndra specific you want to add?

Following yesterday's discussion on DOE's proposed restructuring, credit crew pulled together some examples of OMB involvement in restructurings or work-outs contemplated by agencies. We typically do not tell agencies how to restructure outstanding loans or guarantees, but rather determine the budgetary treatment and how much it will cost.

> FCRA established OMB authorities and responsibility for implementation, including oversight over subsidy cost estimates. Sec. 50[illegible] authority and responsibility for determining the terms and conditions of eligibility for and the amount of assistance provided by a direct loan or a loan guarantee rests with the implementing Federal agency. For loan-by-loan programs where such actions are not assumed in the baseline cost estimates, OMB reviews proposed restructurings for consistency with statutory and regulatory requirements, credit policies, and administration policies. [redacted]
>
> Under the FCRA, OMB determines whether the restructuring constitutes a modification or a work-out. There are two major differences between modifications and work-outs. First, the primary purpose of a work-out is cost avoidance on troubled loans —not the provision of additional subsidy to the borrower. Second, the effects of work-outs can be estimated as part of the subsidy cost and included in the baseline, and therefore these effects are required to be included in the expected cash flows. Any differences between the estimated work-out and the actual work-out are captured in a reestimate and covered with permanent indefinite authority under FCRA. Modifications, in contrast require budget authority for the upfront increase in costs due to Government action. There is some grey area with the second distinction. If an action is not assumed in the baseline cost estimate, depending on the specific circumstances, it could still be classified as a workout if the action reduces the expected cost to Government of resolving the troubled loan.
>
> If OMB determines the change is a modification, OMB must review, approve, and apportion budget authority for the change in cost before an agency can amend terms. So, while OMB does not become involved with negotiating terms with individual borrowers, outcomes of the OMB review can influence the agency's decisions and the terms offered. For example, if an agency does not have sufficient statutory or budget authority to modify a loan, then it cannot amend terms until such authority is provided. In such cases, an agency may propose legislation or may seek alternatives that fit within existing law.
>
> Below are some examples of similar transactions involving restructuring:
>
> Hurricane Katrina: Several Federal credit programs had significant exposure to areas affected by Hurricane Katrina. Across Government, agencies were looking to existing authorities to determine what actions could be taken to help the affected borrowers, including deferring payments, partial forgiveness, and other term changes. In some cases, it was determined that sufficient authority existed and agencies moved forward with work-outs already captured in baseline cost estimates, or modifications for those programs that did not assume such actions. In other cases, the Administration requested new authority to fund the costs of easing terms for Katrina-affected borrowers.

Troubled Asset Relief Program: TARP has made several changes in terms both through legislation and administrative actions, such as changes that allowed TARP recipients to pre-pay equity investments, amended eligibility requirements, relaxed requirements to benefit troubled borrowers, or allowing recipients to refinance into another Treasury program. Because these terms affected the cost, OMB worked closely with Treasury to review in each circumstance and make a determination whether a given action constituted a modification or a work-out, and that the changes were appropriately captured in the cost estimates.

Air Transportation Stabilization Board Loan Guarantees: This program was established shortly after 2001, to provide assistance to the airline industry. Over the course of this program, OMB and the Air Transportation Stabilization Board worked closely to determine the nature of certain actions including restructuring, re-amortizations, and refinancing (whether modifications or work-outs), and estimate the costs associated with these changes.

USDA Rural Utilities Service Loan Extensions: A statutory change modified the program, by allowing eligible borrowers to extend their loan terms provided that the borrower paid a fee to cover any change in cost associated with extending the loan. OMB and USDA worked closely to develop the model used to determine the cost, and borrower fees for modified loans where the re-amortization would result in a cost. A borrower may determine that its own benefits do not outweigh the required fee.

Department of Commerce, Emergency Steel Loan Guarantee Program: The Department of Commerce approved several amendments, or modifications to a loan guarantee agreement over a few years, including reduced interest rates and eased terms. In one instance, Commerce and OMB worked together on the costs.

Department of Veterans Affairs, Native American Direct Loan Program: When it became apparent that a failure in VA's process led to seriously inadequate housing for one borrower, VA counsel determined that it fell within the authorization for VA to fund critical improvements to the property through the financing account. Because this action fell outside of the baseline cashflows and resulted in a cost to the Government, OMB determined it constituted a *modification and should be treated accordingly.*

[redacted]
Budget Review Division
Policy Analyst, Federal Credit Programs
Office of Management and Budget
[redacted]

FCRA established OMB authorities and responsibility for implementation, including oversight over subsidy cost estimates. Sec. 505(g) of FCRA made clear that the authority and responsibility for determining the terms and conditions of eligibility for and the amount of assistance provided by a direct loan or a loan guarantee rests with the implementing Federal agency. For loan-by-loan programs where such actions are not assumed in the baseline cost estimates, OMB reviews proposed restructurings for consistency with statutory and regulatory requirements, credit policies, and administration policies.

Under the FCRA, OMB determines whether the restructuring constitutes a modification or a work-out. There are two major differences between modifications and work-outs. First, the primary purpose of a work-out is cost avoidance on troubled loans —not the provision of additional subsidy to the borrower. Second, the effects of work-outs can be estimated as part of the subsidy cost and included in the baseline, and therefore these effects are required to be included in the expected cash flows. Any differences between the estimated work-out and the actual work-out are captured in a reestimate and covered with permanent indefinite authority under FCRA. Modifications in contrast require budget authority up front for any increase in costs due to Government action. There is some grey area with the second distinction. If an action is not assumed in the baseline cost estimate, depending on the specific circumstances, it could still be classified as a workout if the action reduces the expected cost to Government of resolving the troubled loan.

If OMB determines the change is a modification, OMB must review, approve, and apportion budget authority for the change in cost before an agency can amend terms. So, while OMB does not become involved with negotiating terms with individual borrowers, outcomes of the OMB review can influence the agency's decisions and the terms offered. For example, if an agency does not have sufficient statutory or budget authority to modify a loan, then it cannot amend terms until such authority is provided. In such cases, an agency may propose legislation or may seek alternatives that fit within existing law.

Below are some examples of similar transactions involving restructuring:

Hurricane Katrina: Several Federal credit programs had significant exposure to areas affected by Hurricane Katrina. Across Government, agencies were looking to existing authorities to determine what actions could be taken to help the affected borrowers, including deferring payments, partial forgiveness, and other term changes. In some cases, it was determined that sufficient authority existed and agencies moved forward with work-outs already captured in baseline cost estimates, or modifications for those programs that did not assume such actions. In other cases, the Administration requested new authority to fund the costs of easing terms for Katrina-affected borrowers.

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Air Transportation Stabilization Board Loan Guarantees: This program was established shortly after 2001, to provide assistance to the airline industry. Over the course of this program, OMB and the Air Transportation Stabilization Board worked closely to determine the nature of certain actions including restructuring, re-amortizations, and refinancing (whether modifications or work-outs), and estimate the costs associated with these changes.

USDA Rural Utilities Service Loan Extensions: A statutory change modified the program, by allowing eligible borrowers to extend their loan terms provided that the borrower paid a fee to cover any change in cost associated with extending the loan. OMB and USDA worked closely to develop the model used to determine the cost, and borrower fees for modified loans where the re-amortization would result in a cost. A borrower may determine that its own benefits do not outweigh the required fee.

Department of Commerce, Emergency Steel Loan Guarantee Program: The Department of Commerce approved several amendments, or modifications to a loan guarantee agreement over a few years, including reduced interest rates and extended terms. In one instance, Commerce and OMB worked together on the costs.

Department of Veterans Affairs, Native American Direct Loan Program: When it became apparent that a failure in VA's process led to seriously inadequate housing for one borrower, VA counsel determined that it fell within the authorization for VA to fund critical improvements to the property through the financing account. Because this action fell outside of the baseline cashflows and resulted in a cost to the Government, OMB determined it constituted a modification and should be treated accordingly.

Footnote 613

[redacted]

From: Colyar, Kelly T.
Sent: Tuesday, January 04, 2011 2:20 PM
To: [redacted] Saad, Fouad P.; [redacted]
Subject: RE: Solyndra memo: COM[redacted]

That's the question I have and what I need to confirm with DOE.

From: [redacted]
Sent: Tuesday, January 04, 2011 2:19 PM
To: Saad, Fouad P.; Colyar, Kelly T.; [redacted]
Subject: RE: Solyndra memo: COMM[redacted]

Why is the cost for building and land so much lower now-- $60 vs $380 in Fitch 8/09 analysis?

From: Saad, Fouad P.
Sent: Tuesday, Janu[redacted]
To: Colyar, Kelly T.; [redacted]
Subject: RE: Solyn[redacted]

That works too; there seems to be any number of ways to show this is a bad idea.

From: Colyar, Kelly T.
Sent: Tuesday, January 04, 2011 2:08 PM
To: Saad, Fouad P.; [redacted]
Subject: RE: Solynd[redacted]

Can't we just say:

<u>Liquidation</u>
Estimated recoveries today: $319M
Claims: DOE 1st priority
Expected Loss: $460-319= $141M loss

Restructured
Most Optimistic DOE analysis: $300
Subtract $75M 1st priority
Available: $225M
Claims: Pari-passu with $75M ($150M+$75M = $225M) = $150M recovery for DOE.
Expected Loss: $385M principle plus deferred interest

From: Saad, Fouad P.
Sent: Tuesday, January 04, 2011 1:56 PM
To: Colyar, Kelly T.; [redacted]
Subject: RE: Solynd[redacted]

I've added a little module to the recovery Excel sheet Kelly circulated yesterday that tries to get at Rick and Alex's questions about what the 'return on' or impact of DOE's additional $75m is vs. the investors.

J:\CREDIT\Energy\Title 17\Solyndra\October 2010\Solyndra Liquidation Comparison v2.xlsx

It's imperfect, but I think the main message is that even based on DOE's assumptions, putting the remaining $75m of the DOE loan into Solyndra at this point only seems to improve recoveries by about $87 million. While this is a 110% improvement in recoveries in DOE's view, the "return" would be around 16% on the additional $75m. But the question is whether the additional absolute return ($12m) is worth putting an additional $75m in taxpayer dollars at risk.

Using Kelly's analysis, the additional $75m results in a 200% loss to the government.

Unfortunately, I don't have enough info now to assess the 'return' to the investors of their $75m. At first glance, their seniority seems to get them their $75m back and protect them from losing any more money, but it doesn't seem likely that they'd get much else back, assuming their recoveries on the second tranche for both DOE and investors are minimal (although minimal is better than zero for investors).

From: Colyar, Kelly T.
Sent: Tuesday, January 04, 2011 1:27 PM
To: [redacted] Saad, Fouad P.
Subject: RE: Solyndra memo: COMMENTS BY 1:00 PLEASE

Thanks. I'll add.

From: [redacted]
Sent: Tuesday, January 04, 2011 1:22 PM
To: [redacted] Colyar, Kelly T.[redacted]aad, Fouad P.
Subject: RE: Solyndra memo: COMMENTS BY 1:00 PLEASE

I know we're under constraints to keep the memo to 1-page (or close), but think that the following blurb that [redacted] put together pulling from a past modification/workout exercise is worth incorporating into the memo before the recommendation.

I think this is a better framing, and allows us to delete the 'third option,' which isn't really an option.

Background on why this is a modification, not a workout.
There are two major differences between modifications and work-outs. First, the primary purpose of workouts is cost avoidance, not the provision of additional subsidy to the borrower. OMB staff believe that the proposed restructuring would result in a cost to the USG, not a savings. Second, the effects of workouts on cash flow subsidy cost can be estimated for a portfolio of new loans or guarantees proposed in the President's budget or included in the baseline, and therefore these effects are required to be included in the expected cash flows of the initial subsidy estimate. Any differences between the estimated workout and the actual workout are captured in a reestimate and covered with permanent indefinite authority under FCRA.

From: [redacted]
Sent: Tuesday, January 04, 2011 1:08 PM
To: [redacted] Colyar, Kelly T.; [redacted] Saad, Fouad P.
Subject: RE: Solyndra memo: COMMENTS BY 1:00 PLEASE

Credit crew comments are in the attached, layered on [redacted] (We were already halfway through when Fouad opened the document, and didn't want to lose time).

I don't know that the last option is a viable one (require DOE to change terms), since OMB does not have authority to make decisions for the agency; we only have authority over the costs under FCRA, and coordination responsibilities.

One option might be to strike the third option, and work it into the first option (modification) as a pro that it would be captured in the cost if this is found legal, and a con on the second (work-out), as we would need to engage on the legal and policy issues either way.

From: [redacted]
Sent: Tuesday, January 04, 2011 12:36 PM
To: Colyar, Kelly T.; [redacted] Saad, Fouad P.
Subject: RE: Solyndra memo: COMMENTS BY 1:00 PLEASE

A few comments/questions attached.

From: Colyar, Kelly T.
Sent: Tuesday, January 04, 2011 12:06 PM
To: [redacted] Saad, Fouad P.
Subject: Solyndra memo: COMMENTS BY 1:00 PLEASE

This still needs more work, but we are scheduled to meet with Alex and Jeff Z. at 3:30. Please send me any edits by 1:00.

Thanks.

J:\CREDIT\Energy\Title 17\Solyndra\October 2010\Solyndra Restructuring.docx

Footnote 615

[redacted]

From: [redacted]
Sent: Tuesday, January 04, 2011 1:19 PM
To: [redacted]
Subject: RE: Example relevant to Solyndra mod

Given the one-page guideline, and that we shouldn't be proposing option 3 anyway, I think it's OK for this to be a separate email. I will incorporate.

From: [redacted]
Sent: Tuesday, January 04, 2011 1:18 PM
To: [redacted]
Subject: Example relevant to Solyndra mod

I realize its too late to get this into the memo, but I'm sure this isn't the last chance we have to opine on the issue. Below is a synopsis of the Commerce example we discussed based on what I could glean from the files and your understanding of the outcome. Also, I out together some points on the differences between a modification and a workout and applied them to the Solyndra situation.

Example:
Department of Commerce, Steel, Oil & Gas Loan Guarantee Program, Wheeling-Pittsburgh modification: The Department of Commerce approved several amendments of the original loan guarantee agreement between 2004 and 2008. Ultimately, these amendments resulted in a cost to the USG and required an upward modification to the subsidy cost. In looking though our files we did not come across the original modification request. Our understanding is that the agency assumed a workout that would minimize claim payments or avoid incurring the cost of holding and liquidating assets. After the amendments were signed, OMB was made aware of the terms and determined it a modification. It appears that the amendments lowered the interest rate, allowed the borrower to sell $350M if its capital stock, and waived mandatory prepayments.

Background on why this is a modification, not a workout.
There are two major differences between modifications and workouts. First, the primary purpose of workouts is cost avoidance, not the provision of additional subsidy to the borrower. OMB staff believe that the proposed restructuring would result in a cost to the USG, not a savings. Second, the effects of workouts on cash flow subsidy cost can be estimated for a portfolio of new loans or guarantees proposed in the President's budget or included in the baseline, and therefore these effects are required to be included in the expected cash flows of the initial subsidy estimate. Any differences between the estimated workout and the actual workout are captured in a reestimate and covered with permanent indefinite authority under FCRA. Because Title XVII estimates the subsidy cost for each loan on a case by case basis, rather than a portfolio basis, there was not assumption of workout included in the original subsidy cost for Soyndra.

[redacted]
Budget Review Division
Policy Analyst, Federal Credit Programs
Office of Management and Budget
[redacted]

From: [redacted]
Sent: Tuesday, January 04, 2011 12:31 PM

To: Colyar, Kelly T.; [redacted] Saad, Fouad P.
Subject: RE: Solyndra memo: COMMENTS BY 1:00 PLEASE

When will the memo be open to edit (and see what edits have already been put in)?

From: Colyar, Kelly T.
Sent: Tuesday, January 04, 2011 12:06 PM
To: [redacted] Saad, Fouad P.
Subject: Solyndra memo: COMMENTS BY 1:00 PLEASE

This still needs more work, but we are scheduled to meet with Alex and Jeff Z. at 3:30. Please send me any edits by 1:00.

Thanks.

J:\CREDIT\Energy\Title 17\Solyndra\October 2010\Solyndra Restructuring.docx

Footnote 616-619

[redacted]

From: Richardson, Susan [redacted]
Sent: Friday, January 07, 2011 9:06 AM
To: Colyar, Kelly T.; [redacted] Nwachuku, Frances; Aitken, Steven D.
Subject: RE: Solyndra

Kelly, We are relying on the definition of Work Out set out in Section 185.3(ab) of Circular A-11. On the subordination issue, we are still working this through internally and anticipate having consensus soon. We have not changed the working theory discussed on our call.

Hope this is helpful. Thanks for your efforts. Susan

From: Colyar, Kelly T. [redacted]
Sent: Thursday, January 06, 2011 2:35 PM
To: Richardson, Susan; [redacted] Nwachuku, Frances; Aitken, Steven D.
Subject: RE: Solyndra

Susan/[redacted]

Thanks again for the call earlier this week. 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?

Also, could you send over the legal definition of 'workout' that DOE is using in this analysis?

Thanks again.

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 1:14 PM
To: Colyar, Kelly T.; [redacted]
Subject: RE: Solyndra

I would strongly prefer to keep this as small a group as possible. I thought this would be an informal discussion with you.

From: Colyar, Kelly T. [redacted]
Sent: Tuesday, January 04, 2011 1:07 PM
To: Richardson, Susan; [redacted]
Subject: RE: Solyndra

2:30 it is. We can use the dial in number below. Our GC folks will be joining (Steve and Bill). UST may also join since they have been in previous discussions.

[redacted]

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 12:42 PM
To: [redacted] Colyar, Kelly T.
Subject: RE: Solyndra

Kelly, We will call your office at 2:30

From: [redacted]
Sent: Tuesday, January 04, 2011 12:41 PM
To: Richardson, Susan; 'Colyar, Kelly T.'
Subject: RE: Solyndra

Works for me

[redacted]
Loan Guarantee Program
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585
[redacted]

From: Richardson, Susan
Sent: Tuesday, January 04, 2011 12:41 PM
To: 'Colyar, Kelly T.'
Cc: [redacted]
Subject: RE: Solyndra

Ok by me – [redacted]

From: Colyar, Kelly T. [redacted]
Sent: Tuesday, January 04, 2011 12:13 PM
To: Richardson, Susan
Cc: [redacted]
Subject: RE: Solyndra

Could we do 2:30 instead?

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 12:07 PM
To: Colyar, Kelly T.
Cc: [redacted]
Subject: RE: Solyndra

Kelly, Would you be available to speak to [redacted] and me at 3 PM today? Thnx

From: Colyar, Kelly T. [redacted]
Sent: Monday, January 03, 2011 11:00 PM
To: Richardson, Susan
Subject: Re: Solyndra

Thanks. And to clarify my question on the IP, the Term Sheet includes all IP, Intangibles, and Goodwill in the collateral package. Was this changed in the final documentation or were there changes at a later point? I'm confused as to how DOE did not have the IP given the Term Sheet language.

From: Richardson, Susan [redacted]
To: Colyar, Kelly T.
Sent: Mon Jan 03 22:42:33 2011
Subject: Re: Solyndra

Kelly, I will get back to you tomorrow. Susan

From: Colyar, Kelly T. [redacted]
To: Nwachuku, Frances; Richardson, Susan
Cc: Aitken, Steven D. [redacted]; Richardson, William [redacted] Carroll, Kevin; Mertens, Richard A. [redacted] Saad, Fouad P. [redacted]
Sent: Mon Jan 03 21:24:45 2011
Subject: RE: Solyndra

Susan,

I understand Frances is out today. I also believe you'll be looking at some, if not all, of these questions so I wanted to go ahead and forward this over to you. We are trying to work through the proposed Solyndra restructuring and had a few clarifying questions (see email and additions below). Could you take a look? I understand DOE wants to execute the revised loan agreement January 10, so your assistance in getting back to us quickly is appreciated.

Thanks again for your help. Let me know if you have any questions.

<u>In addition to the email below:</u>

1. What is the DOE approval process for changes to loan agreements (i.e., who approves such changes)? Was there a Credit Committee or Credit Review Board to review the proposal? Who ultimately is authorizing the revisions? Is there an associated action memo? Although we have a good sense of the approval process for new loans, we are not clear on the approval process for changes to those loans.
2. Why was the January 10 date selected for executing the revised loan documents? Are there implications if these changes are postponed?

From: Colyar, Kelly T.
Sent: Monday, January 03, 2011 12:07 PM
To: Nwachuku, Frances
Subject: Solyndra

Frances,

Happy New Year! I wanted to follow up on a couple of questions related to the proposed Solyndra revisions.

1) Has DOE counsel opined on whether the proposal conforms with 1702 d(3) of the authorizing statute? I've provided the language below for reference. Could you send me DOE counsel's opinion on this question so that we can follow up with our folks?

(3) SUBORDINATION.—The obligation shall be subject to the condition that the obligation is not subordinate to other financing.

2) Also, since the Term Sheet explicitly included all intellectual property, licenses, general intangibles and goodwill in the collateral package (item 20.v), I was somewhat confused as to how the IP was pledged to another investor. At what point was that lien entered into? Was DOE aware of that lien prior to closing? Also, how does this conform with 1702 C ii of the statute:

> (C) TERMS AND CONDITIONS.—A guarantee agreement shall include such detailed terms and conditions as the Secretary determines appropriate to—
> (i) protect the interests of the United States in the case of default; and
> (ii) [redacted].

Footnote 620

[redacted]

From: Colyar, Kelly T.
Sent: Friday, January 07, 2011 4:38 PM
To: Saad, Fouad P.; [redacted] Carroll, J. Kevin
Cc: [redacted]
Subject: RE: Talking points on work-out analysis

It's all from the parent and would be minimal if any---there may also be some inventory, but theoretically, that is all held at the parent as well. Regardless, we can always clarify in a technical discussion.

From: Saad, Fouad P.
Sent: Friday, January 07, 2011 4:36 PM
To: Colyar, Kelly T.; [redacted]; Carroll, J. Kevin
Cc: [redacted]
Subject: Re: Talking points on work-out analysis

Could there also be a tp re: current assets (i.e. Any cash/receivables on project's books today should be valued at 100% in liquidation)?

This may overlap with but isn't the same as 1b.

From: Colyar, Kelly T.
To: [redacted] Carroll, J. Kevin; Timberlake, Courtney B.
Cc: Richardson, William; Mas, Alex; Ericsson, Sally C.; Saad, Fouad P.; [redacted] Mertens, Richard A.; [redacted]
Sent: Fri Jan 07 16:25:50 2011
Subject: RE: Talking points on work-out analysis

Here's what we suggest. Let us know if folks have any questions or comments.

Thanks.

- If the Department determines that this is a work out, then the Department needs to be able to support this by demonstrating that the work-out results in lower costs.
- OMB has concerns with the analysis provided. There are several pieces of information which we would need to perform this analysis.

1. <u>Liquidation Scenario</u>: The liquidation analysis DOE provided appears to understate potential recoveries, and additional information is needed to evaluate the expected recoveries to the Government. Please provide detail for the valuation performed under the liquidation scenario, including any haircuts, and timing assumptions embedded in the analysis. Specifically, we are concerned that the analysis provided:
   a. does not appear to assign values to the land and buildings that are consistent with previously provided analyses supported by both the Independent Engineer and a nationally recognized Rating Agency; and
   b. does not appear to reflect all assets in the collateral package (e.g., project equity)

2. <u>Alternatives to Restructuring</u>: DOE's analysis assumes that the only alternative to restructuring is a liquidation. While we believe DOE's liquidation analysis may understate potential recoveries, we also believe there are other alternatives that would result in higher recoveries than simple liquidation today.

a. For example, DOE could sell the company and/or its distressed debt to a private equity firm that specializes in turn-around. By definition, these firms would only invest if they thought they could extract better value than liquidation. Please provide an estimate of what the potential recoveries under this scenario might be.

3. <u>Going concern/restructuring scenario</u>:

a. The analysis provided did not appear to factor in the interest costs—or time value of money to the Government given that repayments would be later and still at risk. Could DOE please provide the expected re-amortized cashflows, and underlying default/recovery assumptions post-restructuring? Also, this analysis should take into account the order of priority in DOE's claims under the restructuring.

b. The analysis DOE provided suggests that under a restructuring, Solyndra and the project would effectively be on par with stronger competitors in estimating a going-concern value. 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, at least under the original marketing plan and pricing.

i. Could DOE assess whether the additional capital and time for restructuring would reduce costs or otherwise provide efficiencies to result in a more competitive company?

ii. Could DOE provide a 2011 projected solar supply stack and indicate how Solyndra's current and projected cost structure compares?

From: [redacted]
Sent: Friday, January 07, 2011 3:28 PM
To: Carroll, J. Kevin; Timberlake, Courtney B.
Cc: Richardson, William; Mas, Alex; Ericsson, Sally C.; Colyar, Kelly T.; Saad, Fouad P.; [redacted] Mertens, Richard A.; [redacted]
Subject: RE: Talking points on work-out analysis

Kelly and I are talking now, and working out some ways to better target the ask for DOE. She will send around shortly.

From: Carroll, J. Kevin
Sent: Friday, January 07, 2011 3:27 PM
To: Timberlake, Courtney B.
Cc: Richardson, William; Mas, Alex; Ericsson, Sally C.; Colyar, Kelly T.; Saad, Fouad P. [redacted]
Mertens, Richard A.; [redacted]
Subject: FW: Talking points on work-out analysis

Kelly had to [redacted] but she may be able to clarify. We do not have full information on the workout. Kelly called after receiving this to say that she was concerned that this was constructed as an easy target for DOE to hit.

I believe that we have some of the information but not all of it. For example, we still don't know when the restructured firm starts to pay the loan. As I said in the meeting, we have strong doubts as to whether the workout situation is more valuable.

From: Timberlake, Courtney B.
Sent: Friday, January 07, 2011 3:21 PM
To: Carroll, J. Kevin; Richardson, William
Cc: Mas, Alex; Ericsson, Sally C.; Saad, Fouad P.; Colyar, Kelly T.; [redacted] Mertens, Richard A.; [redacted]
Subject: RE: Talking points on work-out analysis

Kevin,

It is my understanding that we do have the necessary materials, and that they show that the workout is a cost. This seems to be different than what was expressed at the meeting. Could you clarify?

From: Carroll, J. Kevin
Sent: Friday, January 07, 2011 2:51 PM
To: Richardson, William
Cc: Mas, Alex; Ericsson, Sally C.; Timberlake, Courtney B.; Saad, Fouad P.; Colyar, Kelly T.; [redacted] Mertens, Richard A.; [redacted]
Subject: FW: Talking points on work-out analysis

These are our suggested talkers:
Please call me or Fouad if you have questions.

[redacted]

****

You requested talking points for your conversation with DOE/CC concerning our request for an expected value analysis. Below are our suggested points, which others on this note might wish to comment on :

- If the Department determines that this is a work out, then the Department needs to be able to support this by demonstrating that the workout will REDUCE COSTS to the government.
- This would seem to require comparing potential recoveries in two circumstances: where a default occurs soon without the restructuring (which would likely result in a liquidation of the project) vs. what potential recoveries might be after the proposed restructuring. And, even if the restructuring happens, there are several potential scenarios that could result.
- We believe the best way for the Department to make such a demonstration of reduced costs to the government is in terms of an Expected Value of these various scenarios. In other words, determine the average cost to the government as a result of liquidation and in the different post-restructuring scenarios, weighted by the probability that the Department applies to that scenario. (If the possible outcomes were $100 with a 25% probability and $400 with a 75% probability, the expected value would be ($100*.25)+($400*.75) =$325 as the "expected value.")

  [If DOE asks how these scenarios might be constructed:]

  - Scenario A: The restructuring is meant to get the project construction completed, and hopefully get the project to a cash-flow positive situation. In that case, recoveries in the event of a default can be estimated on a "going-concern" basis (i.e., assuming, for example, that another company would choose to buy the project and continue to operate it). We understand DOE used this approach to assess the value of recoveries post-restructuring.
  - Scenario B: It is, however, possible that even after the restructuring, that default could result in a liquidation (e.g. even though the facility is completely built and rights to IP are part of the asset package, no one wants to buy it because the product remains uncompetitive at the prices necessary to make it profitable).
  - DOE may choose to model additional scenarios to reach its expected value.

From: Carroll, J. Kevin
Sent: Friday, January 07, 2011 2:25 PM

To: Mertens, Richard A.
Cc: Saad, Fouad P.
Subject: FW: Talking points on work-out analysis

Rick,
Attached are the bullets for Bill Richardson. I don't think he needs the grayed out ones; I think that is part of the legal analysis that he is on top of.

Let us know what you think and whether you think BRD needs to review. I think if Courtney sees it we are OK.

From: Saad, Fouad P.
Sent: Friday, January 07, 2011 2:05 PM
To: Carroll, J. Kevin
Subject: Talking points on work-out analysis

Here are some suggested talking points for GC's conversation with DOE GC:

- Our view is that a work-out determination requires 3 conditions be met: 1) a project is troubled or in imminent default, 2) the proposed changes to the loan should seek to maximize recoveries (i.e. minimize costs) to the Government, and 3) restructurings of the sort proposed should have been anticipated in the original credit subsidy cost estimate at loan origination.
- For this project, the original cost estimate did not anticipate the type of loan changes being proposed, including subordination of the loan and discounting parts of DOE's loan. This alone would suggest it should be treated as a modification for budget purposes.
- But the second criterion is critical too because the point of a work-out is to REDUCE COSTS to the government, not to increase the subsidy for the borrower.
- We therefore have to compare potential recoveries in two circumstances: where a default occurs soon without the restructuring (which would likely result in a liquidation of the project) vs. what potential recoveries might be after the proposed restructuring.

  But even if the restructuring happens, several potential scenarios could result. So the cost to the Government after a restructuring needs to be estimated as an Expected Value of these various scenarios. In other words, we need to determine the average cost to the Government of the different scenarios post-restructuring, weighted by the probability that the Department applies to that scenario. (If the possible outcomes were 100 with a 25% probability and 400 with a 75% probability, the expected value would be (100*.25)+(400*.75) or (25+300)=325 as the "expected value.")

  - Good Scenario: The restructuring is meant to get the project construction completed, and hopefully get the project to a cash-flow positive situation. In that case, recoveries in the event of a default can be estimated on a "going concern" basis (i.e. assuming, for example, that another company would choose to buy the project and continue to operate it). We understand DOE used this approach to assess the value of recoveries post-restructuring.
  - Bad Scenario: It is, however, possible that even after the restructuring, that default could result in a liquidation (e.g. even though the facility is completely built and rights to IP are part of the asset package, no one wants to buy it because the product remains uncompetitive at the prices necessary to make it profitable).
  - DOE may choose to model additional scenarios to reach its expected value.
- Preliminary analysis on our end suggests that the Expected Value of recovery scenarios post-restructuring may be lower than the liquidation value of the project prior to restructuring. That conclusion suggests to us that this is not a work-out.

Footnote 625, 628

[redacted]

From: Colyar, Kelly T.
Sent: Friday, January 07, 2011 5:22 PM
To: [redacted]
Subject: Fw: Solyndra

Fyi--doesn't accepting DOE's market value mean the liquidation value is closer to around $87M (60M + 10 percent scrap value on equipment of 275M).

From: Nwachuku, Frances [redacted]
To: Colyar, Kelly T.
Sent: Fri Jan 07 17:11:48 2011
Subject: RE: Solyndra

Hi Kelly,

Just wanted to touch base with you and to ensure that you got what you need from me vis a vis the liquidation analysis. To recap:

The $60 million value for FAB 2 (and you are right, the actual all-in cost is in the neighborhood of $220 million, excluding allocation for contingency that was barely utilized but allocated for other eligible project costs) refers to the aggregate of the value of the land plus the estimated value of the building in the context of current market value of similar structures in Silicon value. Information from a commercial real estate professional contacted by the DOE indicates that prices range from $80 - $100/sq.ft. It was also indicated that a facility could command a higher price if it was well located and met, for the most part, the needs of the acquirer. We have placed the FAB 2 facility at the higher end and assumed a mid-value of $100/sq.ft and $125/sq.ft. on the higher side. That would suggest a value from the building between $30 -$38 million.

Do you have a sense for when you will be done with the determination as to classification of the restructuring? We are pushing against the Monday funding and are incentivized to paper the deal to ensure a higher recovery should things not work out as anticipated. I am available to discuss. Thanks

Frances

Frances I. Nwachuku
Director
Portfolio Management
Loan Guarantee Program Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

[redacted]

From: Colyar, Kelly T. [redacted]
Sent: Thursday, January 06, 2011 2:35 PM

To: Richardson, Susan; [redacted] Nwachuku, Frances; Aitken, Steven D.
Subject: RE: Solyndra

Susan [redacted]

Thanks again for the call earlier this week. 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?

Also, could you send over the legal definition of 'workout' that DOE is using in this analysis?

Thanks again.

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 1:14 PM
To: Colyar, Kelly T.; [redacted]
Subject: RE: Solyndra

I would strongly prefer to keep this as small a group as possible. I thought this would be an informal discussion with you.

From: Colyar, Kelly T. [redacted]
Sent: Tuesday, January 04, 2011 1:07 PM
To: Richardson, Susan [redacted]
Subject: RE: Solyndra

2:30 it is. We can use the dial in number below. Our GC folks will be joining (Steve and Bill). UST may also join since they have been in previous discussions.

[redacted]

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 12:41 PM
To: [redacted] Colyar, Kelly T.
Subject: RE: Solyndra

Kelly, We will call your office at 2:30

From: [redacted]
Sent: Tuesday, January 04, 2011 12:41 PM
To: Richardson, Susan; 'Colyar, Kelly T.'
Subject: RE: Solyndra

Works for me

[redacted]
Loan Guarantee Program
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585
[redacted]

[redacted]

From: Richardson, Susan
Sent: Tuesday, January 04, 2011 12:41 PM
To: 'Colyar, Kelly T.'
Cc: [redacted]
Subject: RE: Solyndra

Ok by me -[redacted]

From: Colyar, Kelly T. [redacted]
Sent: Tuesday, January 04, 2011 12:13 PM
To: Richardson, Susan
Cc: [redacted]
Subject: RE: Solyndra

Could we do 2:30 instead?

From: Richardson, Susan [redacted]
Sent: Tuesday, January 04, 2011 12:07 PM
To: Colyar, Kelly T.
Cc: [redacted]
Subject: RE: Solyndra

Kelly, Would you be available to speak to [redacted]nd me at 3 PM today? Thnx

From: Colyar, Kelly T. [redacted]
Sent: Monday, January 03, 2011 11:00 PM
To: Richardson, Susan
Subject: Re: Solyndra

Thanks. And to clarify my question on the IP the Term Sheet includes all IP, Intangibles, and Goodwill in the collateral package. Was this changed in the final documentation or were there changes at a later point? I'm confused as to how DOE did not have the IP given the Term Sheet language.

From: Richardson, Susan [redacted]
To: Colyar, Kelly T.
Sent: Mon Jan 03 22:42:33 2011
Subject: Re: Solyndra

Kelly, I will get back to you tomorrow. Susan

From: Colyar, Kelly T. [redacted]
To: Nwachuku, Frances; Richardson, Susan
Cc: Aitken, Steven D. [redacted] Richardson, William [redacted]
Carroll, Kevin; Mertens, Richard A. [redacted]; Saad, Fouad P.
[redacted]
Sent: Mon Jan 03 21:24:45 2011
Subject: RE: Solyndra

Susan,

I understand Frances is out today. I also believe you'll be looking at some, if not all, of these questions so I wanted to go ahead and forward this over to you. We are trying to work through the proposed Solyndra restructuring and had a few clarifying questions (see email and additions below). Could you take a look? I understand DOE wants to execute the revised loan agreement January 10, so your assistance in getting back to us quickly is appreciated.

Thanks again for your help. Let me know if you have any questions.

In addition to the email below:

1. What is the DOE approval process for changes to loan agreements (i.e., who approves such changes)? Was there a Credit Committee or Credit Review Board to review the proposal? Who ultimately is authorizing the revisions? Is there an associated action memo? Although we have a good sense of the approval process for new loans, we are not clear on the approval process for changes to those loans.
2. Why was the January 10 date selected for executing the revised loan documents? Are there implications if these changes are postponed?

From: Colyar, Kelly T.
Sent: Monday, January 03, 2011 12:37 PM
To: Nwachuku, Frances
Subject: Solyndra

Frances,

Happy New Year! I wanted to follow up on a couple of questions related to the proposed Solyndra revisions.

1) Has DOE counsel opined on whether the proposal conforms with 1702 d(3) of the authorizing statute? I've provided the language below for reference. Could you send me DOE counsel's opinion on this question so that we can follow up with our folks?

    (3) SUBORDINATION.—The obligation shall be subject to the condition that the obligation is not subordinate to other financing.

2) Also, since the Term Sheet explicitly included all intellectual property, licenses, general intangibles and goodwill in the collateral package (item 20.), I was somewhat confused as to how the IP was pledged to another investor. At what point was that lien entered into? Was DOE aware of that lien prior to closing? Also, how does this conform with 1702 C ii of the statute:

    (C) TERMS AND CONDITIONS.—A guarantee agreement shall include such detailed terms and conditions as the Secretary determines appropriate to—
    (i) protect the interests of the United States in the case of default; and
    (ii) [redacted]

Footnote 629

Outlook E-mail

From: [redacted]
Sent: 1/3/2011 6:44:26 PM
To: [redacted]
Subject: FW: Solyndra

See Kelly's email (below)

[redacted]
Loan Guarantee Program
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585
[redacted]

From: Nwachuku, Frances
Sent: Monday, January 03, 2011 12:54 PM
To: [redacted]
Subject: Fw: Solyndra

[redacted]

Can we discuss later today or tomorrow.

Frances

From: Colyar, Kelly T. [redacted]
To: Nwachuku, Frances
Sent: Mon Jan 03 12:07:23 2011
Subject: Solyndra

Frances,

Happy New Year! I wanted to follow up on a couple of questions related to the proposed Solyndra revisions.

1) Has DOE counsel opined on whether the proposal conforms with 1702 d(3) of the authorizing statute? I've provided the language below for reference. Could you send me DOE counsel's opinion on this question so that we can follow up with our folks?

    (3) SUBORDINATION.–The obligation shall be subject to the condition that the obligation is not subordinate to other financing.

2) Also, since the Term Sheet explicitly included all intellectual property, licenses, general intangibles and goodwill in the collateral package (item 20.v), I was somewhat confused as to how the IP was pledged to another investor. At what point was that lien entered into? Was DOE aware of that lien prior to closing? Also, how does this conform with 1702 C ii of the statute:

    (C) TERMS AND CONDITIONS.—A guarantee agreement
    shall include such detailed terms and conditions as the
    Secretary determines appropriate to—
    (i) protect the interests of the United States in
    the case of default; and
    (ii) have available all the patents and technology
    necessary for any person selected, including the Secretary,
    to complete and operate the project.

Footnote 630

Call w [redacted]   T 01/04/11

[Had conversation w/ OMB] + SSR

Issue: Gtee not subordinated

Nothing more in lege
Part of statute

Consider statute as a whole
- Focused on origination
- Limitations on terms [at origination]
- Describes foreclosure

Not continuing obligation; would constrain OSG's flexibility to do a workout & thereby increase OSG's exposure

Could drafters have intended this?

Leg History of analogous provisions

A-129 Does apply ...
Gov't's claim shall not be subordinated [§3]

Forbearance
Grace Periods

Reimbursement structurally subordinated

CONFIDENTIAL   MFHR00102

Footnote 631

Call from [redacted].

Th 01/06/11

Briefing at 10^{30} AM Friday ...

Arises in origination context

Anti-subordination lawsuit hold up
BR payment / reimbursement

See A-129 / 53(c) Contractual arrangements
- Commercial point

Footnote 632

Meeting at [redacted] office F 01/07/11

Frances [redacted] / SSR / [redacted]

① Background

SI has big liquidity issue
\$175m from SI investors

Prices are holding up \$2.45/w
Drive it down

No cost overruns
85% completed

8:1 – 12:1 Price/EBITDA

\$180m – \$360m Our estimate
\$500m GS Estimate

UCC OID Note

GE payments (Kim Klein)

E. Figge – Architecture of statute

OMB has requested legal analysis

① Get comfortable
② What is right package

2

FCRA definition of workout

OMB making "determination" whether
it's a modification or workout

OMB circular re: subordination

modification = New Credit Subsidy

Workout =

Footnote 635

[redacted]

From: Carroll, J. Kevin
Sent: Tuesday, January 11, 2011 4:44 PM
To: [redacted]; Colyar, Kelly T.; Saad, Fouad P.; [redacted] Mertens, Richard A.
Subject: RE: Solyndra

And that Congress had no intent to govern the program with the statute.

-----Original Message-----
From: [redacted]
Sent: Tuesday, January 11, 2011 4:25 PM
To: Colyar, Kelly T.; Carroll, J. Kevin; Saad, Fouad P.; [redacted] Mertens, Richard A.
Subject: RE: Solyndra

I think that's right.

Question: How do you all feel about DOE's argument that just because subordination is prohibited in the original loan doesn't mean DOE can't do it later, even if it costs money? It seems that basically DOE could modify to allow subordination on any loan, at any time, for any reason, if one were to push this to the extreme.

-----Original Message-----
From: Colyar, Kelly T.
Sent: Tuesday, January 11, 2011 3:55 PM
To: [redacted]; Carroll, J. Kevin; Saad, Fouad P.; [redacted] Mertens, Richard A.
Subject: RE: Solyndra

I think there are a couple of points here:

1. Had 'the company' filed for bankruptcy, it would have been the parent company. DOE's loan is with the project company and as such would be bankruptcy remote. DOE could have taken action under the technical default provisions to avoid a bankruptcy and therefore, DOE's debt would not have been subjected to subordination to new debt at the parent level.
2. The statute and regulations require DOE to consult with DOJ in a payment default. If there was threat of bankruptcy, it might be worth asking DOE if they have consulted with the AG.

-----Original Message-----
From: Richardson, William
Sent: Tuesday, January 11, 2011 3:39 PM
To: Colyar, Kelly T.; Aitken, Steven D.; [redacted] Carroll, J. Kevin; Mas, Alex; Ericsson, Sally C.; Saad, Fouad P.; [redacted] Mertens, Richard A.; [redacted]
Subject: RE: Solyndra

I spoke today to Susan Richardson and [redacted] about the legal basis for a refinancing that includes subordination. They provided the following analysis, which I asked them and they have agreed to provide to us in writing, in the form of a preliminary draft of part of the presentation they plan to provide to the Secretary and OMB. They will also be reaching out to Kelly to provide a revised version of their expected values analysis that addresses the questions she has outlined. I'll circulate a meeting request for sometime tomorrow so we can discuss next steps.

DOE's theory is similar to what we expected, except that it does not (as we had thought) rely on a specific determination that this is a workout scenario under A-11 and FCRA. Based on the present tense language and structure of the provision, they read the no subordination language as applying only at the time DOE makes the original guarantee, and not as a restriction on refinancing down the road that DOE believes is necessary to serve the government's interests. They argue that the provision is set forth in a section relating to the creation of the loan documents, and not in a later section regarding defaults that they believe to govern financial distress down the road. This argument is supported somewhat by a 2009 revision of their regulations in other respects, in which they indicate that the later section relates to the post-closing default scenario while this provision deals with "threshold" requirements at the loan stage. I believe their bottom line position to be that Congress did not clearly and expressly deprive the Secretary of the ability of a guarantor to address financial distress down the road by adopting commercially reasonable methods to protect the interests of the United States in the event of default (a purpose they point out is set forth in the default section). As a demonstration that this is a well recognized situation for agreeing to subordination in order to attract new money, they noted that had the company filed for bankruptcy as it was about to, the bankruptcy laws would have provided for new financing to be entitled to a senior position. (I have asked them for some information on the legislative history of the predecessor provision to this statute, but we don't expect it will shed any some light on the question.)

They agree that we need to understand the answers to Kelly's questions in order to ensure that their analysis is reasonable and their folks will be reaching out to her.

Footnote 639

Call from [redacted] T 01/11/11

Had call w/ OMB DGC

DOE has right to interpret its own statute

[redacted] - Don't say "X" means "Y"

Footnote 640

[redacted]

From: Colyar, Kelly T.
Sent: Tuesday, January 11, 2011 3:43 PM
To: Carroll, J. Kevin; Saad, Fouad P.; [redacted]
Subject: RE: Solyndra

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

-----Original Message-----
From: Richardson, William
Sent: Tuesday, January 11, 2011 3:39 PM
To: Colyar, Kelly T.; Aitken, Steven D.; [redacted]; Carroll, J. Kevin; Mas, Alex; Ericsson, Sally C.; Saad, Fouad P.; [redacted] Mertens, Richard A.; [redacted]
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Footnote 641, 642

[redacted]

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Footnote 643, 646

PRIVILEGED AND CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

[redacted] Initial Draft 01-12-11

[+01-13-11 [redacted] Edits and Comments (in Footnotes)]

S. Richardson DRAFT 1/14/11

Facts:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of ~~the~~ repayment by Solyndra Fab 2, LLC (the "Borrower") of a ~~$535~~ 535 million loan (the "Guaranteed Loan") ~~from~~ made by the Federal Financing Bank ("FFB"). The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic panel fabrication facility (the "Project").

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things~~,~~ ~~(a)~~) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE~~,~~[1] ~~and (b) remedies if Borrower defaults on such reimbursement obligations.~~, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

[Several] [Is this correct? I thought it was only one] events of default relating to financial requirements have occurred under the Loan Guarantee Agreement~~, although as yet there has been no payment default on the Guaranteed Loan that would require DOE to make Guarantee payments.~~[2] ~~.~~ At the time of occurrence of [those] default[s], $[ ] of the Guaranteed Loan Commitment was still to be advanced. At this writing construction of the Project is [several months] from completion. Absent continued cash infusions (including, but not limited to, continued funding of the Guaranteed Loan), a payment default would have occurred under the Guaranteed Loan, the Project would have remained incomplete and the Borrower likely would have filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

As more fully described in Exhibit A hereto, DOE has carefully considered the circumstances leading to the Borrower's default and all reasonable responses to ~~such~~ the default, including

---

1 ~~These contractual reimbursement obligations are in addition to DOE's subrogation rights under applicable law.~~

2 ~~Fe [redacted] Not sure if you want to be this precise, but this is more technically correct. It also shows that DOE is dealing with the problem early.~~

foreclosure on the collateral ~~securing the~~that secures Borrower's ~~reimbursement~~ obligations under the Loan Guarantee Agreement. Based on that analysis, DOE has determined that a restructuring of the Borrower's ~~reimbursement~~ obligations to DOE~~, in order~~ under the Loan Guarantee Agreement, designed to enable the Borrower to obtain additional third-party indebtedness that will fund (in part) completion of the Project and provide working capital to the Borrower (together, the "Restructuring"), will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's loss on the Guaranteed Loan.

The Restructuring contains the following elements:[3]

(a) all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

(b) the Borrower will ~~issue~~obtain additional funding under a $75 million note ("~~Tranche~~ Tranche A") issued to third party lenders, and will issue a $175 million note ("~~Tranche~~ Tranche E") to certain third-party lenders (that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) the Borrower's existing $~~535~~ 535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("~~Tranche~~ Tranche B") and a $385 million reimbursement obligation ("~~Tranche~~ Tranche D");

(d) the Borrower ~~has~~will have the right to borrow an additional $75 million ("~~Tranche~~ Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien priority and payment priority, except that, for the first 2 years after closing of the restructuring ~~closing Tranche~~, Tranche A will have payment priority from the proceeds of a realization upon the collateral securing the Borrower's payment obligations ~~under Tranches A, B and C~~;

(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities on a *pari passu* basis in lien priority and payment priority; and

(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring ~~(i)~~ for the first two years following closing of the restructuring, the Borrower's reimbursement obligations to DOE for ~~Tranches~~ Tranches B and D

---

[3] ~~For~~ [redacted] ~~Do you want to attach the diagram?~~

~~($535 million principal amount)~~ will be subordinated in payment priority to the Borrower's obligations to the Third-Party Lenders for ~~Tranche~~ Tranche A ~~during the first two years~~($75 million principal amount), and (ii) the Borrower's reimbursement obligations to DOE for ~~Tranche~~ Tranche D ($385 million principal amount) will be subordinated in lien and payment priority to the Borrower's obligations to the Third-Party Lenders for ~~Tranches~~ Tranches A and C ~~at all times~~($150 million principal amount) until repayment in full.

Issue:

Whether ~~DOE's~~ the proposed subordination of certain of the Borrower's reimbursement obligations to ~~the Borrower's payment obligations to the Third Party Lenders violates Section~~DOE is consistent with Subsection 1702(d)(3) of Title XVII~~, which~~. Subsection 1702(d)(3) provides ~~"The~~that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

~~Conclusion:~~

Short Answer:

The proposed restructuring is ~~not prohibited~~permitted under Title XVII ~~because the~~. The subordination condition contained in ~~Section~~Subsection 1702(d)(3) is, by its terms, applicable only when ~~the Guarantee~~a guarantee is issued ~~and is not a continuing obligation that must be satisfied at all times until the guaranteed loan has been satisfied in full~~. It is not a continuing obligation or restriction on the authority of the Secretary, and subordination in the context of the proposed restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

Analysis:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to ~~establish a loan guarantee program to~~ make loan guarantees for specified categories of energy projects ~~that (a) avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and (b) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued. As the authorizing legislation for a loan guarantee program, Title XVII outlines the components that would logically apply to a loan guarantee program. In particular~~[4]

- ~~Section 1701 of Title XVII defines certain terms essential to the reading of Title XVII,~~

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[4] ~~For~~ [redacted] ~~I don't know how you feel about bullet points generally, but here I think they really help the reader.~~

~~1. Section 1702(b), entitled "Specific Appropriation or Contribution", provides that a loan guarantee may not be made until an appropriation for the cost of the loan guarantee has been made or the borrower has paid the credit subsidy cost. This clause ensures that the loan guarantee program be a "self-paid" program.~~

~~2. Section 1702(c), entitled "Amount", provides that the guaranteed loan cannot be in excess of 80% of the cost of the project. As is typical in lending situations, lenders limit the amount of debt that can placed on a project to ensure that the debt will be able to be recovered upon a realization of the collateral.~~

~~3.~~ Section 1702(d~~), entitled "~~) (Repayment~~",~~) has three subparts~~. Section 1701(d)(1), entitled "In General" provides that "No guarantee *shall be made* unless the Secretary determines that there is~~, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the ~~principal and interest on the obligation by the borrower." Section 1702(d)(2), entitled "Amount", provides "No guarantee *shall be made* unless the Secretary determines~~loan; that the ~~amount of the obligation (when combined with amounts~~aggregate available ~~to the Borrower from other sources) will be~~ funding is sufficient to ~~carry out the project. Section 1702(d)(3), entitled "Subordination", provides that "The obligation shall be subject to the condition that the~~ achieve project completion; and that the guaranteed obligation is not subordinate to other financing~~"~~.

~~4. Section 1702(e), entitled "Interest Rate", provides that the obligation shall be bear interest that is appropriate and is "market". Such a provision ensures that the project is not burdened by an excessive rate of interest that would increase the likelihood that the borrower would default on the guaranteed loan.~~

~~5. Section 1702(f), entitled "Term", provides that term of the guaranteed loan shall not exceed the lesser of 30 years or 90% of the projected useful life. Such a requirement ensures that the collateral securing the loan has value after the scheduled repayment of the loan which minimizes the risk that the project will not be abandoned prior to the repayment of the loan and also increases the probability that debt will be recovered upon a realization on the collateral.~~

~~Taken together, Section 1702(b) – (f) contain threshold requirements that must be met before a loan guarantee may be made. These requirements are designed to minimize the probability of default for any loan guaranteed, and if a default does occur to maximize the probability that the debt will be satisfied from the proceeds from a foreclosure on the collateral.~~

The requirements of these subsections reflect a Congressional intent that the loan be structured at the outset to maximize the probability that the project will reach completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1703(g) addresses events and circumstances that may occur after loan origination, setting out the ~~rights~~authority and obligations of DOE and the holder upon a default of the guaranteed loan. ~~Included in DOE's rights are:~~

~~(1) the right to forbear from exercise of remedies after a default~~ Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C~~));~~

~~(2)~~)) to the ~~right of DOE~~authority, after ~~a~~ payment under the loan guarantee ~~to allow the borrower, pursuant to an agreement with DOE,~~, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if ~~it~~ that is in the public interest (Section 1702(g)(2)(A~~)(ii)), and~~

~~(3) the right to enter into reimbursement agreements with the borrower (i.e., workouts of loans) if (a) the borrower cannot make principal and interest payments under the guaranteed obligation, the borrower is not otherwise in default, and the probable net benefit to the government of the restructuring is greater than that which would result in the event of a default (i.e., foreclosure on the collateral), and (b) the payments under the loan guarantee are not in excess of the payments due under the guaranteed loan (i.e., payment under the loan guarantee satisfies the requirement) (Section 1703(g)(3)(C)).~~

~~The foregoing provisions effectively permit DOE to pay scheduled principal and interest under the guaranteed loan pursuant to the loan guarantee and to amend any reimbursement agreement that was entered into with a borrower at the issuance of the loan guarantee~~)).

The Subordination Restriction in Section 1702(d)(3) Is Not a Continuing Obligation

~~As noted above, Section~~Subsection 1702(d)(3) provides~~: "The~~ that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

~~While the non-subordination provision of Section 1702(d)(3) clearly applies at the time of the issuance of the loan guarantee, such section~~[6] ~~does not require that the guaranteed loan~~ remain ~~not subordinate to other financings at all times for the following reasons:~~

~~First, as discussed above, the clause is contained in those provisions of Section 1702 that relate to the origination of the guaranteed loan.~~ Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. Moreover, we do not believe it can reasonably be read either as a requirement that the guaranteed loan may never be subordinated, or as a restriction on

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[6] ~~For [redacted] Do you want to use language here (and throughout) such as "as reasonable reading of this Section does not require . . ."?~~

the authority of the Secretary following the issuance of a loan. Almost without exception, commercial loans are subject to conditions precedent that must be satisfied prior to the advancement of funds by the lender. ~~Accordingly,~~ By its plain meaning, and in the context of customary commercial practice, the word "condition" can logically be read to mean a condition to the making of the guaranteed loan. ~~Assuming that such is the case, the use of "is" must mean that the condition must be satisfied at the time of the making of the guaranteed loan. Under basic contract law a condition is met once it is satisfied, as distinct from a covenant that is an ongoing obligation.~~ It is axiomatic in the context of commercial loan agreements that once a condition precedent has been satisfied (or waived), it has no continuing legal effect. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[7]

~~[Interestingly, the "no subordination" language in Section 1702(d)(3) differs from similar language in Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities". Section 19(c)(4) of such act contains the following language regarding subordination: "(c) The Administrator, with due regard to the need for competition, shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." The difference in the language is significant in that "not be subordinated" to other financing implies a continuing covenant, whereas the Section 1702(d)(3) "condition that the obligation is not subordinate" language indicates that the non-subordination condition is only to be satisfied at issuance of the guaranteed loan.[8,9]]~~

~~Second, a continuing prohibition on subordination would practically eliminate the ability of a borrower to obtain a restructuring loan of the type that is typically made to financially distressed borrowers to~~

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7 It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator...shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language to have the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, we believe that the change to "is not subordinate" suggests an intent to clarify the operation of the language in a manner that reinforces our reading.

~~8 We do note that the language in Section 19(c)(4), because it does not say "shall", does not necessarily operate as a covenant.~~

~~9 For [redacted] Recommend ommiting. As both 19(c)(4) and 1702(d)(3) use the phrase "subject to the condition", the argument that 19(c)(4) implies a covenant may undermine the more important point in the previous paragraph as to subordination being a condition precedent.~~

~~provide them with funds necessary to recover.~~ In addition to the plain meaning of the words, and their placement, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit terms and conditions that must be satisfied in connection with the issuance of a guarantee, the statute gives the Secretary broad authority to determine the terms of loan guarantees. In addition to rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. [The statute also affirmatively requires that the loan guarantee agreement contain "such detailed terms and conditions as the Secretary determines appropriate to protect the United States in a default". In contrast to Subsection 1702(d)(3), by reason of both of its placement in the Statute and its use of the word "shall," subsection 1702(g)(2)(C) likely does have continuing effect in the context of an amendment to a loan guarantee agreement – and, in this instance, in light of the financial reality, argues in favor of permitting subordination.]

A continuing prohibition on subordination would, in our view, be inconsistent with the statutory scheme, as it would preclude the use of a common restructuring strategy for a financially distressed borrower that requires additional capital. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms, so a restructuring loan is the typical source of funding for such a company. A fundamental principle of ~~such~~ restructuring loans is that they have payment and lien priority over existing loans~~, and restructuring~~ – without such priority, few, if any, lenders would ~~not make such loans unless they were comfortable that the loan would be repaid either by the borrower or from the proceeds upon a realization of the collateral securing the loan (and hence the payment and lien priority requirement). Accordingly, a continuing non-subordination obligation would preclude the use of such a financing as a tool to minimize the federal government's recovery on a defaulted loan.~~

~~[Third, a continuing non-subordination obligation would result in Section 1702(d)(3) being in conflict with the Bankruptcy Code.~~[10] ~~Under the Bankruptcy Code, the bankruptcy court has the authority to approve debtor-in-possession financing over the objections of secured creditors (and as with a restructuring loan, a debtor-in-possession lender would not~~ be willing to ~~make~~extend a loan~~ to a bankrupt entity unless such lender was assured that it had payment and lien priority over the existing creditors). Therefore, if the non-subordination provision of Section 1702(d)(3) were a continuing obligation, then it would be in conflict with the powers granted to the bankruptcy courts under the Bankruptcy Code.]~~. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is faced with a choice of providing an additional loan, subordinating to a lender that provides the needed capital or proceeding either to foreclosure or a Chapter 11 filing.[11]

~~10 For [redacted] This argument is weak enough to omit. The existence of a right to do something under the Bankruptcy Code does not imply a conflict with a prohibition in Title XVII. Many laws preclude the exercise of rights granted by other laws.~~

11 [In contrast to the consensual restructuring proposed in this matter, the Bankruptcy Court has authority, under Chapter 11 of the Bankruptcy Code, to grant lenders providing "debtor-in-possession"

~~Fourth, a continuing non-subordination obligation has the potential to result in the federal government's inability to minimize its loss on a guaranteed loan, because it will preclude the defaulted borrower's ability to obtain a restructuring or debtor-in-possession loan that is by its nature designed to assist the defaulted borrower in its repayment of existing loans. Indeed Title XVII expressly contemplates that DOE may enter into restructuring agreements if the borrower cannot make principal and interest payments under the guaranteed obligation, the borrower is not otherwise in default, and the probable net benefit to the government of the restructuring is greater than that which would result in the event of default. (Section 1702(g)(3)(C)). Given that Title XVII authorized the establishment by DOE of a loan guarantee program, acknowledges that loan defaults do occur, and contemplates that DOE has the ability to amend its reimbursement agreement with the borrower so long as the net benefit to the government of the restructuring is greater than a foreclosure on the collateral, the elimination of an essential tool in the minimization of lender losses is inconsistent with the purpose of Title XVII.~~

~~*Other Policy Considerations*~~

~~DOE's ability to restructure the borrower's reimbursement obligations and to subordinate such reimbursement obligations to other financing is not without limitation, and is subject to several constraints.~~

~~The first constraint is imposed by Section 1702(g)(3)(C) and which has been discussed above. The second constraint is imposed by Section 609.18 of the regulations implementing Title XVII, which implements the requirement under the Federal Credit Reform Act of 1990 that requires the payment of additional fees if the credit subsidy cost is altered as a result of a modification to the terms of a reimbursement agree. More specifically, Section 609.18, requires that (a) DOE consult with OMB and the Secretary of the Treasury before DOE grants any deviation that would constitute a material change in the financial terms of the reimbursement agreement between DOE and the borrower, and other related agreements, and (b) if such deviation were not captured in the credit subsidy cost, that additional fees or discretionary appropriations be made to reflect such deviation. In the case where the borrower is required to pay such fees, then the mere expenditure would limit the requests for modifications of the terms of the reimbursement agreement. In the case where DOE pays for such fees from discretionary appropriations, then budgetary constraints on DOE would limit its ability to modify existing reimbursement agreements. In any case where the borrower's reimbursement obligation to DOE is subordinated to other financing, it is reasonable to assume that a cost would be payable as a result of the probability of a lower realization upon such collateral.~~

Conclusion.

On the current facts, the Director of Monitoring has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the borrower's obligations under the loan guarantee agreement, and is demonstrably preferable to a liquidation of the borrower. The supporting financial analysis is set forth in Exhibit A to this

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financing to a company that has filed under Chapter 11, "super" priority status, including, subject to certain requirements, priorit over secured creditors. [cite].]

memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, we believe that a refusal to amend the loan guarantee agreement to effect the proposed subordination, which likely would have lead to a Chapter 11 filing by the Borrower, would have been inconsistent with [both the specific mandate of Section 1702(g)(2)(C)(i) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and] the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, in addition to protecting the financial interests of the United States, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and will avert the loss of jobs that otherwise would occur.[12]

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[12] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to delineate that point rigidly in this memorandum, based on a single set of facts. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

Footnote 644

[redacted]

From: [redacted]
Sent: [redacted] 13, 2011 11:50 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Subrogation Memo
Attachments: WS_BinaryComparison_WASHINGTON DC-#627884-v2-Title_XVII_Memo_KCC_01-13-11-WASHINGTON DC-#627884-v3-Title_XVII_Memo_KCC_01-13-11.doc

OK, and here's a comment from [redacted]

Regards,
[redacted]

[redacted]
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W. Suite 6000
Washington, D.C. 20006
[redacted]

From: [redacted]
Sent: [redacted] 13, 2011 11:41 AM
To: [redacted]
Subject: Subrogation Memo

[redacted] redline to the prior version of the memo attached. The only substantive comment I have is in the 19(c)(4) discussion. This reads as a bit tortured so I added a note for [redacted] to consider deleting. Otherwise, I think it makes the best case possible based on a reasonable interpretation supported by the restructuring policy arguments.

[redacted]

The following files have been attached to this mail by Workshare Professional...

WS_BinaryComparison_WASHINGTON DC-#627884-v2-Title_XVII_Memo_KCC_01-13-11-WASHINGTON DC-#627884-v3-Title_XVII_Memo_KCC_01-13-11.doc (Word Document)

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party any transaction or matter addressed herein.

For information about this legend, go to
http://www.mofo.com/Circular230/

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Footnote 646

Outlook E-mail

From: [redacted]
Sent: 1/15/2011 4:33:30 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Solyndra/Subordination Analysis
Attachments Solyndra Memo_SSR_01-13-11.doc

Hi [redacted] -- See Susan's question about the bankruptcy footnote. Could you look at it and reply directly to her. Thanks.

Regards,
[redacted]

[redacted]
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W. Suite 6000
[redacted]

-----Original Message-----
From: Richardson, Susan [redacted]
Sent: [redacted]
To: [redacted]
Cc: [redacted]
Subject: Solyndra/Subordination Analysis

[redacted]

In the interest of time (and with apologies to [redacted] for not giving him first crack), I am attaching for your review my revised draft of [redacted] very helpful draft of the statutory analysis.

Note that we have tentatively committed to send this (along with Frances's financial analysis) to OMB by COB Wednesday.

[redacted] I leave it to you whether you want to have [redacted] and/or Scott review this. Clearly Scott will need to do so eventually, and I assume it is best if he sees it before it goes to OMB (but after incorporation of comments from this group). Also, I welcome views on whether it should go to OMB as a draft.

[redacted] There is a footnote re bankruptcy that may or may not add much (my point is that we can do this consensually, or it can be done to us in Chapter 11). But assuming it stays in, I would be grateful if you would have an expert vet it.

Have a great weekend ([redacted] I hope the skiing was good and that everyone remained in one piece!)

Cheers, susan

PS I will most likely keep tinkering with this over the weekend - so feel free to send me any thoughts or comments as you have them. Thnx

Susan S Richardson
Chief Counsel, Office of Loan Programs
U.S. Department of Energy
[redacted]

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

PRIVILEGED AND CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE; CONTAINS BUSINESS CONFIDENTIAL INFORMATION

DRAFT 1/14/11

Facts:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank ("FFB"). The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic panel fabrication facility (the "Project").

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

[Several] [is this correct? I thought it was only one] events of default relating to financial requirements have occurred under the Loan Guarantee Agreement. At the time of occurrence of [those] default[s], $[ ] of the Guaranteed Loan Commitment was still to be advanced. At this writing construction of the Project is [several months] from completion. Absent continued cash infusions (including, but not limited to, continued funding of the Guaranteed Loan), a payment default would have occurred under the Guaranteed Loan, the Project would have remained incomplete and the Borrower likely would have filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

As more fully described in Exhibit A hereto, DOE has carefully considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on the collateral that secures Borrower's obligations under the Loan Guarantee Agreement. Based on that analysis, DOE has determined that a restructuring of the Borrower's obligations to DOE under the Loan Guarantee Agreement, designed to enable the Borrower to obtain additional third-party indebtedness that will fund (in part) completion of the Project and provide working capital to the Borrower (together, the "Restructuring"), will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's loss on the Guaranteed Loan.

The Restructuring contains the following elements:

(a) all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

(b) the Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) the Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) the Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "<u>Senior Facilities</u>"), will constitute senior secured facilities on a *pari passu* basis in lien priority and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A will have payment priority from the proceeds of a realization upon the collateral securing the Borrower's payment obligations;

(f) Tranches D and E (the "<u>Subordinate Facilities</u>") will constitute subordinate secured facilities on a *pari passu* basis in lien priority and payment priority; and

(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring (i) for the first two years following closing of the restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount), and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in lien and payment priority to the Borrower's obligations to the Third-Party Lenders for Tranches A and C ($150 million principal amount) until repayment in full.

<u>**Issue**</u>:

Whether the proposed subordination of certain of the Borrower's reimbursement obligations to DOE is consistent with Subsection 1702(d)(3) of Title XVII. Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

<u>**Short Answer**</u>:

The proposed restructuring is permitted under Title XVII. The subordination condition contained in Subsection 1702(d)(3) is, by its terms, applicable only when a guarantee is issued. It is not a continuing obligation or restriction on the authority of the Secretary, and subordination in the context of the proposed restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

Analysis:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to make loan guarantees for specified categories of energy projects in accordance with Section 1702 (Terms and Conditions). As set forth in the Preamble to the original Final Rule issued under Title XVII, one of the principal goals of the guarantee program authorized by Section 1703 of Title XVII is to encourage the commercial use in the United states of new or significantly improved energy-related technologies. (See "Summary".) One of the principal goals of the American Reinvestment and Recovery Act of 2009, [cite], which added Section 1705 to Title XVII, is to preserve and create jobs and promote economic recovery. [Section 3(a)(1).]

The Guarantee qualified under both Sections 1705 and 1703. It was issued under Section 1705, but the Borrower was required, as a matter of policy and by contract, to comply with Section 1703 and the Final Rule. So the policies of both 1703 and 1705 are implicated by the Guarantee transaction.

Section 1702

In setting out the terms and conditions for loan guarantees, Section 1702 is organized to reflect the life cycle of loan guarantees, from origination to default to foreclosure on collateral. More particularly, Section 1702 is subdivided roughly as follows:

- Subsections 1702(b) – (f) set forth threshold requirements for the issuance of loan guarantees;
- Subsection 1702(g) sets forth the rights and obligations of DOE and the holder of a guaranteed loan in the event of default (including a provision that requires the guarantee agreement to include provisions the Secretary determines are necessary to protect the interests of the United States in the case of default); and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of loan guarantees.

Section 1702(b) – (f) - Loan Origination Provisions

As indicated above, Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue here, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term) describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan; that the aggregate available funding is sufficient to achieve project completion; and that the guaranteed obligation is not subordinate to other financing.

The requirements of these subsections reflect a Congressional intent that the loan be structured at the outset to maximize the probability that the project will reach completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1703(g) addresses events and circumstances that may occur after loan origination, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

The Subordination Restriction in Section 1702(d)(3) Is Not a Continuing Obligation

Subsection 1702(d)(3) provides that"[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing" .

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. Moreover, we do not believe it can reasonably be read either as 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. Almost without exception, commercial loans are subject to conditions precedent that must be satisfied prior to the advance of funds by the lender. By its plain meaning, and in the context of customary commercial practice, the word "condition" can logically be read to mean a condition to the making of the guaranteed loan. It is axiomatic in the context of commercial loan agreements that once a condition precedent has been satisfied (or waived), it has no continuing legal effect. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[1]

In addition to the plain meaning of the words, and their placement, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit terms and

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[1] It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator...shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language to have the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, we believe that the change to "is not subordinate" suggests an intent to clarify the operation of the language in a manner that reinforces our reading.

conditions that must be satisfied in connection with the issuance of a guarantee, the statute gives the Secretary broad authority to determine the terms of loan guarantees, in addition to rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. [The statute also affirmatively requires that the loan guarantee agreement contain "such detailed terms and conditions as the Secretary determines appropriate to protect the United States in a default". In contrast to Subsection 1702(d)(3), by reason of both of its placement in the Statute and its use of the word "shall," subsection 1702(g)(2)(C) likely does have continuing effect in the context of an amendment to a loan guarantee agreement – and, in this instance, in light of the financial reality, argues in favor of permitting subordination.]

A continuing prohibition on subordination would, in our view, be inconsistent with the statutory scheme, as it would preclude the use of a common restructuring strategy for a financially distressed borrower that requires additional capital. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms, so a restructuring loan is the typical source of funding for such a company. A fundamental principle of restructuring loans is that they have payment and lien priority over existing loans – without such priority, few, if any, lenders would be willing to extend a loan. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is faced with a choice of providing an additional loan, subordinating to a lender that provides the needed capital or proceeding either to foreclosure or a Chapter 11 filing. [2]

<u>Conclusion</u>.

On the current facts, the Director of Monitoring has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the borrower's obligations under the loan guarantee agreement, and is demonstrably preferable to a liquidation of the borrower. The supporting financial analysis is set forth in Exhibit A to this memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, we believe that a refusal to amend the loan guarantee agreement to effect the proposed subordination, which likely would have lead to a Chapter 11 filing by the Borrower, would have been inconsistent with [both the specific mandate of Section 1702(g)(2)(C)(i) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and] the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, in addition to protecting the financial interests of the United States, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed restructuring furthers the statutory policies of promoting the

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[2][In contrast to the consensual restructuring proposed in this matter, the Bankrutcy Court has authority, under Chapter 11 of the Bankruptcy Code, to grant lenders providing "debtor-in-posession" financing to a company that has filed under Chapter 11, "super" priority status, including, subject to certain requirements, priorit over secured creditors. [cite].]

commercialization of innovative energy technologies and will avert the loss of jobs that otherwise would occur.[3]

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[3] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to delineate that point rigidly in this memorandum, based on a single set of facts. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

Outlook E-mail

From: Richardson, Susan
Sent: 1/18/2011 3:46:58 PM
To: [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

My instinct is that something that bare bones will not go over well at OMB, particularly as the OMB lawyers have already expressed some skepticism about the pure statutory analysis; and have expressly asked that we take into account policy considerations and the specific context of the Solyndra facts. That said, I will give some thought to moving towards less detail; but I would very much appreciate [redacted] view on the subject, before I spend too much time on it.

-----Original Message-----
From: [redacted]
Sent: Tuesday, January 18, 2011 2:45 PM
To: Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

The only way to provide less detail is to provide really less detail. To do that would mean: 1. make bold face statements that the statute addresses the process for making and administering loans separately; 2. Make clear that we are in this instance faced with a question of what happens if there is an event of default. This puts us in 1702(g); and 3. Say that 1702(g)(2) is not be read in isolation. Rather, in context, 1702(g) as a whole is meant to provide the Secretary with sufficient authority and flexibility to protect the interests of the US. I am not opposed to less detail.

-----Original Message-----
From: Richardson, Susan
Sent: Tuesday, January 18, 2011 2:31 PM
To: [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

Thanks [redacted] Do you think there is too much detail?

-----Original Message-----
From: [redacted]
Sent: Tuesday, January 18, 2011 2:25 PM
To: Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

On the theory that less is more in this context, I wouldn't go into any greater detail than is currently in the memo. I did find two typos, that I fixed in the attached version.

-----Original Message-----
From: Richardson, Susan
Sent: Tuesday, January 18, 2011 12:58 PM
To: Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

Colleagues, I have comments from [redacted] If possible, I will appreciate receiving additional comments by COB today. I will also entertain motions for a meeting if anyone thinks it useful - otherwise, I will assess whether further discussion is needed based on the comments. Thanks for everyone's help. Cheers, S

-----Original Message-----
From: Richardson, Susan
Sent: Tuesday, January 18, 2011 9:44 AM
To: Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra/Subordination Analysis

In case you had the good sense to wait until today to face this, please review the attached, which is marked to show a few clean up changes. Rgds, susan

-----Original Message-----

From: Richardson, Susan
Sent: Friday, January 14, 2011 6:52 PM
To: [redacted]
Cc: Nwachuku, Frances
Subject: Solyndra/Subordination Analysis

[redacted]

In the interest of time (and with apologies to [redacted] for not giving him first crack), I am attaching for your review my revised draft of [redacted]s very helpful draft of the statutory analysis.

Note that we have tentatively committed to send this (along with Frances's financial analysis) to OMB by COB Wednesday.

[redacted] I leave it to you whether you want to have [redacted] and/or Scott review this. Clearly Scott will need to do so eventually, and I assume it is best if he sees it before it goes to OMB (but after incorporation of comments from this group). Also, I welcome views on whether it should go to OMB as a draft.

[redacted] There is a footnote re bankruptcy that may or may not add much (my point is that we can do this consensually, or it can be done to us in Chapter 11). But assuming it stays in, I would be grateful if you would have an expert vet it.

Have a great weekend [redacted] I hope the skiing was good and that everyone remained in one piece!)

Cheers, susan

PS I will most likely keep tinkering with this over the weekend - so feel free to send me any thoughts or comments as you have them. Thnx

Susan S Richardson
Chief Counsel, Office of Loan Programs
U.S. Department of Energy
[redacted]

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

PRIVILEGED AND CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE; CONTAINS BUSINESS CONFIDENTIAL INFORMATION

DRAFT 1/14/11

Facts:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank. The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic panel fabrication facility located in Freemont California (the "Project").

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The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

[Several] [is this correct? I thought it was only one] events of default relating to financial requirements have occurred under the Loan Guarantee Agreement. At the time of occurrence of [those] default[s], $[ ] of the Guaranteed Loan Commitment was still to be advanced. At this writing, construction of the Project is [several months] from completion. Absent continued cash infusions (including, but not limited to, continued funding of the Guaranteed Loan), a payment default would have occurred under the Guaranteed Loan, the Project would have remained incomplete and the Borrower likely would have filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

As more fully described in Exhibit A hereto, DOE has carefully considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on its collateral. Based on that analysis, DOE has determined that a restructuring of the Borrower's obligations to DOE under the Loan Guarantee Agreement, designed to enable the Borrower to obtain additional third-party indebtedness that will fund (in part) completion of the Project and provide working capital to the Borrower (together, the "Restructuring"), will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's loss on the Guaranteed Loan.

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The Restructuring contains the following elements:

(a) all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

(b) the Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) the Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) the Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A (a new $75 million loan) will have payment priority from the proceeds of a realization (if any) upon the collateral securing the Borrower's payment obligations;

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(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities on a *pari passu* basis in lien and payment priority; and

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(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring (i) for the first two years following closing of the restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount, in aggregate) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount) in a liquidation, and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in lien and payment priority to the Borrower's obligations to the Third-Party Lenders for Tranches A and C ($150 million principal amount in new loans) until repayment in full.

Issue:

Whether the proposed subordination of certain of the Borrower's reimbursement obligations to DOE is consistent with Subsection 1702(d)(3) of Title XVII. Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

Short Answer:

The proposed restructuring is permitted under Title XVII. The subordination condition contained in Subsection 1702(d)(3) is, by its terms, applicable only as a condition precedent to the issuance of a loan guarantee. It is not a continuing obligation or restriction on the authority of the Secretary, and subordination in the context of the proposed restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

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Analysis:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to make loan guarantees for specified categories of energy projects in accordance with Section 1702 (Terms and Conditions). As set forth in the Preamble to the original Final Rule issued under Title XVII, one of the principal goals of the guarantee program authorized by Section 1703 of Title XVII is to encourage the commercial use in the United States of new or significantly improved energy-related technologies. (See "Summary".) One of the principal goals of the American Reinvestment and Recovery Act of 2009, [cite], which added Section 1705 to Title XVII, is to preserve and create jobs and promote economic recovery. [Section 3(a)(1).]

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The Guarantee qualified under both Sections 1705 and 1703. It was issued under Section 1705, but the Borrower was required, as a matter of policy and by contract, to comply with Section 1703 and the Final Rule. The policies of both 1703 and 1705 are furthered by the Guarantee transaction.

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Section 1702

In setting out the terms and conditions for loan guarantees, Section 1702 is organized to reflect the life cycle of loan guarantees, from origination to default to foreclosure on collateral. More particularly, Section 1702 is subdivided roughly as follows:

- Subsections 1702(b) – (f) set forth threshold requirements for the issuance of loan guarantees;
- Subsection 1702(g) sets forth the rights and obligations of DOE and the holders of a guaranteed loan in the event of default (including a provision that requires the guarantee agreement to include provisions the Secretary determines are necessary to protect the interests of the United States in the case of default); and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of loan guarantees.

Section 1702(b) – (f) - Loan Origination Provisions

As indicated above, Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue here, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term)

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describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan; that the aggregate available funding is sufficient to achieve project completion; and that the guaranteed obligation is not subordinate to other financing.

The requirements of these subsections reflect a Congressional intent that the loan be structured at the outset to maximize the probability that the project will reach completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1702(g) addresses events and circumstances that may occur after loan origination, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

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The Subordination Restriction in Section 1702(d)(3) Is Not a Continuing Obligation

Subsection 1702(d)(3) provides that"[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing" .

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. Moreover, we do not believe it can reasonably be read either as 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. Almost without exception, commercial loans are subject to conditions precedent that must be satisfied prior to the advance of funds by the lender. Once such a condition precedent has been satisfied (or waived), it has no continuing legal effect. By its plain meaning, and in the context of customary commercial practice, the word "condition" can logically be read as such a condition precedent to issuance of the guaranteed loan. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[1]

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Deleted: It is axiomatic in the context of commercial loan agreements that once a condition precedent has been satisfied (or waived), it has no continuing legal effect.

[1] It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator...shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to

In addition to the plain meaning of the words, and their placement in the statute, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit terms and conditions that must be satisfied in connection with the issuance of a guarantee, the statute gives the Secretary broad authority to determine the terms and conditions of loan guarantees. It also provides for rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. Emphasizing the importance of Secretarial discretion, the statute affirmatively requires that the loan guarantee agreement contain "such detailed terms and conditions *as the Secretary determines appropriate* to protect the United States in a default.". In contrast to Subsection 1702(d)(3), by reason of both of its placement in the Statute and its use of the word "shall," subsection 1702(g)(2)(C) [likely] does have continuing effect in the context of an amendment to a loan guarantee agreement – and, in this instance, in light of the financial reality, argues in favor of permitting subordination.

A continuing prohibition on subordination would, in our view, be inconsistent with the statutory scheme, as it would preclude the use of a common restructuring strategy for a financially distressed borrower that requires additional capital. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms, so a restructuring loan is the typical source of funding for such a company. A fundamental principle of restructuring loans is that they have payment and lien priority over existing loans – without such priority, few, if any, lenders would be willing to extend a loan. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is faced with a choice of providing an additional loan itself, subordinating to a lender that provides the needed capital and proceeding either to foreclosure or a Chapter 11 filing.[2]

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Conclusion.

On the current facts, the Director of Monitoring has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the borrower's obligations under the

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the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language to have the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, we believe that the change to "is not subordinate" suggests an intent to clarify the language in a manner that reinforces our reading.

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[2] In contrast to the consensual restructuring proposed in this matter, under title 11 of the United States Code (the "Bankruptcy Code"), a Bankruptcy Court has the authority to authorize a debtor under chapter 11 to obtain "debtor-in-posession" financing and to grant the lenders "super" priority administrative claim status, including, subject to certain requirements, a lien senior or equal to an existing lien on property of the debtor's estate. 11 U.S.C.§ 364(d).

Deleted: [In contrast to the consensual restructuring proposed in this matter, the Bankruptcy Court has authority, under Chapter 11 of the Bankruptcy Code, to grant lenders providing "debtor-in-possession" financing to a company that has filed under Chapter 11, "super" priority status, including, subject to certain requirements, priorit over secured creditors. [cite].]

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

Loan Guarantee Agreement, and is demonstrably preferable to a liquidation of the borrower. The supporting financial analysis is set forth in Exhibit A to this memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, we believe that a refusal to amend the loan guarantee agreement to effect the proposed subordination, which likely would have lead to a Chapter 11 filing by the Borrower, would have been inconsistent with both the specific mandate of Section 1702(g)(2)(C)(i) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, in addition to protecting the financial interests of the United States, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and will avert the loss of jobs that otherwise would occur.[3]

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[3] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to delineate that point rigidly in this memorandum, based on a single set of facts. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

Outlook E-mail

From: Richardson, Susan
Sent: 1/19/2011 10:24:18 AM
To: [redacted]
Cc: Nwachuku, Frances
Subject: RE: Solyndra Memo_SSR_01-18-11 RHE Jr edits
Attachments Solyndra Memo_SSR_01-18-11B.doc

Attached is a cumulative set of changes (including the ones I circulated ystdy AM – apologies for technical ineptitude…). This (with any final suggestions from the group) is what I propose to send to OMB. I will put it into formal memo format, but send it as a draft.

[redacted] pls see one question for you on first page, arising from a comment of [redacted]

From: [redacted]
Sent: Tuesday, January 18, 2011 9:13 PM
To: [redacted] Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Subject: Re: Solyndra Memo_SSR_01-18-11 RHE Jr edits

I am not pushing less detail, though I think the less we say now the less likely it is that we get tripped up in our own words later.

From: [redacted]
To: Richardson, Susan; [redacted]
Cc: Nwachuku, Frances
Sent: Tue Jan 18 17:25:16 2011
Subject: FW: Solyndra Memo_SSR_01-18-11 RHE Jr edits

Team,

My edits in blue added to Susan's and [redacted] I think the memo is the right level of detail to support the contemplated action to be taken by the Secretary.

Only need to meet if [redacted] comments are other comments cannot be reconciled, or if [redacted] would like to further discuss the merits of a shorter approach.

[redacted]

[redacted]
Deputy General Counsel for Energy Policy
United States Department of Energy

[redacted]

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

PRIVILEGED AND CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE; CONTAINS BUSINESS CONFIDENTIAL INFORMATION

DRAFT 1/14/11

Facts:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank. The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic panel fabrication facility located in Freemont California (the "Project"). Completion of construction of the Project is scheduled t occur on or about [ ] 2011.

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

A default relating to a financial requirement has occurred under the Loan Guarantee Agreement. At the time of occurrence of that default, $95 million of the Guaranteed Loan Commitment remained to be advanced. As more fully described in Exhibit A hereto, DOE has carefully considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on its collateral. Based on that analysis, DOE has determined that a restructuring of the Borrower's obligations to DOE under the Loan Guarantee Agreement (the "Restructuring"), will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's loss on the Guaranteed Loan. The Restructuring will enable the Borrower to obtain additional third-party indebtedness that will fund (in part) completion of the Project and provide working capital to the Borrower. In light of the financial analysis, and the parties' agreement to negotiate in good faith the definitive Restructuring documentation, DOE has continued to permit advances under the Guaranteed Loan. Absent continued funding of the Guaranteed Loan, the Borrower would have been unable to continue Project construction and would likely have filed for reorganization under Chapter 11 of the Bankruptcy Code.

The Restructuring contains the following elements:

(a) DOE's collateral package will be enhance, as all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

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Deleted: At this writing construction of the Project is [several months] from completion. Absent continued cash infusions (including, but not limited to, continued funding of the Guaranteed Loan), a payment default would have occurred under the Guaranteed Loan, the Project would have remained incomplete and the Borrower likely would have filed for bankruptcy under Chapter 11 of the Bankruptcy Code.¶

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(b) the Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) the Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) the Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A (a new $75 million loan) will have payment priority from the proceeds of a foreclosure (if any) on the collateral securing the Borrower's payment obligations;

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(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities on a *pari passu* basis in lien and payment priority; and

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(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring (i) for the first two years following closing of the restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount, in aggregate) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount) in a liquidation, and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in lien and payment priority to the Borrower's obligations to the Third-Party Lenders for Tranches A and C ($150 million principal amount in new loans) until repayment in full.

Issue:

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Whether the proposed subordination of certain of the Borrower's reimbursement obligations to DOE is consistent with Subsection 1702(d)(3) of Title XVII. Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing" **Short Answer:**

Deleted: ¶

The proposed restructuring is permitted under Title XVII. The subordination condition contained in Subsection 1702(d)(3) is, by its terms, applicable only as a condition precedent to the issuance of a loan guarantee. It is not a continuing obligation or restriction on the authority of the Secretary, and subordination in the context of the proposed restructuring will further the express statutory intent that the Secretary seek to maximize the prospects of repayment of borrowers' obligations (as well as the technology and job preservation goals of Title XVII).

Deleted: when a guarantee is issued

[To be styled as a Memorandum to the Secretary, from Chief Counsel, LPO through GC]

Analysis:

Title XVII

Title XVII of the Energy Policy Act of 2005, as amended, (42 U.S.C. 16511-16514) ("Title XVII") authorizes DOE to make loan guarantees for specified categories of energy projects in accordance with Section 1702 (Terms and Conditions). As set forth in the Preamble to the original Final Rule issued under Title XVII, one of the principal goals of the guarantee program authorized by Section 1703 of Title XVII is to encourage the commercial use in the United States of new or significantly improved energy-related technologies. (See "Summary".) One of the principal goals of the American Reinvestment and Recovery Act of 2009 P.L. 111-5, which added Section 1705 to Title XVII, is to preserve and create jobs and promote economic recovery. (Section 3(a)(1).)

The Guarantee qualified under both Sections 1705 and 1703. It was issued under Section 1705, but the Borrower was required, as a matter of policy and by contract, to comply with Section 1703 and the Final Rule. The policies of both 1703 and 1705 are furthered by the Guarantee transaction and the proposed Restructuring.

Section 1702

In setting out the terms and conditions for loan guarantees, Section 1702 is organized to reflect the life cycle of loan guarantees, from origination to default to foreclosure on collateral. More particularly, Section 1702 is subdivided roughly as follows:

- Subsections 1702(b) – (f) set forth threshold requirements for the issuance of loan guarantees;
- Subsection 1702(g) sets forth the rights and obligations of DOE and the holders of a guaranteed loan in the event of default (including a provision that requires the guarantee agreement to include provisions the Secretary determines are necessary to protect the interests of the United States in the case of default); and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of loan guarantees.

Section 1702(b) – (f) - Loan Origination Provisions

As indicated above, Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue here, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term) describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan; that the aggregate available funding is sufficient to achieve project completion; and that the guaranteed obligation is not subordinate to other financing.

The requirements of these subsections reflect a Congressional intent that guaranteed loans be structured at the outset to maximize the probability that the project will reach completion and the

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debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1702(g) addresses events and circumstances that may occur after loan origination, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

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The Subordination Restriction in Section 1702(d)(3) Is a Condition Precedent to the Issuance of a Loan Guarantee and Not a Continuing Obligation Restricting Restructuring Options

Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing".

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. Moreover, we do not believe it can reasonably be read either as 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. Almost without exception, commercial loans are subject to conditions precedent that must be satisfied prior to the advance of funds by the lender. Once such a condition precedent has been satisfied (or waived), it has no continuing legal effect. By its plain meaning, and in the context of customary commercial practice, the word "condition" can logically be read as such a condition precedent to issuance of the guaranteed loan. This reading of the provision is reinforced by the use of the word "is," which we view as confirming the intent that the condition be satisfied at a single point in time.[1]

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Deleted: It is axiomatic in the context of commercial loan agreements that once a condition precedent has been satisfied (or waived), it has no continuing legal effect.

In addition to the plain meaning of the words, and their placement in the statute, we believe our reading is consistent with the policies embodied in the statute. Beyond the relatively few explicit

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[1] It is worth noting that Section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5919), which created a predecessor DOE loan guarantee program entitled "Loan Guarantees for Alternative Fuel Demonstration Facilities" contained similar, but not identical, subordination language. Section 19(c)(4) of that act provides that "(c) [t]he Administrator...shall guarantee or make a commitment to guarantee any obligation...only if ....(4) the obligation is subject to the condition that it not be subordinated to any other financing." In context (including the use of the word condition), we read the predecessor language to have the same effect as the Title XVII provision. However, the words "not be subordinated" arguably could be more susceptible to an interpretation that they have continuing effect. While not dispositive, the change to "is not subordinate" suggests an intent to clarify the language in a manner that reinforces our reading.

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terms and conditions that must be satisfied in connection with the issuance of a guarantee, the statute gives the Secretary broad authority to determine the terms and conditions of loan guarantees. It also provides for rights and powers that are designed to ensure both flexibility and superior legal authority in the case of a distressed loan. Emphasizing the importance of Secretarial discretion, the statute affirmatively requires that the loan guarantee agreement contain "such detailed terms and conditions *as the Secretary determines appropriate* to protect the United States in a default.". In contrast to Subsection 1702(d)(3), by reason of both of its placement in the Statute and its use of the word "shall," subsection 1702(g)(2)(C) appears to have continuing effect in the context of an amendment to a loan guarantee agreement – and, in this instance, in light of the financial analysis, argues in favor of permitting subordination.

A continuing prohibition on subordination would, in our view, be inconsistent with the statutory scheme, as it would preclude the use of a common restructuring strategy for a financially distressed borrower. Investors are unlikely to make an equity investment in a distressed company on commercially acceptable terms. Accordingly, a loan restructuring is the typical means of obtaining additional funding for a distressed company. A fundamental principle of restructuring is that new loans have payment and lien priority over existing loans – without such priority, few, if any, lenders would be willing to extend a loan in distressed circumstances. Accordingly, in a situation where a financially troubled borrower needs fresh capital to ensure its survival, a senior creditor typically is faced with a choice of providing an additional loan itself, subordinating to a lender that provides the needed capital and proceeding either to foreclosure or a Chapter 11 filing.[3]

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Conclusion.

On the current facts, the Director of Monitoring has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the Borrower's obligations under the Loan Guarantee Agreement, and is demonstrably preferable to a liquidation of the Borrower. The supporting financial analysis is set forth in Exhibit A to this memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, a refusal to amend the Loan Guarantee Agreement to effect the proposed Restructuring, which likely would have lead to a Chapter 11 filing by the Borrower, could be considered inconsistent with both the specific mandate of Section 1702(g)(2)(C)(i) (to include in the guarantee agreement terms and

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[3] In contrast to the consensual restructuring proposed in this matter, under title 11 of the United States Code (the "Bankruptcy Code"), a Bankruptcy Court has the authority to authorize a debtor under chapter 11 to obtain "debtor-in-possession" financing and to grant the lenders "super" priority administrative claim status, including, subject to certain requirements, a lien senior or equal to an existing lien on property of the debtor's estate. 11 U.S.C.§ 364(d).

Deleted: [In contrast to the consensual restructuring proposed in this matter, the Bankruptcy Court has authority, under Chapter 11 of the Bankruptcy Code, to grant lenders providing "debtor-in-possession" financing to a company that has filed under Chapter 11, "super" priority status, including, subject to certain requirements, priority over secured creditors. [cite].]

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conditions appropriate to protect the interests of the United States in the case of default) and the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and preserving jobs.[3]

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Deleted: in addition to protecting the financial interests of the United States,

Deleted: will avert the loss of jobs that otherwise would occur

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[3] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to delineate that point rigidly in this memorandum. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

Deleted: , based on a single set of facts

Footnote 648

[redacted]

From: Timberlake, Courtney B.
Sent: Friday, January 21, 2011 11:18 AM
To: Ericsson, Sally C.
Cc: [redacted]
Subject: Fw: Solyndra
Attachments: Solyndra Memo_SSR_01-19-11 (3)-Final.doc; Solyndra Model 1-14-11 - MC - Sensitivities.xlsm; Exhibit A.pptx

Sorry, missed you on this.

----- Original Message -----
From: Timberlake, Courtney B.
To: Mertens, Richard A.; Carroll, J. Kevin; Saad, Fouad P.; Colyar, Kelly T.; [redacted]
Sent: Fri Jan 21 11:17:16 2011
Subject: Fw: Solyndra

----- Original Message -----
From: Richardson, Susan [redacted]
To: Richardson, Susan [redacted]; Mas, Alex; Richardson, William; Timberlake, Courtney B.; Ericsson, Sally C.; Mertens, Richard A.; Aitken, Steven D.
Cc: Nwachuku, Frances [redacted]; Richardson, Susan [redacted]
Sent: Thu Jan 20 18:50:43 2011
Subject: RE: Solyndra

All,

Attached are 1) a legal memorandum respecting the permissibility of subordination in the context of the proposed restructuring; 2) a slide deck describing the underlying financial analysis; and 3) the financial model, which includes two tabs (OMB and Financial Statement) that contain both the cost analysis and the repayment schedule based on the terms of the restructuring.

Please note that the legal memorandum is still in draft form, but it has been fully reviewed internally, including by the General Counsel.

Please feel free to contact me, [redacted] or Frances with any questions you may have.

Kind regards, Susan

Susan S Richardson
Chief Counsel, Office of Loan Programs
U.S. Department of Energy
[redacted]

DRAFT 1/19/11

MEMORANDUM FOR THE SECRETARY

THROUGH: SCOTT BLAKE HARRIS
GENERAL COUNSEL
OFFICE OF GENERAL COUNSEL

FROM: SUSAN S. RICHARDSON
CHIEF COUNSEL
LOAN PROGRAMS OFFICE

SUBJECT: SOLYNDRA RESTRUCTURING

FACTS:

The Department of Energy ("DOE") has issued a guarantee (the "Guarantee") of repayment by Solyndra Fab 2, LLC (the "Borrower") of a $535 million loan (the "Guaranteed Loan") made by the Federal Financing Bank. The proceeds of the Guaranteed Loan are being used to finance the construction of a solar photovoltaic ("PV") panel fabrication facility located in Fremont California (the "Project"). Construction of the Project is scheduled to be complete on or about June 30, 2011.

The Guarantee and related documents obligate DOE to make scheduled payments of principal and interest on the Guaranteed Loan if the Borrower fails to make those payments. DOE and the Borrower have entered into a Common Agreement (the "Loan Guarantee Agreement") that contains the terms and conditions pursuant to which DOE issued the Guarantee and includes, among other things (a) the Borrower's contractual obligation to reimburse DOE for guarantee payments made by DOE, which obligation is secured by a first lien on the Borrower's assets and (b) customary remedies for default on the Borrower's obligations under the Loan Guarantee Agreement. These rights are in addition to DOE's rights of subrogation under applicable law.

A default relating to a financial requirement has occurred under the Loan Guarantee Agreement. When that default occurred, on December 1, 2010, $95 million of the Guaranteed Loan Commitment remained to be advanced. DOE has considered the circumstances leading to the Borrower's default and all reasonable responses to the default, including foreclosure on its collateral. Based on the analysis set forth in Exhibit A hereto, DOE has determined that a restructuring of the Borrower's obligations under the Loan Guarantee Agreement (the "Restructuring") will yield the highest probable net benefit to the Federal Government by minimizing the Federal Government's potential loss on the Guaranteed Loan. In light of the financial analysis, and the parties' agreement to negotiate in good faith the definitive Restructuring documentation, DOE has continued to permit advances under the Guaranteed Loan, enabling Project construction to continue pending closing of the Restructuring. Absent continued funding of the Guaranteed Loan, the Borrower has indicated that it would file for reorganization under Chapter 11 of the Bankruptcy Code or liquidation under Chapter 7 of the Bankrupcty Code, impeding or preventing Project completion. Given the Borrower's limited operations in the PV space, a Chapter 11 filing would likely lead to a liquidation.

The Restructuring contains the following elements:

(a) DOE's collateral package will be enhanced, as all assets of the Borrower's parent and its affiliates will be transferred to the Borrower and thereafter secure the Borrower's obligations to DOE and Third Party Lenders (defined below);

(b) The Borrower will obtain additional funding under a $75 million note ("Tranche A") issued to third party lenders, and will issue a $175 million note ("Tranche E") to certain third-party lenders that previously funded that amount to the Borrower's parent (collectively with the holders of Tranche A, the "Third-Party Lenders");

(c) The Borrower's existing $535 million reimbursement obligation to DOE will be amended to comprise a $150 million reimbursement obligation ("Tranche B") and a $385 million reimbursement obligation ("Tranche D");

(d) The Borrower will have the right to borrow an additional $75 million ("Tranche C") from the Third-Party Lenders on specified terms and conditions;

(e) Tranches A, B and C (the "Senior Facilities"), will constitute senior secured facilities on a *pari passu* basis in lien and payment priority, except that, for the first 2 years after closing of the restructuring, Tranche A (a new $75 million loan) will have payment priority from the proceeds of a foreclosure (if any) on the collateral securing the Borrower's payment obligations;

(f) Tranches D and E (the "Subordinate Facilities") will constitute subordinate secured facilities, secured on a *pari passu* basis, but with DOE's Tranche D having payment priority; and

(g) The Senior Facilities will have certain lien and payment priority over the Subordinate Facilities.

Therefore, under the Restructuring (i) for the first two years following closing of the Restructuring, the Borrower's reimbursement obligations to DOE for Tranches B and D ($535 million principal amount, in aggregate) will be subordinate in payment priority to the Borrower's obligations to the Third-Party Lenders for Tranche A ($75 million principal amount) in a liquidation only, and (ii) the Borrower's reimbursement obligations to DOE for Tranche D ($385 million principal amount) will be subordinate in

- Subsection 1702(g) sets forth the rights and obligations of DOE and the holders of a guaranteed loan in the event of default; and
- Subsections 1702(h) and (i) relate to DOE's ongoing administration of the loan guarantee program.

Section 1702(b) – (f) - Loan Origination Provisions

Subsections 1702(b)-(f) relate to the issuance of loan guarantees. While only Section 1702(d)(3) is directly at issue, it is worth noting that each of Sections 1702(b) (Specific Appropriation or Contribution), (c) (Amount), (e) (Interest Rate) and (f) (Term) describe either predicates to the issuance of a loan guarantee or characteristics of the debt that must, expressly or implicitly, be satisfied at the time of issuance.

Section 1702(d) (Repayment) has three subparts, including subpart (3). Read together, they require the Secretary to determine, prior to issuance of a loan guarantee, that there is a reasonable prospect of repayment of the loan, that the aggregate available funding is sufficient to achieve project completion, and that the guaranteed obligation is not subordinate to other financing.

The requirements of these subsections reflect a Congressional intent that guaranteed loans be structured at the outset to maximize the probability that the project will reach completion and the debt will be repaid in accordance with its terms (as well as ensuring the funding of adequate reserves against default).

Section 1702(g) - Rights of DOE and the Holder of a Loan Guarantee After a Default

Subsection 1702(g) addresses events and circumstances that may occur after issuance of a loan guarantee, setting out the authority and obligations of DOE and the holder upon a default of the guaranteed loan. Read together, the provisions express an intention to afford to the Secretary, in a distressed situation, broad authority to take action that will protect and maximize the interests of the United States. That authority ranges from agreement to forbearance for the benefit of the borrower (Section 1702(g)(1)(C)) to the authority, after payment under the loan guarantee, to elect either to take control of the project or to permit the borrower to continue to pursue the purposes of the project if that is in the public interest (Section 1702(g)(2)(A)).

The Subordination Restriction in Section 1702(d)(3) Is a Condition Precedent to the Issuance of a Loan Guarantee and Not a Continuing Obligation Restricting Restructuring Options

Subsection 1702(d)(3) provides that "[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing."

Both by reason of its placement within the statutory scheme, and the plain meaning of the words, we read Section 1702(d)(3) as a condition precedent to the issuance of the loan guarantee. We do not believe it can reasonably be read either as a requirement that the faced with a choice of providing an additional loan itself, subordinating to a lender that provides the needed capital and proceeding either to foreclosure or a bankruptcy filing.

CONCLUSION:

On the current facts, the Loan Programs Office has determined that the proposed restructuring offers the best prospect of eventual repayment in full of the Borrower's obligations under the Loan Guarantee Agreement, and is demonstrably preferable to a liquidation of the Borrower. The supporting financial analysis is set forth in Exhibit A to this memorandum. In light of that determination, we conclude that the proposed subordination of the Borrower's obligations to DOE is consistent with both the text and the purposes of Title XVII. Indeed, a refusal to amend the Loan Guarantee Agreement to effect the proposed Restructuring, which likely would lead to a Chapter 11 filing by the Borrower and possible liquidation, could be considered inconsistent with both the specific mandate of Section 1702(g)(2)(C) (to include in the guarantee agreement terms and conditions appropriate to protect the interests of the United States in the case of default) and the overall scheme of Title XVII, which gives the Secretary the authority and tools necessary to protect the interests of the United States and to maximize the prospect of repayment of guaranteed loans. Moreover, by maximizing the prospect that the Borrower will complete the Project and continue as a going concern, the proposed Restructuring furthers the statutory policies of promoting the commercialization of innovative energy technologies and preserving jobs.[2]

[2] A question has been raised as to where the line should be drawn between origination and financial default in determining whether subordination may be agreed to under under Title XVII. We do not believe it is necessary (or appropriate) to draw such a line in this memorandum. We do believe, however, that it is consistent with the statutory scheme to conclude that the Secretary has the authority to make such a determination in connection with specific loan guarantee transactions, consistent with the statutory purposes of fostering the commercialization of innovative energy technologies and preserving jobs, while protecting the interests of the United States and seeking to maximize the prospects of repayment of guaranteed obligations.

[redacted]

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Footnote 650, 653

[redacted]

From: Colyar, Kelly T.
Sent: Tuesday, January 25, 2011 12:41 PM
To: [redacted] Saad, Fouad P.
Cc: [redacted]
Subject: RE: Review of DOE's analysis FW: Solyndra

This looks good. I would add that the analysis does not provide any analytical data supporting the assumptions indicating positive cashflow under a restructuring. The scenarios provided are also limited. For example, the analysis also does not include a scenario in which DOE completes the project using the DOE loan and existing equity and sales it as a going concern.

From: [redacted]
Sent: Tuesday, January 25, 2011 12:37 PM
To: Colyar, Kelly T.; Saad, Fouad P.
Cc: [redacted]
Subject: Review of DOE's analysis FW: Solyndra

I did a quick review of the additional analysis DOE provided last Friday. To make sure we're on the same page for this afternoon's meeting, can you review and let me know of any amendments? Thanks!

DOE's financial analysis did not contain any new information on the value under a liquidation today. It did include an analysis of the new capital structure and waterfall under a liquidation post completion. The returns under this scenario are minimal nominal projections and it is not clear how the analysis is risk adjusted (the value of the project at the point of liquidation is a pasted value). The third scenario DOE reviewed, performance of the project under the Consolidation Plan, includes debt service projections but no sensitivities for projecting default.

- **Liquidate today (sale of assets):** DOE assumes a liquidation value of 87M to 95M (19% to 21% recovery). There is no additional analysis regarding the building liquidation value. DOE continues to assume the building to be worth 13% to 16% of the original cost. The land is assumed to be worth 50% of the cost of the undeveloped parcel, and no value is assigned to the developed parcel. The branch has questioned whether the building (and land?) is undervalued. At origination, the building and land was anticipated to be valued at 80% of the cost. If so, the liquidation recovery would be [illegible] assuming the 95M of the original Guaranteed Loan Commitment does not disburse.

- **Liquidate after completion (going concern):** The liquidation analysis assumes the project fails in December 2011, *post-completion and after restructuring*. The total liquidation value, 300M is hard coded and increases by 100M every year the plant stays operating. With interest accruals and additional draws, DOE would have a gross return of 221M (41% recovery) or a net return of 126M (23% recovery), assuming a loss on the 95M of the original Guaranteed Loan Commitment that would have disbursed.

    1. These figures are minimal, nominal projections based on the waterfall. For example, the value of DOE's subordinated tranche is 71M: the liquidation amount (300M) less the total senior debt (229M), as compared to the value of DOE's subordinated debt (312M).

    2. This analysis also does not include "convertible preferred tranches" for both DOE and investor equity stakes. One of the links in the model is broken, preventing these projections from populating, so I pulled out the convertible pieces to get the gross and net returns above.

- **Recovery analysis (restructuring):** DOE's financial model projects sufficient cash flow for debt service under the restructuring beginning in 2013, but does not include a recovery analysis under a going concern.

[redacted]
Budget Review Division
Policy Analyst, Federal Credit Programs
Office of Management and Budget
[redacted]

-----Original Message-----
From: Timberlake, Courtney B.
Sent: Friday, January 21, 2011 11:17 AM
To: Mertens, Richard A.; Carroll, J. Kevin; Saad, Fouad P.; Colyar, Kelly T.;[redacted]
Subject: Fw: Solyndra

----- Original Message -----
From: Richardson, Susan [redacted]
To: Richardson, Susan [redacted] Mas, Alex; Richardson, William; Timberlake, Courtney B.; Ericsson, Sally C.; Mertens, Richard A.; Aitken, Steven D.
Cc: Nwachuku, Frances [redacted]
Sent: Thu Jan 20 18:50:43 2011
Subject: RE: Solyndra

All,

Attached are 1) a legal memorandum respecting the permissibility of subordination in the context of the proposed restructuring; 2) a slide deck describing the underlying financial analysis; and 3) the financial model, which includes two tabs (OMB and Financial Statement) that contain both the cost analysis and the repayment schedule based on the terms of the restructuring.

Please note that the legal memorandum is still in draft form, but it has been fully reviewed internally, including by the General Counsel.

Please feel free to contact me, [redacted] or Frances with any questions you may have.

Kind regards, Susan

Susan S Richardson
Chief Counsel, Office of Loan Programs
U.S. Department of Energy
[redacted]

Footnote 654

[redacted]

From: Colyar, Kelly T.
Sent: Thursday, January 27, 2011 4:12 PM
To: 'Nwachuku, Frances'; 'susan.richardson[redacted]
Cc: Saad, Fouad P.
Subject: Solyndra Follow Up
Attachments: Follow Up Questions 1-27-11.docx

Frances/Susan/[redacted]

In anticipation of tomorrow's meeting, we wanted to provide you with the attached background questions to help guide the discussion.

Please let me know if you have any questions. Otherwise, we look forward to seeing you tomorrow.

Thanks.

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1. Could DOE walk us through the analysis with an emphasis on a crosswalk between the spreadsheet and the power point presentation?
2. Could DOE provide the source data for the assumptions/projections in the model? How do these correspond with or differ from EERE projections, where applicable?
3. Could DOE walk through the scenarios outlined in the "OMB tab"?
4. We are still not clear on how the market changes have affected the liquidation value of the land and building. Could DOE provide a crosswalk between the Fitch report dated August 7, 2009 and the valuation indicated in DOE's power point?
5. Please provide the backup calculations and rationale for the EBITDA multiples valuation parameters, e.g., the multiple thresholds, companies chosen as comparables, etc.
6. What recoveries would result from a DCF valuation for Solyndra?
7. The memo states that "given the Borrower's limited operations in the PV space, a Chapter 11 filing would likely lead to a liquidation." If the Chapter 11 filing were to lead to a reorganization, rather than liquidation, what is DOE's estimate of recovery under that scenario?

Footnote 656

[redacted]

From: [redacted]
Sent: Friday, January 28, 2011 3:10 PM
To: Colyar, Kelly T.; Saad, Fouad P.
Cc: [redacted]
Subject: RE: Solyndra -- background on senior secured for meeting with DOE

Thanks.

From : Colyar, Kelly T.
Sent: Friday, January 28, 2011 3:06 PM
To: [redacted] Saad, Fouad P.
Cc: [redacted]
Subject: RE: Solyndra -- background on senior secured for meeting with DOE

That's correct on the risk rating [illegible] I'll edit below.

From: [redacted]
Sent: Friday, January 28, 2011 3:0[illegible] PM
To: Colyar, Kelly T.; Saad, Fouad P.
Cc: [redacted]
Subject: Solyndra -- background on senior secured for meeting with DOE

Thanks—I had these pieces from [redacted] already. It looks like DOE wasn't providing the detailed default/recovery analysis at the time this loan was made. Also, for the reestimates, it doesn't look like we have anything in writing. That said, I put together the following—is this accurate?

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.

DOE's model assumes that DOE has a senior secured position on pledged assets. The only exception captured in the model is where there is a co-lending situation, and DOE agrees up front to have pari passu sharing of recoveries in the event of default under certain conditions. The Solyndra Fab 2 project did not include any other debt in the baseline cashflows. [See DOE memos to OMB during recovery rate methodology development, DOE model documentation page 24, various projects supporting data.]

The Solyndra original subsidy rate assumptions assumed a [illegible]% recovery rate, reflecting DOE's fully-secured senior position on Solyndra. Both the conditional commitment term sheet and final financing documents included senior secured position, with a lien on all project assets. This assumption is documented in DOE's credit paper. Similarly, Fitch's rating analysis assumed there would be no financing superior to DOE, and based recoveries on a liquidation scenario. The current baseline assumptions for Solyndra as reflected in the most recently approved OMB reestimate reflect no change to the recovery rate assumptions. [See original package provided to OMB in March 2009, closing materials provided September 2009, and reestimate materials provided over the fall/winter 2012 Budget formulation process.]

Footnote 658

From: Nwachuku, Frances
Sent: Friday, January 28, 2011 1:00 PM
To: [redacted]
Subject: FW: Discounted Cash Flow Analysis
Attachments: Solyndra NPV CalculationA.xlsx

[redacted]

Use this instead.

Frances

Frances I. Nwachuku
Director
Portfolio Management
Loan Guarantee Program Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

[redacted]

From: Nwachuku, Frances
Sent: Friday, January 28, 2011 12:49 PM
To: [redacted]
Subject: FW: Discounted Cash Flow Analysis

As discussed.

Frances

Frances I. Nwachuku
Director
Portfolio Management
Loan Guarantee Program Office
US Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

[redacted]

From: [redacted]
Sent: Friday, January 28, 2011 11:21 AM
To: [redacted]
Cc: [redacted] Nwachuku, Frances; [redacted]
Subject: RE: Discounted Cash Flow Analysis

Updated to include NPV of operating cashflows as well.

From: Stephen Shulman [redacted]
Sent: Friday, January 28, 2011 10:13 AM
To: [redacted]
Cc: [redacted] Nwachuku, Frances; [redacted]
Subject: Re: Discounted Cash Flow Analysis

I'm not sure what (or why) OMB is asking, but you may want to show NPV of operating cashflows as well.

On Thu, Jan 27, 2011 at 8:13 PM, [redacted] wrote:
All,

Please find attached an NPV analysis for Solyndra as requested by OMB. Please note that Solyndra's most recent model did not have the cashflow waterfall and cash sweep as specified in the term sheet. What I have done is used the same financing structure as in the Consolidation model and imported relevant operating and investing forecasts to determine sweep amounts and FCF. I believe this should get us to the right numbers.

One other note is that the sub debt interest rate is currently assumed to be 10.00%. The NPV will be different depending on the final interest rate assumption.

Please let me know if you have any questions.

Regards,

[redacted]

-----Original Message-----
From: [redacted]
Sent: Thursday, January 27, 2011 6:39 PM
To: [redacted]
Cc: Nwachuku, Frances; [redacted]
Subject: RE: Discounted Cash Flow Analysis

I think it would be December 2010 before we started advancing the remaining $95 million. Frances, does that make sense to you?

-----Original Message-----
From: [redacted]
Sent: Thursday, January 27, 2011 6:29 PM
To: McEvoy, Randolph
Cc: Nwachuku, Frances; [redacted]
Subject: RE: Discounted Cash Flow Analysis

When's the start date for this analysis?

-----Original Message-----
From: [redacted]
Sent: Thursday, January 27, 2011 5:11 PM
To: [redacted]

Cc: Nwachuku, Frances; [redacted]
Subject: Discounted Cash Flow Analysis

Hi [redacted]

OMB has asked us to conduct a discounted cash flow analysis on the model. Could you please pull together an analysis on both the consolidated financial model and the restructuring financial model at a discount rate of 10% and 15%? Frances and [redacted] are meeting with OMB tomorrow at 3:30 so it would be great if you could run the analysis by tomorrow morning.

Let me know if you have any questions.

Thanks.

[redacted]
Portfolio Management
Loan Guarantee Program
U.S. Department of Energy
1000 Independence Avenue, SW
Room 5A-085
Washington, DC 20585
[redacted]

Footnote 659

[redacted]

From: Saad, Fouad P.
Sent: Monday, January 31, 2011 11:12 AM
To: Colyar, Kelly T.; [redacted] Carroll, J. Kevin; [redacted]
Subject: RE: Please provide input by 11 to [redacted]

A few more thoughts to add on loans, in the prescribed format (although probably too long). Kelly/Kevin may want to weigh in, especially on the bracketed items:

Issue: Loan Guarantees

Status: Some improvements over past year, but still facing many challenges.

Credit: OMB and DOE have taken steps to improve the program: OMB's contributions -

- Worked with DOE to propose and implement standardized review process and timelines, and accommodated fast track review process proposals to further accelerate reviews.
- Expedited reviews when there are critical deadlines (e.g. accelerated reviews on [redacted] closing, [redacted] closing and conditional commitment, [redacted] etc.)
- Proposed long-requested DOE legislative changes to bill re: energy efficiency, multiple sites / projects, ATVM fees, etc. as well as budget supplemental
- Helped avoid multiple errors [redacted] etc.) resulting from rushed closings
- [Deferred to DOE on general disputes / interpretation of statute / rules, e.g. [redacted] take out, [redacted] Leveraged Lease, Solyndra restructuring, even when OMB analysis suggested different courses of action might be more appropriate.]
- [ATVM: mediated [redacted] with Treasury, conducting analyses and making arguments on DOE's behalf]

DOE has taken also some helpful steps:

- Eventually accepted they should share more information proactively with OMB and started submitting standardized full packages to us, which has helped dramatically.
- After 'growing pains' around first 1603/LG projects, DOE technical teams have worked more proactively with OMB to sort out some technical issues.
- On a few occasions, DOE has been flagging issues early, preempting last minute debates and delays (e.g. material changes on Abengoa, proposed changes to 'commencement of construction'

Opportunities for Further Improvement:

- Standardize terms and conditions with OMB/UST input; develop and implement to credit / portfolio guidelines and policy metrics / prioritization as a means of protecting taxpayer dollars AND streamlining process
- More Federal staff in inherently governmental positions
- Continue to flag potential policy and technical issues with OMB staff early
- Quickly work to expand portfolio monitoring team and systems, working with OMB/UST early to proactively include feedback
- Work with OMB early on public releases and big decisions (rather than finding ways to circumvent us); we generally have the same objective of seeking to reduce opportunities for embarrassment that would be shared by DOE and the WH.
- [Focus more on executing well, rather than on future authorities and blame games]

From: Colyar, Kelly T.
Sent: Monday, January 31, 2011 10:16 AM

To: Krauss, Lori A.; Carroll, J. Kevin; [redacted] Saad, Fouad P.; [redacted]
Subject: RE: Please provide input by 11 to [redacted]

I agree with that. And, we were informed last week that the analyst n the Budget Office on loans is changing again which means we will have another new person to train.

For loans, see below.

From: [redacted]
Sent: Monday, January 31, 2011 10:09 AM
To: Carroll, J. Kevin; Colyar, Kelly T.; [redacted] Saad, Fouad [redacted]
Subject: RE: Please provide input by 11 to [redacted]

I think there needs to be an acknowledgement that this was a very difficult year in coming to closure on budget numbers, to give context. Lew shouldn't be under the impression that things went smoothly. However, recent personnel changes within the DOE CFO shop (Chris) made communication in an impossible situation, somewhat better. (However, I still had to explain the budget to him again. They don't have internal CFO shop communication functioning smoothly yet and that led to yet more work for OMB examiners.)

From: Carroll, J. Kevin
Sent: Monday, January 31, 2011 [illegible] AM
To: Colyar, Kelly T.; [redacted] Saad, Fouad [redacted]
Subject: Please provide input by 11 to [redacted]

See request at the bottom:

Input to the Lew Chu discussion

Budget:

[redacted]

Loan Guarantees
This is another area where we are making improvements in the relationship. The addition of Federal staff oversight to the contracting workforce is a welcome addition, and we are particularly happy with the individual selected, Owen Barwell. However, one person, particularly at such a senior level is not sufficient. It is critical that the loan guarantee program ensure it has federal staff in place to implement this program effectively. We have made great progress on standardizing our interaction, and would like to work with DOE to help simplify transactions further. We would also like to work with the department to ~~improve the~~ develop policy metrics and selection processes.

Management

[redacted]

Branch. One of the Department's most successful contracting efforts, a[redacted]involved OMB procurement experts from the beginning of the requirements definition through the final contract.

However, the Department's move to "contractor assurance" for health safety and security

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All,

Jack is scheduled to meet with Secretary Chu next week. To prepare for that conversation, Jack would like examples of the following:

- things that are going well between OMB and DOE, including areas where improvements have been made
- areas where improvements would still be helpful (this should include potential actions by DOE <u>and</u> OMB)

Please send inputs in the format below by <u>12:00pm Monday</u>.

Issue:

Status: going well, has improved since xyz, needs improvement

Opportunities for Improvement: (inputs in bullet form, please)

Talking points (only if useful):

Please let me know if you have questions.

Thanks,

[redacted]

Footnote 660

[redacted]

From: Mertens, Richard A.
Sent: Monday, January 31, 2011 4:26 PM
To: [redacted]
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes
Attachments: Issues for Lew-Chu Meeting.docx

Nothing essential in my comments.

From: [redacted]
Sent: Monday, January 31, 2011 4:04 PM
To: Mertens, Richard A.
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes

Ok. I have to integrate this with NNSA, so please keep going through the rest while I'm doing that.

From: Mertens, Richard A.
Sent: Monday, January 31, 2011 4:03 PM
To: [redacted]
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes

I've only gotten through the first couple items, but here's what we have. I put fuller LG and Nukes description as an attachment to make it easier, but I don't know how that fits with the formatting of these materials generally.

Kevin: If I did any damage to your thoughts on the first two items, please comment.

From: [redacted]
Sent: Monday, January 31, 2011 3:58 PM
To: Mertens, Richard A.
Subject: I need whatever we've got in the next 10 minutes

Thanks.

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[redacted]
Office of Management & Budget - Natural Resources, Energy, and Science
[redacted]

[redacted]

Issue: Loan Guarantees

Status: <u>Has Improved</u>: This is another area where we are making improvements in the relationship. The addition of Federal staff oversight to the contracting workforce is a welcome addition, and we are particularly happy with the individual selected to head the Office, Owen Barwell. We are also pleased that DOE has hired a strong person for the Monitoring position to oversee performance of closed loans (OMB has worked well with the Department on its proposed restructuring of the Solyndra deal).

See Attachment A for additional background and talking points on Loan Guarantee Program implementation.

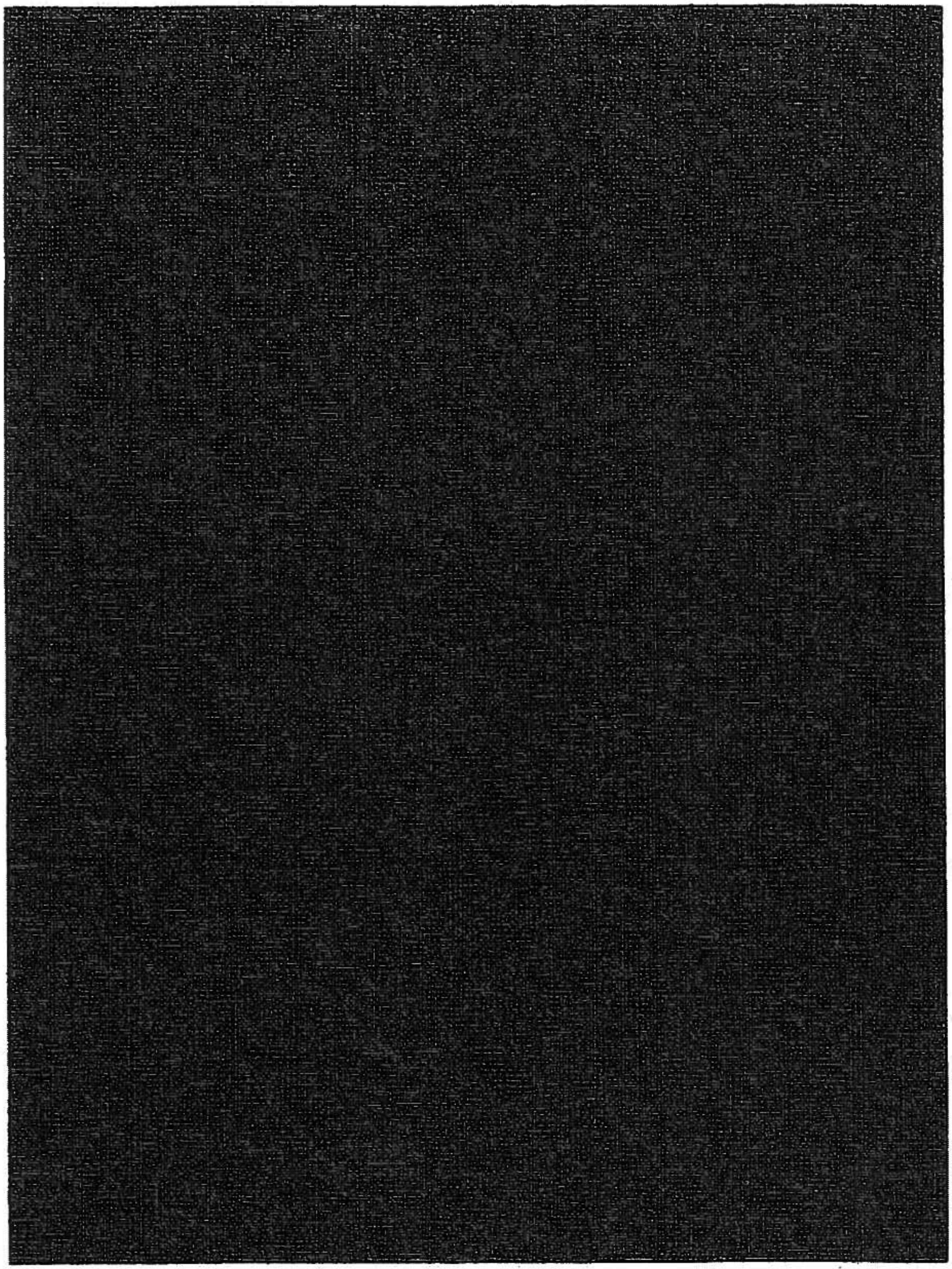
Opportunities for Improvement:

- We have made great progress on standardizing our interaction and would like to work with DOE to help simplify transactions further, target funding toward policy objectives and strengthen monitoring of existing loans.

- <u>Specific Asks</u>: OMB would like to work with the Department on several aspects of program implementation that would improve the policy context for decisions and further streamline implementation:

  1. Develop policy objectives and quantitative metrics to define portfolio objectives and track progress, perhaps using a dashboard to track the progress of projects visible to both OMB and DOE. (Right now, loans appear to come over on an ad hoc, first come basis with no clear linkage to policy goals.)
  2. It is critical that the loan guarantee program ensure it has federal staff in place to implement this program effectively.
  3. With respect to Solyndra, OMB deferred to DOE in making determinations such as the decision with how to proceed with the Solyndra restructuring. However, OMB is responsible for credit subsidy scoring and to determine if such changes constitute a modification to a loan that requires re-scoring of the credit subsidy.

MANAGEMENT ISSUES



[redacted]

Attachment A

[redacted]

Loan Closings:

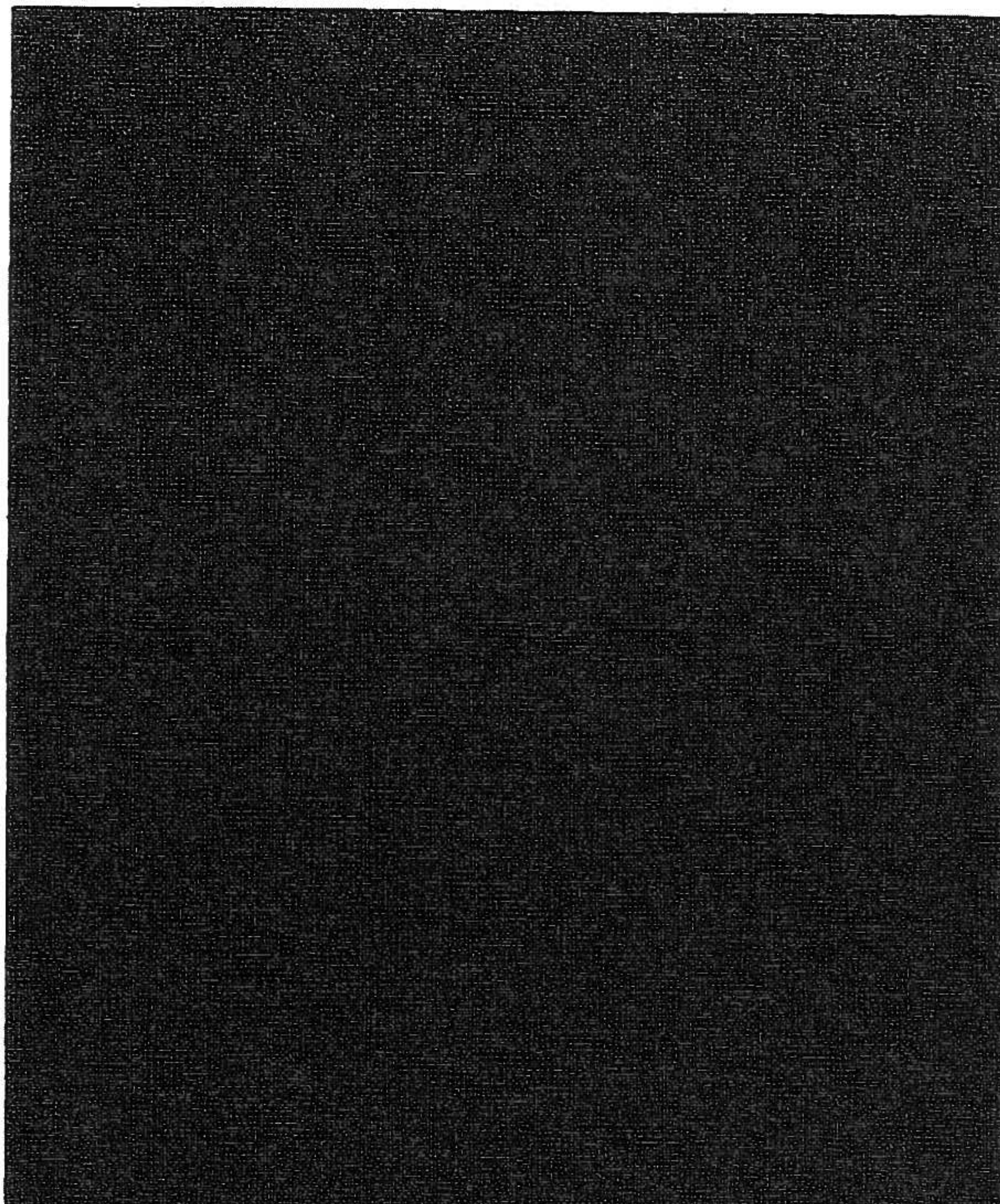
- [redacted]

Conditional Commitments

- [redacted]

[redacted]

[redacted]



[redacted]

Footnote 661

[redacted]

From: [redacted]
Sent: Monday, January 31, 2011 6:13 PM
To: Mertens, Richard A.
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes
Attachments: Memo for the Director - Chu Meeting 2.1.11.docx

[redacted] has decided that the document is too long and is going to cut it down a bit. But here is what I sent up to him.

From: Mertens, Richard A.
Sent: Monday, January 31, 2011 6:07 PM
To: [redacted]
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes

Can you please send us whatever went forward to the Director.

Thanks.

From: [redacted]
Sent: Monday, January 31, 2011 [illegible] PM
To: Carroll, J. Kevin; Mertens, Richard A.
Subject: RE: I need whatever we've got in the next 10 minutes

Got it. thanks.

From: Carroll, J. Kevin
Sent: Monday, January 31, 2011 4:48 PM
To: [redacted]; Mertens, Richard A.
Subject: RE: I need whatever we've got in the next 10 minutes

The improvements in Budget and LGs were intended as good news stories (with room for improvement).

From: [redacted]
Sent: Monday, January 31, 2011 4:45 PM
To: Mertens, Richard A.
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes

We didn't have any "good news" updates for this meeting, did we?

From: Mertens, Richard A.
Sent: Monday, January 31, 2011 4:25 PM
To: [redacted]
Cc: Carroll, J. Kevin
Subject: RE: I need whatever we've got in the next 10 minutes

Nothing essential in my comments.

From: [redacted]
Sent: Monday, January 31, 2011 4:04 PM

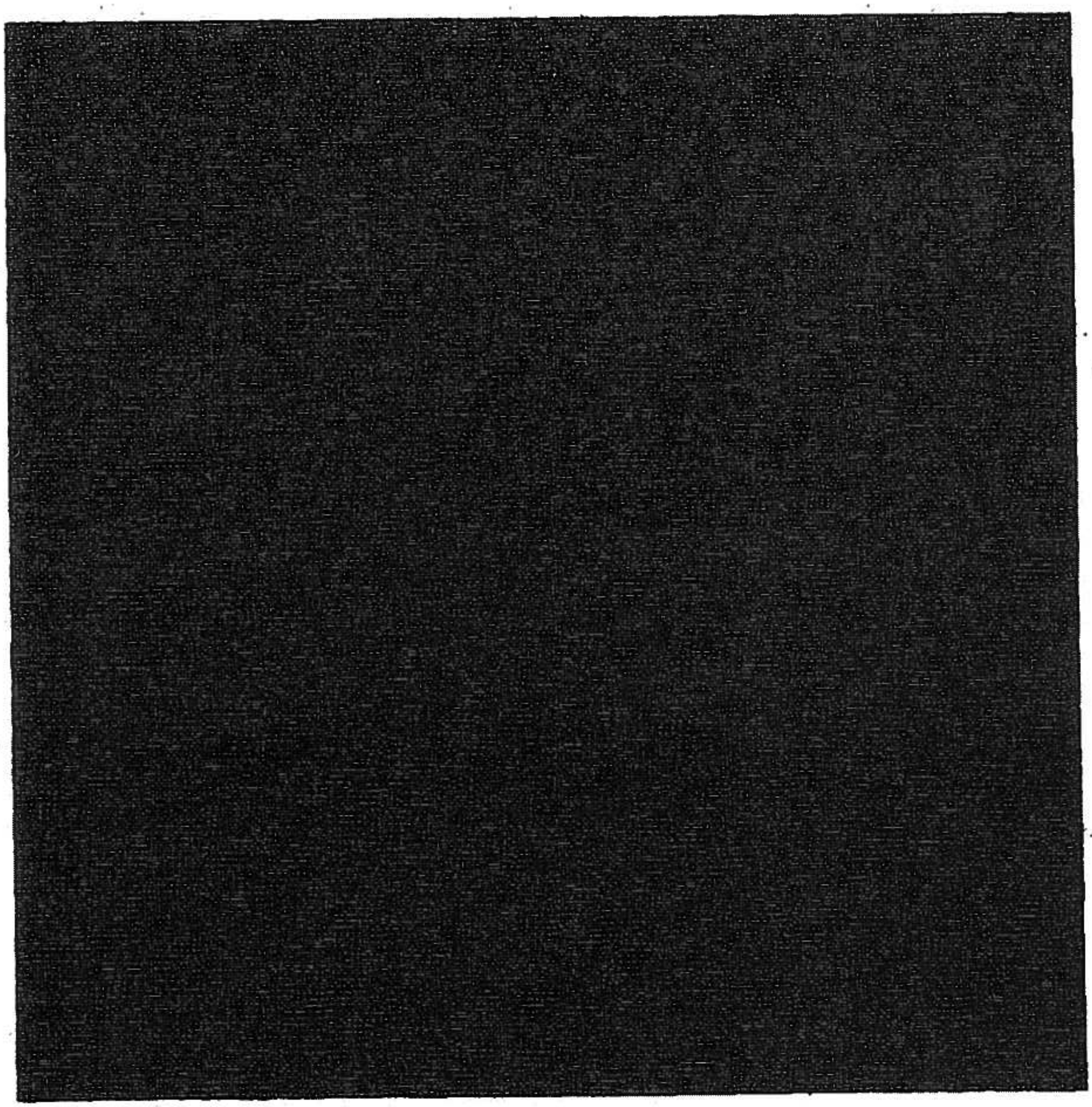
WHAT: MEMO RE: MEETING WITH SECRETARY CHU
FOR: DIRECTOR JACK LEW

[redacted]

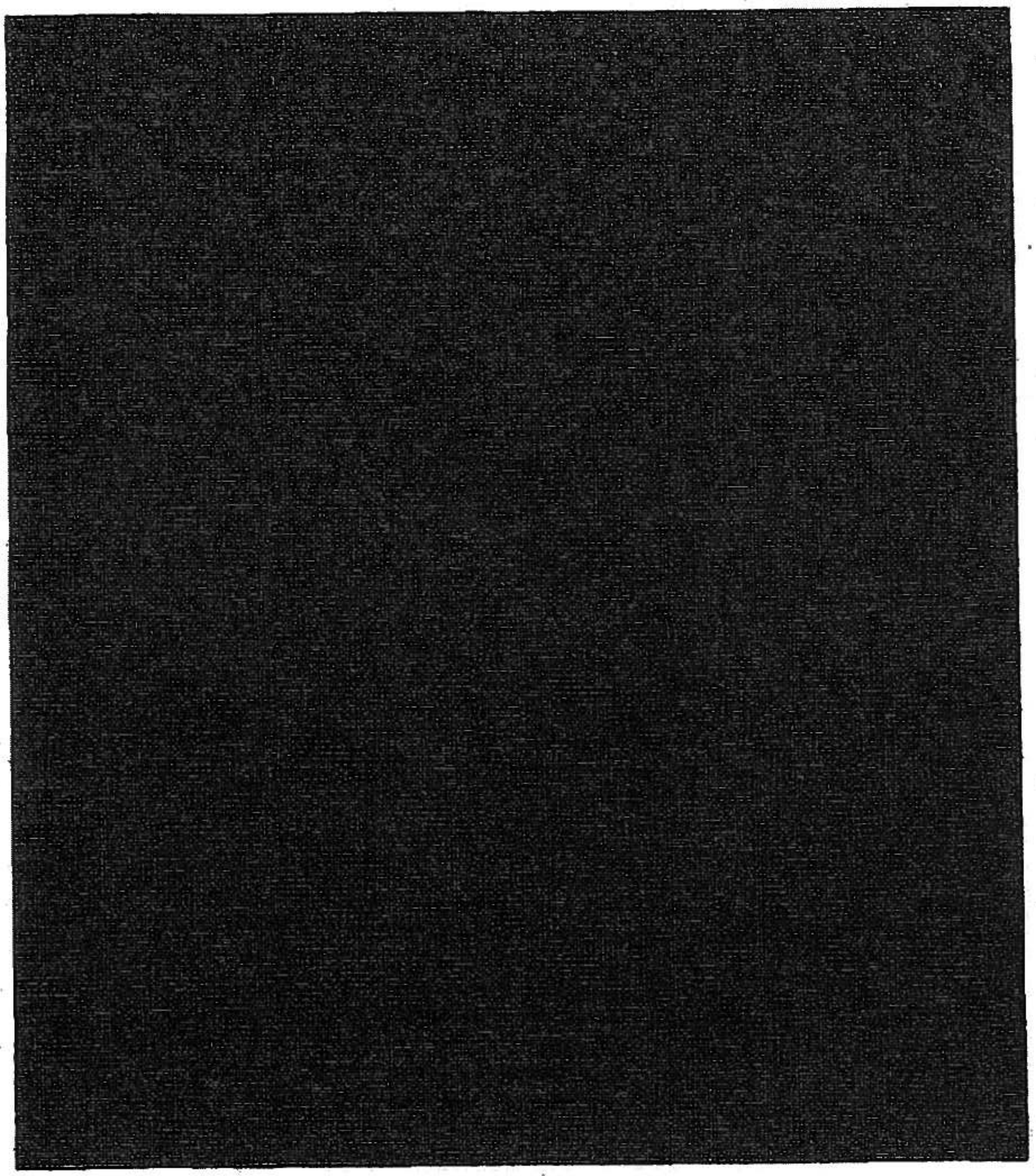
2. **Issue:** Loan Guarantees

Status: Has Improved: This is another area where we are making improvements in the relationship. The addition of Federal staff oversight to the contracting workforce is a welcome addition, and we are particularly happy with the individual selected to head the Office, Owen Barwell. We are also pleased that DOE has hired a strong person for the Monitoring position to oversee performance of closed loans (OMB has worked well with the Department on its proposed restructuring of the Solyndra deal).

[redacted]



[redacted]



Footnote 662

[redacted]

From: Saad, Fouad P.
Sent: Monday, January 31, 2011 1:39 PM
To: Carroll, J. Kevin
Cc: Colyar, Kelly T.
Subject: Solyndra optics

Although the decision has already been made for OMB not to play an active role in determining what to do with Solyndra, the Director/S-1 meeting tomorrow might present an opportunity to flag to DOE at the highest level the stakes involved, for the Secretary to do as he sees fit (and be fully informed and accountable for the decision). Although optics are generally out of our lane, it may be worthwhile for the Director to privately make this point to the Secretary:

Given the PR and policy attention Solyndra has received since 2009, the optics of a Solyndra default will be bad whenever it occurs. While the company *may* avoid default with a restructuring, there is also a good chance it will not. <u>If Solyndra defaults down the road, the optics will arguably be worse later than they would be today</u>. At that point, additional funds have been put at risk, recoveries might be lower, and questions will be asked as to why the Administration made a bad investment, not just once (which could hopefully be explained as part of the challenge of supporting innovative technologies), but twice (which could easily be portrayed as bad judgment, or worse). In addition, the timing will likely coincide with the 2012 campaign season heating up, whereas a default today could be put in the context of (and perhaps even get some credit for) fiscal discipline / good government because the Administration would be limiting further taxpayer exposure, letting bad projects go, and could make public steps it is taking to learn lessons and improve / limit future lending.

I understood from the readout of the Friday meeting that Solyndra's prospects may have hit home for Sally on Friday. Perhaps she'd have an appetite for conveying this message.

[redacted]

From: Ericsson, Sally C.
Sent: Monday, January 31, 2011 1:42 PM
To: Timberlake, Courtney B.; Falkenheim, Michael C.
Cc: [redacted]
Subject: DOE call

I think we should meet with Jeff tomorrow a.m. to discuss how to best communicate the [redacted] and Solyndra decisions to DOE. Make sense?

On the weekly call today, we will thank them for the briefing Friday on Solyndra and let them know we will get back to them on both issues in the next couple of days. I left a voicemail with the Deputy Chief of Staff re our concerns about [redacted] Friday night.

Footnote 667

Footnote 668

From: [redacted]
Sent: Monday, January 31, 2011 2:40 PM
To: [redacted]
Cc:
Subject: Update RE: Credit issues update week of January 31, 2011

I just got off the weekly DOE call and wanted to note two items that weren't captured in the credit issues update.

- DOE sent [redacted] closing materials last Friday. The loan level increased by $250M to serve as a bridge loan until the tax grant comes in.
- [redacted] may be facing cost-overrun issues and could look to rate-payers to cover some portion.

[redacted]
Budget Review Division
Policy Analyst, Federal Credit Programs
Office of Management and Budget
[redacted]

From: [redacted]
Sent: Sunday, January 30, 2011 8:23 PM
To: [redacted]
Cc: [redacted]
Subject: Credit issues update week of January 31, 2011

FFB: [redacted]

HUD: [redacted]

DOE

Title XVII – We have four deals currently at OMB (two conditional commitments and two for financial closing). We also expect a modification cost estimate soon for Solyndra.

Solyndra: 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. After meeting with DOE on Friday to discuss DOE's analysis, OMB intends to let DOE know this week of the modification determination.

[redacted]

[redacted]
Budget Review Division
Policy Analyst, Federal Credit Programs
Office of Management and Budget
[redacted]