
The Committee on Energy and Commerce
Supplemental Memorandum



June 23, 2011

TO: Majority Members, Subcommittee on Oversight and Investigations

FROM: Subcommittee on Oversight and Investigations Majority Staff

RE: OMB's Responsiveness to the Committee's Request for Documents in the Solyndra Loan Guarantee Investigation

I. BACKGROUND

The Committee on Energy and Commerce opened an investigation of the Department of Energy (DOE) Loan Guarantee Program on February 17, 2011, with a letter requesting documents and information from DOE Secretary Steven Chu.

DOE's Loan Guarantee Program was created by the Energy Policy Act of 2005. The Act authorized the Secretary of the Department to make loan guarantees to companies investing in either innovative clean technologies or commercial-scale renewable energy projects. In 2009, the American Reinvestment and Recovery Act (ARRA) appropriated funding to pay for the credit subsidy costs of the DOE loan guarantees for certain renewable energy, electric transmission, and leading edge biofuels systems (referred to as 1705 loan guarantees). Since the stimulus provided funding for the credit subsidy costs, DOE has announced 20 conditional commitments for loan guarantees, and 11 of these guarantees have now closed. These loans represent over \$11 billion in guarantees.

The first guarantee issued by the DOE Loan Programs Office was to Solyndra Inc., a California company, for \$535 million. Since Solyndra received its guarantee in September 2009, the company has experienced a number of financial setbacks. In March 2010, Solyndra's auditor, PriceWaterhouseCoopers stated in the company's SEC registration that the "Company had suffered recurring losses from operations, negative cash flows since inception and has a net stockholder's deficit that, among other concerns, raise substantial doubt about its ability to continue as a going concern." Just three months later, in June 2010, the company cancelled a \$300 million Initial Public Offering (IPO). On November 3, 2010, Solyndra announced that it was closing its older manufacturing facility, resulting in the layoff of 135 temporary employees and approximately 40 full-time employees. Further, in March 2011, DOE announced that it had modified the terms of the Solyndra loan guarantee to extend the repayment period. In addition,

Solyndra announced at the same time that its investors had entered into a \$75 million credit facility with the company, with the option of a second \$75 million.

This Committee's investigation showed that the Office of Management and Budget plays a key role in approving the DOE Loan Guarantees. For this reason, the Committee sent a letter to OMB Director Jacob Lew on March 14, 2011 (March 14 letter), requesting a briefing and certain documents regarding the Solyndra guarantee. Although this document request was sent over three months ago, OMB has yet to fully respond to the Committee's requests. Instead, OMB has repeatedly sought to delay and thwart this Committee's efforts to understand its actions during the course of the Solyndra review.

On June 22, 2011, OMB Deputy General Counsel William R. Richardson, Jr., sent Chairman Stearns a letter characterizing OMB's response to this Committee's investigation. This letter contains multiple misrepresentations and does not present an accurate recitation of OMB's conduct during the course of this investigation. The purpose of this memorandum is to explain in detail the Committee's efforts to achieve production of the documents requested in the March 14 letter, and OMB's responses to the Committee's efforts.

II. OMB's Responsiveness to the Committee's Investigation

A. The Chronology of the Committee's Investigation

In his June 22, 2011, letter, OMB Deputy General Counsel Richardson made certain representations about the efforts of OMB staff to respond to the Committee's March 14 document request. This chronology conveniently leaves out the lengths Committee staff has gone to accommodate OMB's concerns, to obtain even basic information from OMB regarding its actions with respect to Solyndra, as well as OMB's stonewalling of these efforts.

For example, despite the fact that the March 14 letter requests that OMB contact Committee staff to schedule a briefing, OMB never contacted the Committee. Instead, on March 21, 2011, Committee staff contacted OMB staff to schedule the briefing. OMB Legislative Affairs staff responded that they would "check on this." After not hearing back from OMB for another week, Committee staff again emailed the OMB Legislative Affairs staff on March 28, 2011, and asked about the status of the briefing. OMB Legislative Affairs staff called back the next day and proposed some dates for the briefing. The briefing was originally scheduled for April 5, but Committee staff agreed to postpone the briefing at OMB's request due to the ongoing budget negotiations.

An initial briefing took place on April 11, 2011, nearly one month after the Committee's original request. While OMB was able to explain the role of the agency generally with respect to DOE loan guarantees, the OMB staff who attended this briefing were not able to answer several specific questions about OMB's actions regarding the Solyndra review. For example, after DOE made presentations about Solyndra to OMB in January and March of 2009, OMB staff were "sure" that they had asked "all sorts of questions" of DOE staff and "provided feedback," but OMB staff could not or would not say what those questions were. OMB staff was also not able to identify the specific documents or information DOE had provided to OMB staff at the time of these briefings. Presumably, the feedback OMB staff provided and the questions they asked of

DOE helped shape the Solyndra deal. It is clearly relevant to this Committee's understanding of what happened during the Solyndra deal and whether OMB took appropriate actions to assess the risk presented by the guarantee. Yet, OMB has continued to refuse to provide this information to the Committee.

As Deputy General Counsel Richardson stated in his June 22 letter, following the April 11 briefing, Committee staff did request that OMB provide to the Committee copies of all documents that DOE had shared with OMB. However, this request does not, as his letter seems to suggest, excuse OMB from providing all the other documents responsive to the Committee's requests. Committee staff did ask OMB staff six follow-up questions after the briefing. But, OMB's responses did not fully address the questions asked. For example, Committee staff asked OMB to describe the "questions or feedback to DOE" that OMB staff provided after the January, March, and August presentations by DOE to OMB regarding Solyndra. OMB did not answer that question at all with respect to the January and August presentations. With regard to the March 2009 presentation, OMB responded that it "did not provide its views on the credit subsidy range estimated for the project." The Committee did not ask whether OMB provided its views on the credit subsidy; the Committee asked what feedback and questions were asked of DOE.

Further, after the April 11 briefing, Committee staff asked whether the credit subsidy score for Solyndra had changed between January and September of 2009. OMB responded that "the final credit subsidy cost calculated in September 2009 fell within the range originally contemplated." Again, this answer was not responsive to the question asked. In fact, Committee staff recently learned that the credit subsidy cost did change after OMB reviewed the number calculated by DOE in August 2009. Therefore, OMB's answer is not only nonresponsive, it is also misleading and incorrect. OMB's responses to these questions from Committee staff are indicative of its responses to the Committee's requests generally: OMB answers the questions it wants to answer, and asserts that any other information is not necessary to the Committee's investigation. Attached to this memorandum is a copy of OMB's April 15, 2011, email responding to the Committee's questions to this letter. This email demonstrates OMB's efforts not only to limit the information this Committee receives but, possibly, to mislead the Committee.

After receiving OMB's response to the follow-up questions from the April 11 briefing, Committee staff expected that the documents it had requested from OMB would help shed light on OMB's actions during the Solyndra review.¹ In particular, Committee staff pressed OMB for production of certain Solyndra credit subsidy and cash flow documents. These were DOE-created documents that DOE had submitted to OMB during the Solyndra review. Although the Committee had requested that DOE produce these documents, DOE informed Committee staff that it was required to consult with OMB about producing these materials due to their sensitive nature. Before producing the documents to the Committee, DOE had submitted these documents to OMB on or about March 22, 2011 so OMB could approve the production to the Committee. Committee staff emailed OMB staff on March 30, April 4, April 11, and April 12. On April 14, 2011, DOE finally produced to the Committee 90 pages of cash flow and credit

¹ As of the briefing, OMB had only produced two reports provided by DOE to OMB during the review.

subsidy documents, approximately 30 of which were wholly redacted. Even though Committee staff was not convinced that OMB's concerns are legitimate, Committee staff was sensitive to OMB's position that these documents, if made public, might allow future loan guarantee applicants to "game" the system, and therefore agreed to an *in camera* review of these documents at DOE headquarters on April 27, 2011.

B. Committee Staff's Repeated Efforts to Accommodate OMB's Concerns and Obtain Production of the Documents Responsive to the Committee's March 14 Letter

As Deputy General Counsel Richardson stated in his June 22 letter, OMB did produce 20 documents to the Committee, including a credit assessment, a draft term sheet for Solyndra, and engineering and marketing reports, which totaled 393 pages. These documents, however, were all created or provided by DOE to OMB in the course of the Solyndra review. OMB has yet to produce a single memoranda, report, or analysis — aside from the final apportionment paper for Solyndra — reflecting its own work on the Solyndra review. The documents produced reveal nothing about what OMB did with DOE's information, or how OMB considered or weighed the risks presented by the Solyndra deal.

For this reason, Committee staff repeatedly asked OMB staff to produce internal OMB emails responsive to the Committee's March 14, 2011, letter. On May 4 and May 10, 2011, Committee staff sent emails to OMB asking about the status of the production. On May 13, 2011, Committee staff had a conference call with OMB Legislative Affairs staff and General Counsel staff to discuss the production of these emails. During that call, OMB staff communicated that they were only willing to produce emails that OMB staff considered to be "factual" in nature, that is, only those emails that showed the actual Credit Subsidy Score approved by OMB. OMB staff explained that they did not want to produce internal emails among OMB staff regarding the Solyndra deal. As a compromise, OMB staff proposed a second briefing with the Assistant Director of Budget, and represented that this briefing would provide all of the details of OMB's internal deliberations and OMB's questions and concerns regarding the Solyndra guarantee.

Committee staff held a second call with OMB staff regarding the OMB emails on May 19, 2011. Committee staff communicated that a briefing was not sufficient, and that the emails must be produced in order for staff to have an accurate understanding of OMB's concerns during the Solyndra review. A third call was convened for the following day, Friday, May 20, 2011. During that call, Committee staff agreed to the briefing proposed by OMB so long as OMB brought the emails responsive to the Committee's request to the briefing and allowed for an *in camera* review of these records by Committee staff. During this call, OMB staff reiterated that the briefing they proposed would provide all of the details of the review that were reflected in the emails, but said that protecting the confidentiality of OMB staff was the primary concern. Committee staff pointed out that the *in camera* review should address that concern, and asked OMB staff to determine no later than May 23 whether the agency would agree to that form of production.

On Monday, May 23, Committee staff called OMB to ask if they would agree to the proposed *in camera* production of emails. OMB staff stated that they needed additional time to make this determination. At this point, Committee staff recommended to Chairman Stearns that he call OMB to see if he could resolve the matter and move the investigation forward.

Ultimately, a call was scheduled between Chairman Stearns and OMB Deputy Director Jeffrey Zients for May 25, 2011. During that call, Chairman Stearns explained to Deputy Director Zients that the Committee wanted to see the internal emails among OMB staff regarding the Solyndra guarantee. Chairman Stearns further explained that a briefing was not sufficient, as it would not reflect the precise details of the review, what actions OMB took and how they impacted the Solyndra deal, and that an important part of any investigation is to verify the information received by examining records and documents. Deputy Director Zients informed Chairman Stearns that he needed to check with his counsel, and that he would get back to Chairman Stearns about the *in camera* briefing and production.

On May 26, 2011, OMB staff reached out to Chairman Stearns' personal office staff to schedule the briefing. The briefing and *in camera* production was scheduled for June 7, 2011. Although Chairman Stearns made clear to Deputy Director Zients that the *in camera* review was to include all emails, including internal emails, among OMB staff on the Solyndra deal, OMB produced only 8 emails between OMB and DOE sent during a one-week period in late August 2009. These emails did not include any internal emails among OMB staff members regarding the Solyndra loan guarantee. In response to Committee staff's questions, OMB staff acknowledged that OMB had identified other emails between OMB and DOE staff, as well as internal emails between OMB staff members, relating to the review of Solyndra that were responsive to the Committee's March 14 letter, but that OMB was refusing to produce those emails to Committee staff. According to OMB staff, it is unnecessary for the Committee to view the internal emails.

C. The Committee Has a Right to the Documents Requested in the March 14 Letter, and OMB is not Justified in Withholding Them

During the course of this investigation, OMB has continued to assert that this Committee does not need to see, and has not demonstrated a need for, the documents it has requested. Not only is this incorrect, OMB's position also demonstrates a fundamental misunderstanding of the respective roles of Congress and OMB. It is not for OMB staff to selectively decide which responsive documents the Committee needs to see.

The Committee has a right to obtain production of the documents it requested in the March 14 letter. Pursuant to rules X and XI of the U.S. House of Representatives, the Committee is conducting an investigation of the DOE Loan Guarantee Program and the Solyndra loan guarantee. Through the American Recovery and Reinvestment Act (ARRA or stimulus), Congress has appropriated \$2.5 billion in funding to pay the subsidy costs for over \$11 billion in DOE loan guarantee. Under the Financial Credit Reform Act (FCRA), OMB plays a role in reviewing and approving the loan guarantees. However, OMB's role is not limited to simply punching numbers in a calculator to produce a credit subsidy cost, as Committee staff has pointed out exhaustively to OMB staff. Committee staff understands — and has communicated to OMB — that OMB's role extended to asking questions about any aspect of the loan guarantee, including its terms and conditions.

OMB staff has admitted that OMB's involvement in the Solyndra deal began as early as December 2008 — well before the final credit subsidy number was calculated in August 2009. The actions OMB took during those nine months with respect to Solyndra is relevant to this

Committee's investigation. Congress has appropriated \$2.5 billion in funding to pay the subsidy costs for the DOE loan guarantees. This Committee not only has an interest in learning the number calculated and how it was calculated, but it also has a direct interest in learning whether OMB appropriately carried out its role to analyze the risks associated with the Solyndra guarantee. As the risk factors of these loans directly bear on the credit subsidy cost determination, they are plainly relevant to the Committee's investigation. While OMB has provided some information about what OMB did in the week preceding the closing of the Solyndra guarantee in September 2009, it has provided almost no information about its involvement in the preceding nine months. Further, a White House memorandum was presented to President Obama in October 2010 questioning the appropriate role of OMB in the DOE loan guarantee process and proposing changes to OMB's role.

Committee staff believes that this Committee has convincingly, and repeatedly, demonstrated the reasons these documents are relevant to its investigation. OMB's arguments against production are without basis.

III. CONCLUSION

Committee staff believes that OMB staff has consistently responded to this Committee's questions throughout this investigation with half-answers and qualified responses. OMB's repeated delays in responding to the Committee's document requests and its refusal to turn over the documents demonstrate that OMB is engaging in a deliberate pattern of obstruction.

Chairman Stearns made an agreement with the Deputy Director of OMB for an *in camera* production of all responsive emails and communications that took place on June 7. Despite this agreement, OMB reneged and refused to produce the emails. Committee staff questions whether OMB intends to make a good faith effort to respond to the Committee's document requests. OMB staff has acknowledged that these documents exist. OMB staff has acknowledged that they are relevant to the Committee's investigation of the Solyndra loan guarantee, as these records relate to OMB's review of the Solyndra deal. Yet, the agency continues to refuse to produce these documents for review.

Deputy General Counsel Richardson stated in his June 22 letter that OMB is prepared to provide a "further briefing that would afford staff an opportunity to review such additional emails between OMB and DOE." However, Committee staff has been down this road before. OMB has repeatedly promised to produce documents at briefings, only then to refuse to produce such documents. Committee staff's repeated efforts to accommodate OMB's concerns have been instead met with delay and gamesmanship.

It is not for OMB to decide what documents the Energy and Commerce Committee needs to see. This matter can only be resolved by full production of the documents requested.