DOCUMENTS

DOE/SOLYNDRA PROJECT

Materials for Restructuring Analysis

[Updated: 01-03-11]

[Items in blue have been added to or otherwise addressed in memorandum]

[Items in red need not be addressed in memorandum]

(see Table of Contents at end)

FFB NOTE PURCHASE AGREEMENT

Rights and Agreements of the Secretary and FFB

Section 11.1 Rights and Agreements related to Enforcement.

11.1.1 Secretary's Authority.

In consideration of the Secretary's Guarantee relating to the Note that has been purchased by FFB under this Agreement, the Secretary shall have the sole authority (vis-a-vis FFB), in the case of a default by the Borrower under such Note or the occurrence of an Event of Default under the Security Instruments, in respect of acceleration of such Note, the exercise of other available remedies, and the disposition of sums or property recovered. [Note Purchase Agreement, §11.1.1]

11.1.2 Acknowledgment of Security Interest.

FFB acknowledges that the Borrower has, through the execution of the Security Instruments, pledged and granted a security interest to the "Collateral Agent," for the benefit of the "Secured Parties"(as those terms are defined in the Common Agreement) in certain property of the Borrower to secure the payment and performance of certain obligations owed to the Secretary under, *inter alia*, the Security Instruments. [Note Purchase Agreement, §11.1.2]

11.1.3 FFB Cooperation.

FFB shall cooperate with the Secretary to enable the Secretary to exercise and enforce the Secretary's rights and remedies under this Agreement, the Program Financing Agreement, the Note, and the Security Instruments, including, when reasonably requested by the Secretary, executing and delivering to the Secretary instruments, agreements, and other documents prepared by or for the Department for FFB's execution. [Note Purchase Agreement, §11.1.3]

Section 11.2 Secretary's Right to Purchase Advances or the Note.

Notwithstanding the provisions of the Note, the Borrower acknowledges that, under the terms of the Program Financing Agreement, the Secretary may purchase from FFB all or any portion of any Advance that has been made under the Note, or may purchase from FFB the Note in its entirety, in the same manner, at the same price, and subject to the same limitations as shall be

applicable, under the terms of the Note, to a prepayment by the Borrower of all or any portion of any Advance made under the Note, or a prepayment by the Borrower of the Note in its entirety, as the case may be. [Note Purchase Agreement, §11.2]

Definitions

"Security Instruments" shall have the meaning specified in Schedule I to this Agreement.

"**Security Instruments**" means, collectively, (i) the Common Agreement, and (ii) the "Security Documents" (as that term is defined in the Common Agreement), as such agreements and documents may be amended, supplemented, and restated from time to time in accordance with their respective terms. [Note Purchase Agreement Schedule I, Item 3]

Purchase Commitment

Subject to the terms and conditions of this Agreement, FFB agrees to purchase the Note that is offered by the Borrower to FFB for purchase under this Agreement. [Note Purchase Agreement Article 2]

Interest

Section 7.6 Interest Rate Applicable to Advances.

The rate of interest applicable to each Advance made under the Note shall be established as provided in paragraph 6 of the Note. [Note Purchase Agreement §7.6]

Billing by FFB

Section 9.1 Billing Statements to the Borrower, the Department, and the Loan Servicer.

FFB shall prepare a billing statement for the amounts owed to FFB on each Advance that is made under the Note purchased under this Agreement, and shall deliver each such billing statement to the Borrower, the Department, and the Loan Servicer. [Note Purchase Agreement §9.1]

9.3.2 Agreement.

The Borrower agrees that any and all determinations made by FFB shall be conclusive and binding upon the Borrower with respect to:

(a) the amount of accrued interest owed on the Note determined using this rounding methodology; and

(b) the amount of any equal principal installment payment due and payable on the Note determined using this methodology. [Note Purchase Agreement §9.3.2]

Each amount that becomes due and owing on the Note purchased under this Agreement shall be paid when and as due, as provided in the Note. [Note Purchase Agreement Article 10]

Miscellaneous

Section 13.6 Rights Confined to Parties.

Nothing expressed or implied herein is intended or shall be construed to confer upon, or to give to, any Person other than FFB, the Borrower, and the Secretary, and their respective successors and permitted assigns, any right, remedy or claim under or by reason of this Agreement or of any term, covenant or condition hereof, and all of the terms, covenants, conditions, promises, and agreements contained herein shall be for the sole and exclusive benefit of FFB, the Borrower, and the Secretary, and their respective successors and permitted assigns. [Note Purchase Agreement §13.6]

Computation of Interest on Each Advance.

(a) Subject to paragraphs 12 and 15 of this Note, interest on the outstanding principal of each Advance shall accrue from the date on which the respective Advance is made to the date on which such principal is due. [FFB Promissory Note §6]

Payment of Interest; Payment Dates; Payment Borrowings Permitted to Pay Accrued Interest before the First Principal Payment Date.

(a) Interest accrued on the outstanding principal balance of each Advance shall be due and payable on each of the particular dates specified on page 1 of this Note as "Payment Dates" (each such date being a "Payment Date"), beginning on the first Payment Date to occur after the date on which such Advance is made, up through and including the Maturity Date.

(b) On any Payment Date to occur before the "First Principal Payment Date" (as that term is defined in paragraph 8 of this Note), the Borrower shall be permitted to borrow all or a portion of the amount of accrued interest due and payable on such Payment Date for each Advance made before the First Principal Payment Date (each such borrowing being a "Payment Borrowing"), by causing to be delivered to FFB an Advance Request, together with written notification of the Secretary's approval thereof, not later than the third Business Day before the date specified in such Advance Request as the date for such Advance for a Payment Borrowing, specifying the principal amount to be borrowed, in which event FFB shall, subject to the terms and conditions of the Note Purchase Agreement, make an Advance, by an internal transfer of funds on the books of the United States Department of the Treasury, for the account of the Borrower in the amount specified in the respective Advance Request, and shall apply such amount to the payment of the accrued interest. In the case of each Payment Borrowing, FFB shall establish an interest rate for the respective Payment Borrowing in accordance with the principles of paragraph 6(c) of this Note, which rate shall apply from the date on which the Advance is made. [FFB Promissory Note §7]

Fee.

A fee to cover expenses and contingencies, assessed by FFB pursuant to section 6(c) of the FFB Act, shall accrue on the outstanding principal amount of each Advance from the date on which the respective Advance is made to the date on which the principal amount of such Advance is due. The fee on each Advance shall be equal to three-eighths of one percent (0.375%) per annum of the unpaid principal balance of such Advance. The fee on each Advance shall be computed in the same manner as accrued interest is computed under paragraph 6(b) of this Note, and shall be due and payable at the same times as accrued interest is due and payable under paragraph 7 of this Note (adjusted as provided in paragraph 10 of this Note if a Payment Date is not a Business Day). The fee on each Advance shall be credited to the Secretary as required by

section 505(c) of the Federal Credit Reform Act of 1990, as amended (codified at 2 U.S.C. § 661d(c)). [FFB Promissory Note §9]

Manner of Making Payments.

(a) For so long as FFB is the Holder of this Note, each payment under this Note shall be paid in immediately available funds by electronic funds transfer to the account of the United States Treasury (for credit to the subaccount of the Secretary) maintained at the Federal Reserve Bank of New York in the manner described below:

U.S. Treasury Department
ABA No. 0210-3000-4
TREAS NYC/CTR/BNF=D 89000001
OBI=Dept of Energy Loan # (Solyndra Fab 2 LLC)

provided, however, that a payment made in the manner described above shall not discharge any portion of a payment obligation under this Note, or be applied as provided in paragraph 14 of this Note, until the payment has been received and credited to the subaccount of FFB (within the account of the United States Treasury maintained at the Federal Reserve Bank of New York) specified by FFB in a written notice to the Secretary, or to such other account as may be specified from time to time by FFB in a written notice to the Secretary. [FFB Promissory Note §11]

Secretary's Guarantee of Note.

Upon execution of the guarantee set forth at the end of this Note (the "Guarantee"), the payment by the Borrower of all amounts due and payable under this Note, when and as due, shall be guaranteed by the United States of America, acting through the Secretary, pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. § 16511 et seq.). In consideration of the Guarantee, the Borrower promises to the Secretary to make all payments due under this Note when and as due. [FFB Promissory Note §20]

Security Instruments.

This Note is one of several notes permitted to be executed and delivered by, and is entitled to the benefits and security of, the "Security Instruments" (as defined in the Note Purchase Agreement), whereby the Borrower pledged and granted a security interest in certain property of the Borrower, described therein, to secure the payment of and performance of certain obligations owed to the Secretary, as set forth in the Security Instruments. For purposes of the Security Instruments, in consideration of the undertakings by the Secretary set forth in the Program Financing Agreement, the Note Purchase Agreement, and the Guarantee, the Secretary shall be considered to be, and shall have the rights, powers, privileges, and remedies of, the Holder of this Note. [FFB Promissory Note §21]

Guarantee Payments; Reimbursement.

If the Secretary makes any payment, pursuant to the Guarantee, of any amount due and payable under this Note, each and every such payment so made shall be deemed to be a payment hereunder; provided, however, that no payment by the Secretary pursuant to the Guarantee shall be considered a payment for purposes of determining the existence of a failure by the Borrower to perform its obligation to the Secretary to make all payments under this Note when and as due. The Secretary shall have any rights by way of subrogation, agreement or otherwise which arise as a result of such payment pursuant to the Guarantee and as provided in the particular agreement specified on page 1 of this Note as the "Common Agreement" between the Borrower and the United States of America, acting through the Secretary, to evidence the Borrower's obligation to reimburse the Secretary for payment made by the Secretary pursuant to the Guarantee. [FFB Promissory Note §22]

Default and Enforcement.

(a) In case of a default by the Borrower under this Note or the occurrence of an "Event of Default" (as defined in the Security Instruments), then, in consideration of the obligation of the Secretary under the Guarantee, the Secretary, in the name of the Secretary or the United States of America, shall have all rights, powers, privileges, and remedies of the Holder of this Note, in accordance with the terms of this Note and the Security Instruments, including, without limitation, the right to (i) enforce or collect all or any part of the obligation of the Borrower under this Note or arising as a result of the Guarantee; (ii) accelerate (as provided in paragraph 24); (iii) compromise or otherwise negotiate with the Borrower; (iv) bring suit against or foreclose upon any or all of the security interests granted by the Borrower; and (v) to file proofs of claim or any other document in any bankruptcy, insolvency, or other judicial proceeding, and to vote such proofs of claim. [FFB Promissory Note §23(a)]

(b) The Borrower acknowledges that FFB has agreed in the Note Purchase Agreement that, in consideration of the Guarantee, the Secretary shall have the sole authority (vis-à-vis FFB), in the case of a default by the Borrower under this Note or the occurrence of an Event of Default under the Security Instruments, in respect of acceleration (as provided in paragraph 24), the exercise of other remedies available hereunder or under the Note Purchase Agreement, and the disposition of sums or property recovered. [FFB Promissory Note §23(b)]

Acceleration.

Upon the occurrence and continuation of a default by the Borrower under this Note or an Event of Default under the Security Instruments, the Secretary, pursuant to the Security Instruments, may declare the entire unpaid principal amount of this Note, all interest thereon, and all other amounts payable under this Note, and upon such declaration such amounts shall become, due and payable to the Secretary, under the circumstances described, and in the manner and with the effect provided, in the Security Instruments. [FFB Promissory Note §24]

COMMON AGREEMENT

All payments due under the DOE Credit Facility shall be made by the Borrower pursuant to the terms of the DOE Credit Facility Documents and the Collateral Agency Agreement. The Collateral Agent shall apply each payment received by it in accordance with the Collateral Agency Agreement; provided, however, that, notwithstanding any instructions to the contrary in the FFB Note, for purposes of administering payments to FFB, the Borrower shall remit such payments directly to an account designated by the Loan Servicer for payment to FFB. [3.1.1]

Interest Account and Interest Computations.

In accordance with Section 609.10(e)(1) of the Applicable Regulations, interest shall accrue on the unpaid principal amount of each DOE-Guaranteed Loan from the date such DOE-Guaranteed Loan is disbursed to the Collateral Agent or otherwise disbursed or deemed disbursed pursuant to the DOE Credit Facility Documents, to the date such DOE-Guaranteed Loan is paid in full, at a rate per annum relating thereto as specified in the DOE Credit Facility Documents. The Borrower hereby authorizes each Credit Party to record in an account or accounts maintained by such Credit Party on its books (A) the interest rates applicable to all DOE-Guaranteed Loans, (B) the interest periods for each DOE-Guaranteed Loan outstanding, (C) the date and amount of each principal and interest payment on each DOE-Guaranteed Loan outstanding, and (D) such other information as such Credit Party may determine is necessary for the computation of interest payable by the Borrower hereunder. The Borrower agrees that all computations of interest by a Credit Party pursuant to this Section 3.2.1 shall, in the absence of manifest error, be prima facie evidence of the amount thereof. All computations of interest shall be made as set forth in the relevant DOE Credit Facility Documents. [3.2.1]

Interest Payment Dates.

Subject to the terms of the DOE Credit Facility, the Borrower shall pay accrued interest on the outstanding principal amount of each DOE-Guaranteed Loan on each Quarterly Payment Date, on prepayment (to the extent thereof), and at maturity (whether by acceleration or otherwise). [Common Agreement §3.2.2]

Representations

The Borrower makes all of the following representations and warranties to and in favor of each Credit Party as of (i) the Common Agreement Date, (ii) the Financial Closing Date, (iii) each Periodic Approval Date, (iv) each Advance Date, and (v) the Project Completion Date, except as such representations and warranties relate to an earlier date, and all of these representations and warranties shall survive the Financial Closing Date. [Common Agreement Article 5]

Covenants

The Borrower covenants and agrees that until the date all Secured Obligations (other than inchoate indemnity obligations) are paid in full and the DOE Credit Facility Commitment has terminated, unless the Loan Servicer waives compliance in writing: [Common Agreement Article 6]

Events of Default

Remedies for Events of Default.

Upon the occurrence and during the continuance of an Event of Default, the Credit Parties may, without further notice of default, presentment or demand for payment, protest or notice of non-payment or dishonor, or other notices or demands of any kind, all such notices and demands being waived (to the extent permitted by Governmental Rules), exercise any or all rights and remedies at law or in equity (in any combination or order that the Credit Parties, may elect), including, without limitation or prejudice to the Credit Parties' other rights and remedies, the following: [Common Agreement §8.2]

(i) (A) refuse, and the Collateral Agent or any Credit Party shall not be obligated, to make or guarantee any further Advances or any payments from any Project Account or any Account Proceeds or other funds held by the Collateral Agent by or on behalf of the Borrower, and (B) suspend or terminate the DOE Credit Facility Commitment;

(ii) take those actions necessary to perfect and maintain the Liens of the Security Documents;

(iii)declare and make all sums of outstanding principal and accrued but unpaid interest remaining under this Common Agreement and the other Loan Documents together with all unpaid fees, Periodic Expenses and charges due hereunder or under any other Loan Document, payable on demand or immediately due and payable, whereupon such amounts shall immediately mature and become due and payable;

(iv)enter into possession of the Project (or any portion thereof) and perform any and all work and labor necessary to complete the Project (or any portion thereof) or to operate and maintain the Project (or any portion thereof), or otherwise foreclose upon or take possession of any Collateral Security and all sums expended by any such Person in so doing, together with interest on such amount at the Late Charge Rate, shall be repaid by the Borrower to such Person upon demand and shall be secured by the Security Documents, notwithstanding that such expenditures may, together with the aggregate amount of Advances under the DOE Credit Facility, exceed the amount of the total DOE Credit Facility Commitment;

(v) set off and apply such amounts to the satisfaction of the Secured Obligations under all of the Loan Documents, including (A) all monies on deposit in any Project Account, (B) any Account Proceeds, (C) any amounts paid under the Equity Funding Agreement or the Sponsor Support Agreement including any Reserve Letters of Credit issued thereunder, or (D) any other moneys of the Borrower on deposit with the Collateral Agent or any Credit Party;

(vi)prior to the Project Completion Date, require the Sponsor to make an Accelerated Equity Contribution in an amount equal to the lesser of: (A) the balance of the

undrawn Base Equity Commitment and all amounts of the Overrun Equity Commitment, and (B) the outstanding amount of the Secured Obligations at such time;

(vii) cure defaults;

(viii) proceed to protect and enforce its rights and remedies by appropriate proceedings, whether for damages or the specific performance of any provision of this Common Agreement or any other Transaction Document, or in aid of the exercise of any power granted in this Common Agreement or any other Transaction Document, or by law, or proceed to enforce the payment of any amount due and payable; and

(ix)exercise any and all rights and remedies available to it under any of the Transaction Documents with respect to the Project, the Borrower, the Sponsor, the Equity Owners and any other Project Participant and under the Collateral Security or otherwise under Governmental Rules; and

(x) in accordance with Section 609.10(e)(4) of the Applicable Regulations, take such other actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of all Collateral so as to enable the United States to achieve maximum recovery upon default by Borrower on the DOE-Guaranteed Loans.

Agents

Appointment of Agents.

In connection with the Project, each Credit Party hereby appoints, and by its signature below, each such Agent accepts such appointment:

(b) the Collateral Agent to act as Collateral Agent and authorizes it to exercise such rights, powers, authorities and discretions as are specifically delegated to the Collateral Agent by the terms of this Common Agreement and the other Loan Documents, together with all such rights, powers, authorities and discretions as are reasonably incidental thereto. [Common Agreement §9.1(b)]

Reimbursement Agreement

Reimbursement Obligation.

If the Borrower defaults in any payment due to FFB under the DOE-Guaranteed Loan or otherwise under any FFB Funding Document, and as a result of such payment default by the Borrower, DOE becomes obligated to make any payments to FFB pursuant to the DOE Guarantee (a "DOE Guarantee Payment"), the Borrower shall become immediately obligated to reimburse DOE in an amount (the "DOE Guarantee Payment Amount") equal to the sum of (i) all DOE Guarantee Payments paid by DOE to FFB, and (ii) all costs or expenses incurred by DOE in connection therewith, whether by payment to FFB or otherwise. [Common Agreement §10.1]

Payments and Computations.

Interest.

The Borrower shall pay to DOE an amount (the "Borrower Reimbursement Obligations") equal to the sum of (i) the DOE Guarantee Payment Amount, and (ii) interest on DOE Guarantee Payment Amount from the date the DOE Guarantee Payment was paid or incurred by DOE under the DOE Guarantee until payment in full by the Borrower to DOE of the DOE Guarantee Payment Amount, at a rate of interest equal to the rate of interest in effect under the FFB Note Purchase Agreement with respect to Overdue Amounts at the time of the payment default by the Borrower. [Common Agreement §10.2.1]

Method of Payment.

The Borrower shall make each payment with respect to Borrower Reimbursement Obligations hereunder (a "Borrower Reimbursement Payment"), irrespective of any right of counterclaim or set-off, in Dollars and in immediately available funds on or before the fifth Business Day following a written demand by DOE to the Borrower indicating the DOE Guarantee Payment Amount and the date it was paid or incurred by DOE, by wire transfer to the following account, or to such other account as may be specified by DOE from time to time: [Common Agreement §10.2.2]

U.S. Treasury Department
ABA No. 0210-3000-4 TREASNYC/CTR/BNF=D89000001
OBI=LGPO Loan No. 1013 – Guarantee Reimbursement

Taxes.

All Borrower Reimbursement Payments by the Borrower hereunder shall be made in accordance with Section 3.1.2. [Common Agreement §10.2.3]

Calculations.

All computations of interest or fees under this Common Agreement shall be made by the Loan Servicer, on the same basis as payments under the FFB Note Purchase Agreement. [Common Agreement §10.2.4]

Determinations.

Each determination of an amount of interest or fees payable hereunder by the Loan Servicer shall be conclusive and binding for all purposes, absent manifest error. [Common Agreement §10.2.5]

Obligations Absolute.

To the fullest extent permitted by law, the Borrower Reimbursement Obligations are absolute, irrevocable and unconditional, and shall be paid strictly in accordance with the terms of this Common Agreement under all circumstances whatsoever, including without limitation the following circumstances, whether or not with notice to or the consent of the Borrower:

(i) the occurrence, or the failure by DOE or any other Secured Party or any other Person to give notice to the Borrower of the occurrence, of any Event of Default or Potential Default under this Common Agreement or any default under any of the other Loan Documents;

(ii) the extension of the time for performance of any obligations, covenants or agreements of any Person under or arising out of any of the Loan Documents;

(iii)the existence of any claim set-off, counterclaim, defense or other rights of any kind or nature which (A) the Borrower, DOE or any other Person may have at any time against FFB or any transferee, or (B) the Borrower or any other Person may have at any time against DOE, whether in connection with the Loan Documents, the transactions contemplated therein or any unrelated transactions;

(iv)any failure, omission or delay on the part of (A) DOE to assert a defense to a DOE Guarantee Payment Amount under the DOE Guarantee or to otherwise contest the DOE Guarantee, or (B) DOE or any other Secured Party or the Borrower to enforce, assert or exercise any other right, power or remedy conferred by this Common Agreement or any of the Loan Documents;

(v) the taking or the omission on the part of DOE or any other Secured Party or the Borrower of any other actions referred to in any of the Loan Documents;

(vi)the compromise, settlement, release, modification, amendment (whether material or otherwise) or termination of any or all of the obligations, conditions, covenants or agreements of any Person in respect of any of the Loan Documents;

(vii) any amendment or waiver of the payment, performance or observance of any of the obligations, conditions, covenants or agreements of any Person contained in any of the Loan Documents;

(viii) the exchange, surrender, substitution or modification of any security for any of the Loan Documents;

(ix)any disability, incapacity or lack of powers, authority or legal personality of or dissolution or change in the status of the Borrower or any other Person;

(x) any release, irregularity, invalidity, illegality, lack of genuineness, unenforceability or modification affecting this Common Agreement, the DOE Guarantee, the FFB Funding Documents, or the other Loan Documents, or the transactions contemplated hereby or thereby;

(xi)the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets of, the marshaling of assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition with creditors or readjustment of, or other similar proceedings which affect the Borrower or any other Person party to any of the Loan Documents;

(xii) the release or discharge by operation of law of the Borrower from the performance or observance or any obligation, covenant or agreement contained in any of the Loan Documents;

(xiii) any statement or any other document presented under the DOE Guarantee proving to be forged, fraudulent, invalid or insufficient in any respect or any statement therein being untrue or inaccurate in any respect whatsoever;

(xiv) any determination by a court or arbitrator, or any settlement of a disputed claim by any party hereto or other Person, relating to this Common Agreement, the DOE Guarantee, the DOE Credit Facility Agreement, or the other Loan Documents, or the transactions contemplated hereby or thereby; or

(xv) any other circumstance or happening whatsoever, whether or not similar to any of the foregoing. [Common Agreement §10.3]

Security.

Borrower Reimbursement Obligations Secured

The parties expressly acknowledge that the Collateral Security pledged under the Security Documents is pledged to secure payment by the Borrower of the Borrower Reimbursement Obligations. [Common Agreement §10.4.1]

Actions.

The Borrower expressly acknowledges that DOE is free to litigate, settle or otherwise satisfy or discharge its obligation with respect to any DOE Guarantee Payment Amount, and take any action under the Security Documents or otherwise with respect to the Collateral Security, as it may from time to time deem appropriate, and any failure by DOE to advise, notify, or consult with the Borrower shall not be a defense to, or in any way diminish, discharge or derogate from the Borrower Reimbursement Obligations hereunder. [Common Agreement §10.4.2]

DOE Rights.

Rights Cumulative.

DOE's right to reimbursement provided for in this Article 10 shall be in addition to, and not in limitation of, any other claims, rights or remedies of subrogation, reimbursement, contribution, exoneration or indemnification or similar claims, rights or remedies, whether arising under contract, by statute, or otherwise that DOE may have from time to time. [Common Agreement §10.5.1]

Subrogation.

Without limiting the generality of Section 10.5.1, in accordance with Section 609.10(e)(2) of the Applicable Regulations, upon any DOE Guarantee Payment DOE shall be subrogated to the rights of FFB or any subsequent holder of the DOE-Guaranteed Loan, including all related Liens and Collateral, and has superior rights in and to the property acquired from the recipient of the payment as provided in §609.15 of the Applicable Regulations. [Common Agreement §10.5.2]

Further Assurances.

The Borrower shall cooperate with DOE in connection with the exercise of any of its rights under this Article 10 and agrees, promptly upon request by DOE or the Loan Servicer, to execute, acknowledge and deliver all further instruments and documents, and take all such further acts as DOE or the Loan Servicer may reasonably request from time to time in order to carry out the purposes of this Article 10 or to enable DOE to exercise and enforce its rights and remedies hereunder. [Common Agreement §10.6]

COMMON AGREEMENT DEFINITIONS

"Secured Parties" DOE and the Collateral Agent, as their respective interests may appear.

SECRETARY'S GUARANTEE

[The DOE Guarantee reads in its entirety as follows:]

The United States of America, acting through the Secretary of Energy ("Secretary"), hereby guarantees to the Federal Financing Bank, its successors and assigns ("FFB"), all payments of principal, interest, premium (if any), and late charges (if any), when and as due in accordance with the terms of the note dated September 3, 2009, issued by **SOLYNDRA FAB 2 LLC** (the "Borrower") payable to FFB in the maximum principal amount of $535,000,000, to which this Secretary's Guarantee is attached (such note being the "Note"), with interest on the principal until paid, irrespective of (i) acceleration of such payments under the terms of the Note, or (ii) receipt by the Secretary of any sums or property from its enforcement of its remedies for the Borrower's default. [DOE Guarantee, paragraph 1]

The obligation of the United States of America to pay amounts due and payable under this Secretary's Guarantee when such amounts become due and payable in accordance with its terms, constitutes the absolute obligation of the United States of America, against which no offset may be made by the United States of America in discharge of its obligation to make these payments and for which the full faith and credit of the United States of America are pledged. [DOE Guarantee, paragraph 2]

This Secretary's Guarantee is issued pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. § 16511 et seq.), section 6 of the Federal Financing Bank Act of 1973 (12 U.S.C. § 2285), and the Note Purchase Agreement dated as of September 2, 2009, among FFB, the Borrower, and the Secretary. [DOE Guarantee, paragraph 3]

RESTRUCTURING TERM SHEET

Solyndra
Proposed Key Business Terms and Conditions

Structural Consideration: All assets of Solyndra Inc. (including intellectual property) to be moved into Fab 2 LLC. Net Operating Losses currently at Solyndra, Inc. to remain at Solyndra, Inc. Solyndra, Inc. to provide a guaranty of the DOE Guaranteed Loan to be released upon entry into definitive documentation.

Senior Debt - $300 million:

Tranche A:

- $75 million at interest rate of 3-month LIBOR plus 600 basis points [with warrant coverage pursuant to a to be determined structure acceptable to DOE] (reducing to 3-month LIBOR plus 200 basis points effective December 2012)
  - To be underwritten by Argonaut/Madrone
    - Subject to DOE/FFB funding of remaining undisbursed amount of the DOE Guaranteed Loan (approximately $95 million) subject to CP's noted below
      - Pro-rata funding with the DOE from and after December 9, 2010 (provided, however, that fundings in December, 2010 may be deferred until date of January funding by DOE/FFB (which is anticipated to be January 10, 2011) upon a written commitment by Argonaut/Madrone to fund the full Tranche A)
- First out in the event of a liquidation event prior to initial scheduled principal payment date (March, 2013)
- Collateral:
  - Equity interests in Fab 2 LLC and all assets of Fab 2 LLC, including all intellectual property, equipment, agreements, etc. ("Operating Company Collateral")
  - All assets of Solyndra, Inc. (i.e. NOL) ("Holding Company Collateral")
- Solyndra, Inc. shall implement charter restrictions, rights plans or take other similar actions reasonably requested by the Tranche A holders to ensure that it does not suffer a change in ownership for purposes of Section 382 of the Internal Revenue Code.

Tranche B:

- $150 million at interest rate of 2.5%
- To be provided by DOE/FFB (includes undisbursed amount of the DOE Guaranteed Loan (approximately $95 million))
- Collateral:
  - Equity interests in Fab 2 LLC and Operating Company Collateral

Tranche C:
Up to an additional $75 million senior debt financing permitted pari passu with Tranche A and B. Collateral and terms as stated on Tranche A above (except Tranche C will not receive a first out position in the event of a liquidation event prior to initial scheduled principal payment date), or as to be negotiated by new lenders and acceptable to DOE/FFB.

Payment terms – Tranches A, B and C (if applicable):

- Initial principal payment: March, 2013
- Equal quarterly principal payments over 16 quarters
- Final maturity: December, 2016
- PIK interest period: Through December, 2012
- Cash sweep as discussed below under Waterfall
- All prepayments without penalty

Senior Second Position Debt:

- $385 million DOE/FFB financing (represents amounts previously funded)
  - OID to accomplish the following:
    - $270 million initial principal amount, accreting to $385 million evenly on a quarterly basis over a 12 year period
- $175 million existing Convertible Debt
  - OID to accomplish the following:
    - $80 million initial principal amount, accreting to $175 million evenly on a quarterly basis over a 15 year period
- $385 million DOE/FFB and $175 million existing Convertible Debt secured on a pari passu basis in equity interests in Fab 2 LLC and Operating Company Collateral

- Payment terms
  - DOE/FFB OID
    - Principal payments: 24 quarters beginning March, 2017; sculpted so that there is no bullet payment due
    - Final maturity: December, 2022
    - PIK interest period: Through December, 2014
    - Mandatory redemption requirements:
      - Once total balances in Debt Service Reserve and the Excess Cash Retention Account exceeds 125% of outstanding balance of the DOE/FFB OID
    - Optional prepayment
      - Only with payment of fully accreted balance of the of the DOE/FFB OID
    - Upon an event of default, all future accretions will be brought forward (ie. The amount outstanding will be equal to the original face amount less all principal repayments up to the default date)

- Existing Convertible Debt OID:

- Principal payments: 36 quarters beginning March, 2017; sculpted so that there is no bullet payment due
- Final maturity: December, 2025
- PIK interest period: Through December, 2015
- Mandatory redemption requirements:
  - Once total balances in Debt Service Reserve and Excess Cash Retention Account exceeds 125% of outstanding balance and only after the DOE/FFB OID facility is fully repaid
- Optional prepayment
  - Only with settlement of payment of fully accreted balance of Convertible Debt and all accrued and unpaid interest

Restrictions on Solyndra, Inc. and Fab 2 LLC (without consent of DOE):

- No investment in business activities outside of those directly in support of Fab 2 production and sales
- No dividends to shareholders
- No use of IP outside of the current project
- No issuance of debt (except for Tranche C as provided for above)
- Other usual and customary restrictions

CPs for December Advance:. Usual and customary, plus the following:

- As provided for the in the letter to which this term sheet is attached
- Construction and equipment supply plan consistent with projections acceptable to DOE and the IE

CPs to Further DOE Advances:

- Construction progress consistent with the construction plan
- Operational spending within a range (tbd) of agreed budget
- Progress on market development to be agreed upon consistent with plan
- Monthly funding by Tranche A investors into the Liquidity Reserve Account equal to a pro-rata share of each respective DOE/FFB funding to be funded contemporaneously with each such DOE/FFB funding
- No MAE (to be defined consistent with agreed upon operating plan)
- Other usual and customary

Events of Default for Senior Debt:

- Cash Balance of Borrower falls below $5,000,000
- Other usual and customary

Cashflow Waterfall:

All revenues paid to Borrower into a Revenue Account held by a Collateral Agent. All cash to be held in accounts noted below by the Collateral Agent (except for O&M account), with transfers

pursuant to certificates reviewed and approved by DOE on a monthly basis into the following accounts in the following priority:

- First, an amount sufficient to pay budgeted operations and maintenance costs due or reasonably expected to become due within the next month funded into the O&M Account;
- Second, an amount equal to 1/3 of the amount necessary to fund the Debt Service due in the next quarterly period funded into the Debt Service Account;
- Third, an amount equal to the Debt Service Reserve requirement up to a maximum of the next six months of Debt Service (not covered by the Debt Service Account) into the Debt Service Reserve Account;
- Fourth, commencing upon Project Completion, an amount sufficient to replenish the Liquidity Reserve Account such that the account balance is maintained equal to a maximum of $40 million into the Liquidity Reserve Account
- Fifth, commencing upon Project Completion an amount equal to finance capital expenditures approved by the IE into the CapEx Reserve Account;
- Sixth, 60% of any excess amount to be used to reduce outstanding indebtedness beginning in March 2013 (pro rata among Senior Debt (Tranches A, B and C) for as long as any such Senior Debt is outstanding)
- Seventh, all remaining cash into the Excess Cash Retention Account

Other Indebtedness

- None

Governance:

- DOE/FFB Board observation rights until full repayment of the OID facility
- Intercreditor Agreement: To be discussed

Solyndra.2010.12.12.1657.kcc.v.1

DOE STATUTE AND REGULATIONS

[Based on Statute and Regulations Updated 03-30-10]

[Statute in Dark Blue, *USCS current through PL 111-12, approved March 30, 2009*]

[Final Regulations in Dark Red, *Federal Register, Vol. 72, No. 204, October 23, 2007 and amended in Federal Register, Vol. 73, No. 8, January 11, 2009 and Federal Register, Vol. 74, No. 232, December 4, 2009*]

[Public Comments on the Notice of Public Rulemaking in Dark Green, with DOE's Responses in connection with Notice of Public Rulemaking in Green, *Federal Register, Vol. 72, No. 204, 10-23-07*]

Definitions

§16511. Definitions

[Codification of Section 1701]

In this *title [42 USCS §§16511* et seq.]:

. . .

(5) Obligation. The term "obligation" means the loan or other debt obligation that is guaranteed under this section.[1]

§609.2 Definitions.

. . .

Guaranteed Obligation[2] means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Defaults

§16512. Terms and conditions

[Codification of Section 1702]

. . .

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1 See also definition of "Guaranteed Obligation" at §609.2 of Final Regulations.

2 See also 42 USCS §16511(5).

(g) Defaults.

(1) Payment by Secretary.

(A) In general. If a borrower defaults on the obligation (as defined in regulations promulgated by the Secretary and specified in the guarantee contract), the holder of the guarantee shall have the right to demand payment of the unpaid amount from the Secretary.[3] [§1702(g)(1)(A)]

(B) Payment required. Within such period as may be specified in the guarantee or related agreements, the Secretary shall pay to the holder of the guarantee the unpaid interest on, and unpaid principal of the obligation as to which the borrower has defaulted, unless the Secretary finds that there was no default by the borrower in the payment of interest or principal or that the default has been remedied.[4] [§1702(g)(1)(B)]

(C) Forbearance. Nothing in this subsection precludes any forbearance by the holder of the obligation for the benefit of the borrower which may be agreed upon by the parties[5] to the obligation and approved by the Secretary.[6] [§1702(g)(1)(C)]

(2) Subrogation.

(A) In general. If the Secretary makes a payment under paragraph (1), the Secretary shall be subrogated to the rights of the recipient of the payment as specified in the guarantee or related agreements[7] including, where appropriate, the authority (notwithstanding any other provision of law) to--

(i) complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such guarantee or related agreements;[8] or

(ii) permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the project if the Secretary determines this to be in the public interest.[9]

(B) Superiority of rights. The rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, shall be superior to the rights of any other person with respect to the property.[10]

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3 See also §§609.15(a)-(e) of Final Regulations.

4 See also §609.15(f) of Final Regulations.

5 Consider whether DOE could pay a fee for forbearance. [M&F Comment January 2009]

6 See also §609.15(d) of Final Regulations.

7 See also §§609.10(e)(2) and 609.15(g) of Final Regulations.

8 See also §609.15(j) of Final Regulations.

9 See also §609.13(b) of Final Regulations.

(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.[11]

(3) Payment of principal and interest by Secretary. With respect to any obligation guaranteed under this section, the Secretary may enter into a contract to pay, and pay, holders of the obligation, for and on behalf of the borrower, from funds appropriated for that purpose, the principal and interest payments which become due and payable on the unpaid balance of the obligation if the Secretary finds that--

(A) (i) the borrower is unable to meet the payments and is not in default[12];

(ii) it is in the public interest to permit the borrower to continue to pursue the purposes of the project;[13] and

(iii) the probable net benefit to the Federal Government in paying the principal and interest will be greater than that which would result in the event of a default;[14]

(B) the amount of the payment that the Secretary is authorized to pay shall be no greater than the amount of principal and interest that the borrower is obligated to pay under the agreement being guaranteed;[15] and

(C) the borrower agrees to reimburse the Secretary for the payment (including interest) on terms and conditions that are satisfactory to the Secretary.[16] [§1702(g)(3)]

(4) Action by Attorney General.

(A) Notification. If the borrower defaults on an obligation, the Secretary shall notify the Attorney General of the default.[17]

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10 See also §609.15(g) of Final Regulations.

11 See also §609.10(d)(11) of Final Regulations. Protection of intellectual property is an important element of the program. [M&F Comment January 2009]

12 See also §609.13(a)(1) of Final Regulations.

13 See also §609.13(b) of Final Regulations.

14 See also §609.13(c) of Final Regulations.

15 See also §609.13(d) of Final Regulations.

16 See also §609.13(e) of Final Regulations.

17 See also §609.15(c) of Final Regulations.

(B) Recovery. On notification, the Attorney General shall take such action as is appropriate to recover the unpaid principal and interest due from--

(i) such assets of the defaulting borrower as are associated with the obligation;[18] or

(ii) any other security pledged to secure the obligation.[19]

§609.15 Default, demand, payment, and collateral liquidation.[20]

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as "Holder"), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement. [Regulations §609.15(a)]

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.[21] [Regulations §609.15(b)]

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations). In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee

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18 See also §609.15(i) of Final Regulations.

19 See also §609.15(j) of Final Regulations.

20 See also 42 USCS §16512(g)(1)(A), for §609.15(a)-(e) hereof.

21 [S]ection 609.15(b) is not intended and should not be read to preclude demands for failure to pay principal and interest where there has been a default other than a payment default. A non-payment default can become a payment default if such default is not cured within the time specified in the Loan Guarantee Agreement and the debt is accelerated and thus causes the entire amount of the loan to become immediately due and payable. **[DOE Response] [60132]**

Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations).[22] [Regulations §609.15(c)]

(d) No provision of this regulation shall be construed to preclude forbearance by the Holder with the consent of the Secretary for the benefit of the Borrower.[23] [Regulations §609.15(d)]

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, the supporting documentation specified in the Loan Guarantee Agreement and any other supporting documentation as may reasonably be required to justify such demand. [Regulations §609.15(e)]

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government. [Regulations §609.15(f)]

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders and shall have superior rights in and to the property acquired from the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights to the extent held by the Holder.[24] [Regulations §609.15(g)]

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22 See also 42 USCS §16512(g)(4)(A).

23 See also 42 USCS §16512(g)(2)(C).

24 See also 42 USCS §§16512(g)(2)(A)-(B).
DOE today adopts the same interpretation of Title XVII as it adopted in regard to nearly identical language in section 19(g)(2) of the Alternative Fuels Act. Thus, DOE interprets the language in Title XVII as requiring a first lien on all project assets, but as allowing DOE to treat assets pledged to secure a project loan that are not project assets the same as project assets. Consistent with the regulations concerning the disposition of proceeds from the sale of assets pursuant to the Alternative Fuels Act (section 796(f) and (k)), . . . where DOE only guarantees a portion of a Guaranteed Obligation, the Secretary may enter into inter-creditor or other arrangements to share the proceeds from the sale of project collateral with lenders or other holders of the non-guaranteed portion of the Guaranteed Obligation. DOE may, at the discretion of the Secretary, share the proceeds from the sale of collateral. DOE is limited, however, to no greater than a pro rata share for the non-guaranteed Holder. However, in cases where DOE guarantees 100 percent of a loan, the loan must be issued to and funded by the Federal Financing Bank. In those circumstances, DOE will have a first lien priority on project

(h) Where the Loan Guarantee Agreement so provides, the Eligible Lender or other Holder, or other servicer, as appropriate, and the Secretary may jointly agree to a plan of liquidation of the assets pledged to secure the Guaranteed Obligation. [Regulations §609.15(h)]

(i) Where payment of the Guaranteed Obligation has been made and the Eligible Lender or other Holder or other servicer has not undertaken a plan of liquidation, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, may seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.[25] [Regulations §609.15(i)]

(j) If the Secretary is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease the project facilities, or otherwise dispose of any property acquired pursuant to the Loan Guarantee Agreement or take any other necessary action which the Secretary deems appropriate, in order that the original goals and objectives of the project will, to the extent possible, be realized.[26] [Regulations §609.15(j)]

(k) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Loan Guarantee Agreement to recover costs incurred by the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other**[60145]** lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.[27] [Regulations §609.15(k)]

(l) If there was a partial guarantee of the Guaranteed Obligation by DOE, the remaining funds received as a result of the liquidation of project assets may, if so agreed in advance, be applied as follows:

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation; and

(2) Second, distributed among the Holders of the debt on no greater than a pro rata share basis. [Regulations §609.15(l)]

(m) No action taken by the Eligible Lender or other Holder or other servicer in the liquidation of any pledged assets will affect the rights of any party, including the Secretary,

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assets pledged as collateral and all other debt for the project at issue must be subordinate to the Guaranteed Obligation. **[DOE Response] [60124-5]**

25 See also 42 USCS §16512(g)(4)(B)(i).

26 See also 42 USCS §§16512(g)(2)(A)(i) and 15612(g)(4)(B)(ii).

27 See also 42 USCS §16512(h)(1).

having an interest in the loan or other debt obligations, to pursue, jointly or severally, to the extent provided in the Loan Guarantee Agreement, legal action against the Borrower or other liable parties, for any deficiencies owing on the balance of the Guaranteed Obligations or other debt obligations after application of the proceeds received upon liquidation. [Regulations §609.15(m)]

(n) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation of collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances. [Regulations §609.15(n)]

(o) Nothing in this part precludes the Secretary from purchasing the Holder's interest in the project upon liquidation. [Regulations §609.15(o)]

Subordination

§16512. Terms and conditions

[Codification of Section 1702]

(d) Repayment.

. . .

(3) Subordination. The obligation shall be subject to the condition that the obligation is not subordinate to other financing.[28]

§609.10 Loan Guarantee Agreement.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions, which must be specified in the Loan Guarantee Agreement,[29] are satisfied:

(13) Any Guaranteed Obligation is not subordinate[30] to any loan or other debt obligation and is

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28 See also §609.10(d)(13) of Final Regulations.

29 Note the requirement that these terms be specified in the Loan Guarantee Agreement. Note also that some are representations, some are covenants, some are conditions precedent, and some are terms of the loan guarantee. [M&F Comment April 2009]

30 The phrase "not subordinate" allows for pari passu senior loans.

in a first lien position on all assets of the project and all additional collateral pledged as security for the Guaranteed Obligations and other project debt;[31]

B. Financial Structure Issues

The Act imposes certain limitations on the financial structure of proposed projects, including that a loan guarantee "shall not exceed an amount equal to 80 percent of the project cost of the facility that is the subject of the guarantee as estimated at the time at which the guarantee is issued." (42 U.S.C. 16512(c)) Section 1702(g)(2)(B) of the Act further requires that "with respect to any property acquired pursuant to a guarantee or related agreements, [DOE's rights] shall be superior to the rights of any other person with respect to the property." In the NOPR, the Department interpreted this statutory provision to require that DOE possess a first lien priority in the assets of the project and other assets pledged as security, and stated that because DOE believed it is not permitted by Title XVII to adopt a *pari passu* security structure, Holders of the non-guaranteed portion of a loan or debt instrument supported by a Title XVII guarantee would have a subordinate claim to DOE in the event of default.

. . .

According to JP Morgan Securities, Inc. (JP Morgan) it is unclear how lenders would fund the non-guaranteed portions of a partially guaranteed loan on which stripping was prohibited since banks rarely lend for tenures beyond eight to ten years, particularly when the debt is subordinated. JP Morgan further stated that an expectation that lenders would maintain the non-guaranteed portions for the life of such loans is unrealistic, and that by taking a second lien interest, a lender's participation is tantamount to an equity investment. (JP Morgan at 1).

. . .

It is customary and common practice in project financing for multiple lenders to enter into *a pari passu* structure with respect to assets pledged as collateral to secure debt. If such a structure were employed for the Title XVII program, DOE, pursuant to its Loan Guarantee Agreement, and lenders that held non-guaranteed debt, could share proportionately in the proceeds from the sale of project assets pledged as collateral if there were a default and the collateral was sold. In the NOPR, DOE interpreted Title XVII's requirement that DOE have a superior right to project assets pledged as collateral to prohibit *pari passu* structures, and as requiring all other lenders to be subordinate to DOE.

. . .

In the preamble to the final rule implementing section 19(g)(2) of the Alternative Fuels Act and in response to arguments by commenter's concerning the issue of *pari passu* sharing of the project collateral, DOE stated as follows:

> Subsection 796.11(a)(9) of the proposed regulation required that the guaranteed loan not be subordinate to any other loan for the project and that the guaranteed loan be in a first lien position with respect to assets of the project and other

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31 See also 42 USCS §16512(d)(3). This language is tracked in the OGC Form Term Sheet. [M&F Comment April 2009]

> collateral which are pledged as security for repayment of the **[60125]** guaranteed loan. DOE construes the Act to require this, and that only with regard to assets not directly related to the project, but which may be pledged as collateral, may a less than first lien position be acceptable to DOE.

(45 FR 15468, 15471).

DOE today adopts the same interpretation of Title XVII as it adopted in regard to nearly identical language in section 19(g)(2) of the Alternative Fuels Act. Thus, DOE interprets the language in Title XVII as requiring a first lien on all project assets, but as allowing DOE to treat assets pledged to secure a project loan that are not project assets the same as project assets. Consistent with the regulations concerning the disposition of proceeds from the sale of assets pursuant to the Alternative Fuels Act (section 796(f) and (k)), section 609.15 of today's final rule *also provides that where DOE only guarantees a portion of a Guaranteed Obligation, the Secretary may enter into inter-creditor or other arrangements to share the proceeds from the sale of project collateral with lenders or other holders of the non-guaranteed portion of the Guaranteed Obligation. DOE may, at the discretion of the Secretary, share the proceeds from the sale of collateral. DOE is limited, however, to no greater than a pro rata share for the non-guaranteed Holder. However, in cases where DOE guarantees 100 percent of a loan, the loan must be issued to and funded by the Federal Financing Bank. In those circumstances, DOE will have a first lien priority on project assets pledged as collateral and all other debt for the project at issue must be subordinate to the Guaranteed Obligation.*

OMB CIRCULARS

The provision to look at in the circular is the definition of Modification, particularly para. 3, and the definition of Work Out.

OMB Circular A-11

(b) ***Claim payment*** means a payment made to private lenders when a guaranteed loan defaults. [OMB Circular A-11, Section 185, Page 6]

(m) ***Loan guarantee*** means any guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender, except for the insurance of deposits, shares, or other withdrawable accounts in financial institutions. Loans that are financed by the FFB pursuant to agency loan guarantee authority are treated as direct loans rather than loan guarantees. [OMB Circular A-11, Section 185, Page 9]

(n) ***Loan guarantee commitment*** means a binding agreement by a Federal agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement. [OMB Circular A-11, Section 185, Page 9]

(o) ***Loan guarantee subsidy cost*** means the estimated long-term cost to the Government of a loan guarantee, calculated on a net present value basis, excluding administrative costs. Specifically, the cost of a loan guarantee is the net present value, at the time when the guaranteed loan is disbursed by the lender, of the following estimated cash flows:

- Payments by the Government to cover defaults and delinquencies, interest subsidies, and other requirements; and
- Payments to the Government, including origination and other fees, penalties, and recoveries.
-

These estimated cash flows include the effects of expected Government actions and the exercise by the guaranteed lender or the borrower of an option included in the loan guarantee contract. [OMB Circular A-11, Section 185, Page 9]

(p) ***Loan terms*** are those terms made explicit in the contract between the U.S. Government and the borrower or in the federally guaranteed contract between a private lender and the borrower. These assumptions are forecast in the formulation subsidy cost estimate but are known at the time of loan origination. They may include: the interest rate charged on loans, the extent of a guarantee, fees, repayment terms, collateral held, and other factors such as grace periods. [OMB Circular A-11, Section 185, Page 9]

(r) ***Modification*** means a Government action that (1) differs from actions assumed in the baseline estimate of cash flows and (2) changes the estimated cost of an outstanding direct loan (or direct loan obligation) or an outstanding loan guarantee (or loan guarantee commitment). The modification may be **[10]** for a single loan or loan guarantee as well as a group; it may be

any size; and it may affect pre–1992 direct loans and loan guarantees or post–1991 direct loans or loan guarantees. New legislation that alters the baseline cash flow estimate for a loan or group of loans always results in a modification. A Government action may change the cost directly by altering the terms of existing contracts, selling loan assets (with or without recourse) or converting guaranteed loans to direct loans by purchasing them from a private lender. It also may change the cost indirectly by legislatively changing the way in which a portfolio of direct loans or guaranteed loans is administered. Examples of changes in the terms of existing loan contracts are forgiveness, forbearance, interest rate reductions, extensions of maturity, and prepayments without penalty. Examples of changes in loan administration are new methods of debt collection, such as using tax refunds to repay loans and restrictions on debt collections. If the baseline cost estimate does not assume an action, and the cost would be increased or decreased as a result of that action, the action is a modification. [OMB Circular A-11, Section 185, Page 9-10]

Modifications do not include a Government action that is assumed in the baseline cost estimate, as long as the assumption is documented and has been approved by OMB. For example, modifications would not include routine administrative workouts (see section 185.3(ab)) of troubled loans or loans in imminent default. They also would not include a borrower's or the Government's exercise of an option that is permitted within the terms of an existing contract, such as a borrower prepaying the loan. The baseline subsidy estimate must include all anticipated actions by the Government, lenders, and borrowers that are permissible under current law and that affect the cash flow. Subsequently, if the cost estimate of an action by the borrower, lender, or the Government differs from what is anticipated in the documented baseline subsidy estimate, then the difference in cost is included in a reestimate. Assumptions underlying the subsidy estimates must be documented to assist in determining whether an action is a modification or a reestimate. [OMB Circular A-11, Section 185, Page 10]

Modifications do not include additional disbursements to borrowers that increase the amount of an outstanding direct loan or an outstanding loan guarantee. These are treated as new direct loans or loan guarantees in the amount of the additional disbursement. [OMB Circular A-11, Section 185, Page 10]

There are situations where it is not clear whether a Government action constitutes a modification or a reestimate. These situations should be judged on a case-by-case basis by OMB in consultation with the agency. They could include actions by the Government that are not addressed in existing contracts, management changes that are within an agency's existing specific authority for the loan program, and broad changes in agency policy (e.g., loan sale policy). In general, if the possibility of the action was explicitly included in the cash flows for the baseline subsidy estimate, and this can be documented, it would most likely be a reestimate. If not, it would most likely be a modification. [OMB Circular A-11, Section 185, Page 10]

Modifications produce a one-time change in the subsidy cost of *outstanding* direct loans and loan guarantees. The effect of the Government action on the subsidy cost of direct loan obligations and loan guarantee commitments made after the date of the modification, if there is any effect, is not a modification. Instead, the effects are incorporated in the initial cost estimates for

subsequent direct loan obligations and loan guarantee commitments. [OMB Circular A-11, Section 185, Page 10]

(s) ***Modification cost*** means the difference between the estimate of the net present value of the remaining cash flows assumed for the direct loan or loan guarantee contract before and after the modification. The estimate of the remaining cash flows before the modification must be the same as assumed in the baseline for the most recent President's budget. The estimate of the remaining cash flows after the modification must be the pre-modification cash flows adjusted solely to reflect the effects of the modification. [OMB Circular A-11, Section 185, Page 10]

An outstanding direct loan (or direct loan obligation) or loan guarantee (or loan guarantee commitment) cannot be modified in a manner that increases its cost, unless budget authority for the additional cost has been provided in advance in an appropriations act. If the modification is mandated in legislation, the legislation itself provides the budget authority to incur a subsidy cost obligation (whether explicitly stated or not). [OMB Circular A-11, Section 185, Page 10]

(ab) ***Work-outs*** mean plans that offer options short of default or foreclosure for resolving troubled loans or loans in imminent default, such as deferring or forgiving principal or interest, reducing the borrower's interest rate, extending the loan maturity, or postponing collection action. Work-outs are expected to minimize the cost to the Government of resolving troubled loans or loans in imminent default. They should only be utilized if it is likely that the borrower will be able to repay under the terms of the workout and if the cost of the work-out is less than the cost of default or foreclosure. For post–1991 direct loans and loan guarantees, the expected effects of work-outs on cash flow are included in the original estimate of the subsidy cost. Therefore, to the extent that the effects of work-outs on cash flow are the same as originally estimated, they do not alter the subsidy cost. If the effects on cash flow are more or less than the original estimate, the differences are included in reestimates of the subsidy and are not a modification. [OMB Circular A-11, Section 185, Page 12]

185.6 How do I calculate reestimates?

(a) *General.*

Subsidy reestimates are made on direct loans and loan guarantees that have been disbursed. They are recorded in the current year column of the budget. (For example, the subsidy for direct or guaranteed loans disbursed during 2010 would be reestimated during 2011 and would be recorded in the 2011 column of the FY 2012 Budget.) A closing reestimate should be made once all the loans in the cohort have been repaid or written off. [OMB Circular A-11, Section 185, Page 15]

Two different types of reestimates are made:

- Interest rate reestimates, for differences between discount rate assumptions at the time of formulation (the same assumption is used at the time of obligation or commitment) and the actual interest rate(s) for the year(s) of disbursement; and

- Technical reestimates, for changes in technical assumptions. [OMB Circular A-11, Section 185, Page 15]

Technical reestimates of the subsidy cost of a cohort of direct loans or loan guarantees must be made after the close of each fiscal year as long as the loans are outstanding, unless a different plan is approved by the OMB representative with primary budget responsibility for the credit account. The different plan might be with regard to the time when reestimates are made within the year or the frequency of reestimates. If the plan allows reestimates to be made less frequently than every year, it should require reestimates to be made for any year when any one of the following four conditions is met:

(1) When required based on periodic schedules established in coordination with OMB, consistent with the unique attributes of each program (e.g., initially every two years after the cohort has been substantially disbursed, then every five years);

(2) When a major change in actual versus projected activity is detected (e.g., a loan that is large relative to the size of the portfolio goes into default or prepays substantially earlier than expected);

(3) When a material difference is detected through monitoring triggers developed in coordination with OMB. The triggers would focus on major data elements (e.g., total projected versus total actual cohort collections) rather than in-depth individual cohort analysis. Agencies should focus on a few major loan elements recognizing there are different key elements applicable to each program and different reporting problems; and

(4) When a cohort is being closed out. [OMB Circular A-11, Section 185, Page 16]

Technical reestimates are made for all changes in assumptions other than interest rates. This type of reestimate compares the subsidy estimate that already includes any reestimate for actual interest rates with a reestimated subsidy using updated technical information (for defaults, fees, recoveries, etc.) as well as actual interest rates. [OMB Circular A-11, Section 185, Page 16]

The purpose of technical reestimates is to adjust the subsidy estimate for differences between the original projection of cash flows (as estimated at obligation) and the amount and timing of cash flows that are expected based on actual experience, new forecasts about future economic conditions, and other events and improvements in the methods used to estimate future cash flows. Because actual cash flows are experienced every year and the ability to forecast future years also changes, this reestimate must be done after the end of every fiscal year as long as any loans are outstanding (except as provided above). [OMB Circular A-11, Section 185, Page 16]

Reestimates must be made separately for each cohort. If a cohort is divided into risk categories, each risk category within a cohort must be reestimated separately. The reestimate will then be compared with the previous estimate. For this purpose, all details of the previous subsidy estimates by risk category should be retained in program records. [OMB Circular A-11, Section 185, Page 16]

185.7 How do I calculate and record modifications?

When a direct loan or loan guarantee is modified, the subsidy cost of the modification must be calculated. The subsidy cost calculation will indicate whether the Government action changes the subsidy cost. If there is no change in cost, there will be no budgetary effect, and nothing needs to be recorded in the budget. If the modification will increase or decrease the cost, the budgetary effect must be recorded as described under modification cost increases/decreases below. Additional transfers to or from the financing account will be required, with the type of transfer depending on whether the modification affects pre–1992 or post–1991 direct loans and loan guarantees. These additional transfers are described in a separate subsection below. [OMB Circular A-11, Section 185, Page 19]

The subsidy cost of the modification is the difference between the estimate of the net present value of the remaining cash flows for the direct loan or loan guarantee before and after the modification. The estimate of remaining cash flows before modification must be the same as assumed in the baseline for the most recent President's budget. The estimate of remaining cash flows after modification must be the premodification cash flows adjusted solely to reflect the effects of the modification. [OMB Circular A-11, Section 185, Page 19]

OMB Circular A-129

[Nothing of note for now . . .]

[EXTRA: LIST OF DOCUMENTS]

Loan Documents

Loan Documents

1. *Common Agreement (including Definitions, Exhibits & Disclosure Letter)*
2. *FFB Program Financing Agreement*
3. *FFB Note Purchase Agreement*
4. *FFB Promissory Note*
5. *DOE Guarantee*
6. *Collateral Agency Agreement*
7. *Equity Funding Agreement*
8. *Sponsor Support Agreement*

Security Documents

9. *Deed of Trust*

10. *Environmental Indemnity Agreement*
11. *Security Agreement*
12. *Account Control Agreement*
13. *Equity Pledge Agreement*
14. *Direct Agreements*

[ADD]

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DOE/SOLYNDRA RESTRUCTURING

Contractual and Legal Analysis

[Rough Draft: 01-03-11]

(see Table of Contents at end)

I. BACKGROUND

[Briefly describe circumstances and need for restructuring]

II. EXISTING LOAN STRUCTURE

A. DOE-Guaranteed Loans and Advances

1. *DOE has guaranteed an FFB Loan in the principal amount of $535,000,000*

a. The DOE-Guaranteed Loan is from FFB to the Borrower (Fab 2) in the principal amount of up to $535,000,000.

b. The terms of the FFB loans (*i.e.*, the DOE-Guaranteed Loans) are set forth in a Note Purchase Agreement among the Borrower, DOE and FFB.

c. FFB also holds a single "grid-style" Promissory Note, which covers Advances made from time to time (generally monthly).

2. *Advances of the DOE-Guaranteed Loan are made monthly in accordance with the conditions precedent set forth in the Common Agreement*

a. Advances of the loan are made (generally monthly) in accordance with the provisions of the Note Purchase Agreement (which sets forth basic FFB funding mechanics).

b. Detailed conditions precedent to each Advance, designed to protect the DOE's credit exposure, are set forth in the Common Agreement.

B. Repayment of Principal and Interest

1. *Interest on the DOE-Guaranteed Loan is payable quarterly*

a. Interest is due and payable on the 15th day of each February, May, August and November (the "Quarterly Payment Dates"), beginning immediately on the first Quarterly Payment Date after an Advance is made, up through and including the Maturity Date. [FFB Promissory Note §__]

b. Interest is payable during the construction period by means of "Payment Borrowings", which are Advances of the DOE-Guaranteed Loans in the required amount of interest. [FFB Promissory Note §__]

c. On and after the First Principal Payment Date, interest is paid in cash from revenues generated from operations. [FFB Promissory Note §__]

2. *Principal of the DOE-Guaranteed Loan is payable quarterly, beginning May 15, 2012*

a. Principal is payable in 18 equal quarterly payments on the Quarterly Payment Dates beginning on **May 15, 2012**, and thereafter on the 15th day of February, May, August and November of each year until **August 15, 2016**. [FFB Promissory Note §__]

C. Collateral Security Package

1. *All assets of the Borrower, as well as Solyndra, Inc.'s equity interests in the Borrower, are pledged as collateral security for the Borrower's payment obligations*

a. All Borrower Assets Pledged. All assets of the Borrower are pledged as collateral security for the Guaranteed Loans.

b. All Equity Interests Pledged. All Equity Interests in the Borrower (100% held directly by the Sponsor as the sole Equity Owner) are pledged as collateral security for the Guaranteed Loans.

2. *All security is pledged for DOE's benefit, not FFB's*

a. The Note Purchase Agreement provides that "FFB acknowledges that the Borrower has, through the execution of the Security Instruments, pledged and granted a security interest to the "Collateral Agent," for the benefit of the "Secured Parties" (as those terms are defined in the Common Agreement) in certain property of the Borrower to secure the payment and performance of certain obligations owed to the Secretary under, *inter alia*, the Security Instruments." [Note Purchase Agreement, §11.1.2]

3. *FFB is not a Secured Party under the Loan Documents*

a. The Common Agreement defines "Secured Parties" as DOE and the Collateral Agent, as their respective interests may appear.

4. *Upon a default by the Borrower under the FFB Promissory Note or an Event of Default under the Common Agreement and the Security Documents, DOE has the sole authority (vis-a-vis FFB) in respect of acceleration of the FFB Promissory Note and realization on collateral.*

a. The Note Purchase Agreement provides

"In consideration of the Secretary's Guarantee relating to the Note that has been purchased by FFB under this Agreement, the Secretary shall have the sole authority (vis-a-vis FFB), in the case of a default by the Borrower under such Note or the occurrence of an Event of Default under the Security Instruments, in respect of acceleration of such Note, the exercise of other available remedies, and

the disposition of sums or property recovered. [Note Purchase Agreement" §11.1.1][1]

b. "Security Instruments" is defined to mean, "collectively, (i) the Common Agreement, and (ii) the "Security Documents" (as that term is defined in the Common Agreement), as such agreements and documents may be amended, supplemented, and restated from time to time in accordance with their respective terms." [Note Purchase Agreement Schedule I, Item 3]

D. DOE Guarantee

1. DOE's guarantee is issued under Title XVII and references the Federal Financing Bank Act

a. The DOE Guarantee provides that

"This Secretary ' s Guarantee is issued pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. § 16511 et seq.), section 6 of the Federal Financing Bank Act of 1973 (12 U.S.C. § 2285), and the Note Purchase Agreement dated as of September 2, 2009, among FFB, the Borrower, and the Secretary." [DOE Guarantee, paragraph 3]

b. The DOE Guarantee is a full faith & credit obligations of the U.S. government:

"The obligation of the United States of America to pay amounts due and payable under this Secretary's Guarantee when such amounts become due and payable in accordance with its terms, constitutes the absolute obligation of the United States of America, against which no offset may be made by the United States of America in discharge of its obligation to make these payments and for which the full faith and credit of the United States of America are pledged." [DOE Guarantee, paragraph 2]

2. DOE guarantees all payments of principal, interest, premium, and late charges, when and as due in accordance with the FFB Promissory Note

a. The DOE Guarantee guarantees

"all payments of principal, interest, premium (if any), and late charges (if any), when and as due in accordance with the terms of the note dated September 3, 2009, issued by **SOLYNDRA FAB 2 LLC** (the "Borrower") payable to FFB in the maximum principal amount of $535,000,000, to which this Secretary's Guarantee is attached (such note being the "Note"), with interest on the principal until paid, irrespective of (i) acceleration of such payments under the terms of the Note, or (ii) receipt by the Secretary of any sums or property from its enforcement of its remedies for the Borrower's default." [DOE Guarantee, paragraph 1]

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1 See similar language in Section 23(b) of the FFB Promissory Note

b. The FFB Promissory Note provides

Upon execution of the guarantee set forth at the end of this Note (the "Guarantee"), the payment by the Borrower of all amounts due and payable under this Note, when and as due, shall be guaranteed by the United States of America, acting through the Secretary, pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. § 16511 et seq.). In consideration of the Guarantee, the Borrower promises to the Secretary to make all payments due under this Note when and as due. [FFB Promissory Note §20]

E. Guarantee Payments

1. Absent a payment default, FFB has no right to demand any action from DOE

a. The Applicable Regulations provide:

"In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement." [Regulations §609.15(b)]

2. If the Borrower defaults, FFB's recourse is to demand payment under the DOE Guarantee

a. The Act provides:

"(A) In general. If a borrower defaults on the obligation (as defined in regulations promulgated by the Secretary and specified in the guarantee contract), the holder of the guarantee shall have the right to demand payment of the unpaid amount from the Secretary."[2] [§1702(g)(1)(A)]

b. The Act provides:

"(B) Payment required. Within such period as may be specified in the guarantee or related agreements, the Secretary shall pay to the holder of the guarantee the unpaid interest on, and unpaid principal of the obligation as to which the borrower has defaulted, unless the Secretary finds that there was no default by the borrower

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2 See also §§609.15(a)-(e) of Final Regulations.

in the payment of interest or principal or that the default has been remedied."[3] [§1702(g)(1)(B)]

c. The Applicable Regulations provide:

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as "Holder"), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement. [Regulations §609.15(a)]

F. DOE's Rights Under the FFB Promissory Note

1. DOE has all of FFB's rights, powers, privileges, and remedies as Holder of the FFB Promissory Note

a. The FFB Promissory Note provides:

"This Note is . . . entitled to the benefits and security of, the "Security Instruments" (as defined in the Note Purchase Agreement), whereby the Borrower pledged and granted a security interest in certain property of the Borrower, described therein, to secure the payment of and performance of certain obligations owed to the Secretary, as set forth in the Security Instruments. For purposes of the Security Instruments, in consideration of the undertakings by the Secretary set forth in the Program Financing Agreement, the Note Purchase Agreement, and the Guarantee, the Secretary shall be considered to be, and shall have the rights, powers, privileges, and remedies of, the Holder of this Note." [FFB Promissory Note §21]

b. The FFB Promissory Note provides:

"In case of a default by the Borrower under this Note or the occurrence of an "Event of Default" (as defined in the Security Instruments), then, in consideration of the obligation of the Secretary under the Guarantee, the Secretary, in the name of the Secretary or the United States of America, shall have all rights, powers, privileges, and remedies of the Holder of this Note, in accordance with the terms of this Note and the Security Instruments, including, without limitation, the right to (i) enforce or collect all or any part of the obligation of the Borrower under this Note or arising as a result of the Guarantee; (ii) accelerate (as provided in paragraph 24); (iii) compromise or otherwise negotiate with the Borrower; (iv) bring suit against or foreclose upon any or all of the security interests granted

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3 See also §609.15(f) of Final Regulations.

by the Borrower; and (v) to file proofs of claim or any other document in any bankruptcy, insolvency, or other judicial proceeding, and to vote such proofs of claim." [FFB Promissory Note §23(a)]

c. See definition of "Security Instruments", above

2. *DOE payments discharge FFB's rights, but not Borrower's, under the Promissory Note*

a. The FFB Promissory Note provides:

"If the Secretary makes any payment, pursuant to the Guarantee, of any amount due and payable under this Note, each and every such payment so made shall be deemed to be a payment hereunder; provided, however, that no payment by the Secretary pursuant to the Guarantee shall be considered a payment for purposes of determining the existence of a failure by the Borrower to perform its obligation to the Secretary to make all payments under this Note when and as due. [FFB Promissory Note §22]

G. Reimbursement Obligations

1. *The Borrower is currently contractually obligated to reimburse DOE with respect to DOE guarantee payments.*

a. The Common Agreement provides:

"The Borrower shall pay to DOE an amount (the "Borrower Reimbursement Obligations") equal to the sum of (i) the DOE Guarantee Payment Amount, and (ii) interest on DOE Guarantee Payment Amount . . . " [Common Agreement §10.2.1]

b. The FFB Promissory Note provides:

The Secretary shall have any rights by way of subrogation, agreement or otherwise which arise as a result of such payment pursuant to the Guarantee and as provided in the particular agreement specified on page 1 of this Note as the "Common Agreement" between the Borrower and the United States of America, acting through the Secretary, to evidence the Borrower's obligation to reimburse the Secretary for payment made by the Secretary pursuant to the Guarantee." [FFB Promissory Note §22]

2. *The Borrower's contractual reimbursement obligation is in addition to DOE's subrogation rights upon making DOE guarantee payments.*

a. The Applicable Regulations provide:

"The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders and shall have superior rights in and to the property acquired from the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include

all related liens, security, and collateral rights to the extent held by the Holder."[4] [Regulations §609.15(g)]

b. The Common Agreement provides:

"DOE's right to reimbursement provided for in this Article 10 shall be in addition to, and not in limitation of, any other claims, rights or remedies of subrogation, reimbursement, contribution, exoneration or indemnification or similar claims, rights or remedies, whether arising under contract, by statute, or otherwise that DOE may have from time to time." [Common Agreement §10.5.1]

c. The Common Agreement provides:

"Without limiting the generality of Section 10.5.1, in accordance with Section 609.10(e)(2) of the Applicable Regulations, upon any DOE Guarantee Payment DOE shall be subrogated to the rights of FFB or any subsequent holder of the DOE-Guaranteed Loan, including all related Liens and Collateral, and has superior rights in and to the property acquired from the recipient of the payment as provided in §609.15 of the Applicable Regulations." [Common Agreement §10.5.2]

3. *The Collateral Security pledged under the Security Documents is pledged to secure the Borrower Reimbursement Obligations*

a. The Common Agreement provides that

"The parties expressly acknowledge that the Collateral Security pledged under the Security Documents is pledged to secure payment by the Borrower of the Borrower Reimbursement Obligations. [Common Agreement §10.4.1]"

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4 See also 42 USCS §§16512(g)(2)(A)-(B).
DOE today adopts the same interpretation of Title XVII as it adopted in regard to nearly identical language in section 19(g)(2) of the Alternative Fuels Act. Thus, DOE interprets the language in Title XVII as requiring a first lien on all project assets, but as allowing DOE to treat assets pledged to secure a project loan that are not project assets the same as project assets. Consistent with the regulations concerning the disposition of proceeds from the sale of assets pursuant to the Alternative Fuels Act (section 796(f) and (k)), . . . where DOE only guarantees a portion of a Guaranteed Obligation, the Secretary may enter into inter-creditor or other arrangements to share the proceeds from the sale of project collateral with lenders or other holders of the non-guaranteed portion of the Guaranteed Obligation. DOE may, at the discretion of the Secretary, share the proceeds from the sale of collateral. DOE is limited, however, to no greater than a pro rata share for the non-guaranteed Holder. However, in cases where DOE guarantees 100 percent of a loan, the loan must be issued to and funded by the Federal Financing Bank. In those circumstances, DOE will have a first lien priority on project assets pledged as collateral and all other debt for the project at issue must be subordinate to the Guaranteed Obligation. **[DOE Response] [60124-5]**

b. The Common Agreement defines

"Borrower Reimbursement Obligations" to be "the sum of (i) the DOE Guarantee Payment Amount, and (ii) interest on DOE Guarantee Payment Amount from the date the DOE Guarantee Payment was paid or incurred by DOE under the DOE Guarantee until payment in full by the Borrower to DOE of the DOE Guarantee Payment Amount, at a rate of interest equal to the rate of interest in effect under the FFB Note Purchase Agreement with respect to Overdue Amounts at the time of the payment default by the Borrower." [Common Agreement §10.2.1]

c. The Common Agreement defines

"DOE Guarantee Payment Amount" as an amount "equal to the sum of (i) all DOE Guarantee Payments paid by DOE to FFB, and (ii) all costs or expenses incurred by DOE in connection therewith, whether by payment to FFB or otherwise." [Common Agreement §10.1]

H. Administration of DOE-Guaranteed Loan

1. Billing by FFB

FFB prepares a billing statement for all amounts owed to FFB with respect to each Advance made under the Note and delivers each billing statement to the Borrower and DOE. [FFB Note Purchase Agreement, §9.1]

I. Agreed Funds Flow

[add]

J. Provision in Act for DOE Payment of Principal and Interest

1. The Act provides that DOE may enter into a contract to pay principal and interest to holders.

a. The Act provides:

" (3) Payment of principal and interest by Secretary. With respect to any obligation guaranteed under this section, the Secretary may enter into a contract to pay, and pay, holders of the obligation, for and on behalf of the borrower, from funds appropriated for that purpose, the principal and interest payments which become due and payable on the unpaid balance of the obligation if the Secretary finds that--

(A) (i) the borrower is unable to meet the payments and is not in default[5];

(ii) it is in the public interest to permit the borrower to continue to pursue

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[5] See also §609.13(a)(1) of Final Regulations.

the purposes of the project;[6] and

(iii) the probable net benefit to the Federal Government in paying the principal and interest will be greater than that which would result in the event of a default;[7]

(B) the amount of the payment that the Secretary is authorized to pay shall be no greater than the amount of principal and interest that the borrower is obligated to pay under the agreement being guaranteed;[8] and

(C) the borrower agrees to reimburse the Secretary for the payment (including interest) on terms and conditions that are satisfactory to the Secretary."[9] [§1702(g)(3)]

b. The Applicable Regulations provide:

[add later]

2. *There is no need for DOE to enter into such a contract, since DOE has already guaranteed 100% of the loan to FFB.*

a. This provision was likely added to allow for 100% guarantee coverage of troubled loans originally structured as 80% or 90% coverage.

3. *As a fallback, this provision would allow DOE to make payments to the FFB in the current situation, if there were any doubt as to DOE's authority to do so.*

a. These provisions by their terms apply to guaranteed obligations

[Discuss this]

K. DOE Right to Purchase Note from FFB

1. *The Note Purchase Agreement provides that DOE may purchase individual advances or the FFB Promissory Note from FFB.*

a. the Note Purchase Agreement provides

"Notwithstanding the provisions of the Note, the Borrower acknowledges that, under the terms of the Program Financing Agreement, the Secretary may purchase from FFB all or any portion of any Advance that has been made under the Note, or may purchase from FFB the Note in its entirety, in the same manner, at the same price, and subject to the same limitations as shall be applicable, under the

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6 See also §609.13(b) of Final Regulations.

7 See also §609.13(c) of Final Regulations.

8 See also §609.13(d) of Final Regulations.

9 See also §609.13(e) of Final Regulations.

terms of the Note, to a prepayment by the Borrower of all or any portion of any Advance made under the Note, or a prepayment by the Borrower of the Note in its entirety, as the case may be." [Note Purchase Agreement, §11.2]

b. Note that this gives DOE a right to purchase amounts payment-by payment.

III. RESTRUCTURING GOALS AND ISSUES

A. Tranche A and Tranche C Loans are to be Senior to Tranche B and Tranche D

1. Tranche A debt is to have a priority return for two years, and thereafter be pari passu with Tranche B, and senior to Tranche D

a. The Restructuring Term Sheet provides that Tranche A shall be

"First out in the event of a liquidation event prior to initial scheduled principal payment date (March, 2013)"

2. Tranche C debt is to be pari passu with Tranche B, and senior to Tranche D

a. The Restructuring Term Sheet provides that Tranche C shall be

"[in an amount] up to an additional $75 million senior debt financing permitted pari passu with Tranche A and B. Collateral and terms as stated on Tranche A above (except Tranche C will not receive a first out position in the event of a liquidation event prior to initial scheduled principal payment date)"

3. Tranche A and Tranche C debt is to have same collateral as Tranche B and Tranche D

a. The Restructuring Term Sheet provides that the collateral security for Tranche A is

"Equity interests in Fab 2 LLC and all assets of Fab 2 LLC, including all intellectual property, equipment, agreements, etc.'"

B. Subordination of DOE-Guaranteed Loans is Prohibited

1. The Act and the Applicable Regulations prohibit subordination of the DOE-Guaranteed Loans

a. The Act provides:

"(d) Repayment. . . . (3) Subordination. The obligation shall be subject to the condition that the obligation is not subordinate to other financing."[10] [Act §1702(d)(3)]

b. The Applicable Regulations provide:

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10 See also §609.10(d)(13) of Final Regulations.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions, which must be specified in the Loan Guarantee Agreement, are satisfied: . . .
(13) Any Guaranteed Obligation is not subordinate to any loan or other debt obligation and is in a first lien position on all assets of the project and all additional collateral pledged as security for the Guaranteed Obligations and other project debt;[11] [Applicable Regulations §609.10(d)(3)]

2. *The definition of "obligations" is limited to the DOE-guaranteed obligations*

a. The Act provides:

In this *title [42 USCS §§16511* et seq.] . . . (5) Obligation. The term "obligation" means the loan or other debt obligation that is guaranteed under this section.[12] [Act §1701(5)]

b. The Applicable Regulations provide:

Guaranteed Obligation[13] means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act. [Applicable Regulations §609.2]

3. *There does not seem to be any restriction on subordination of Borrower reimbursement obligations to DOE*

[Discuss]

C. Forbearance

1. *The Act and the Applicable Regulations allow for forbearance for the benefit of the Borrower*

a. The Act provides:

(C) Forbearance. Nothing in this subsection precludes any forbearance by the holder of the obligation for the benefit of the borrower which may be agreed upon by the parties to the obligation and approved by the Secretary.[14] [§1702(g)(1)(C)]

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11 See also 42 USCS §16512(d)(3).

12 See also definition of "Guaranteed Obligation" at §609.2 of Final Regulations.

13 See also 42 USCS §16511(5).

14 See also §609.15(d) of Final Regulations.

b. The Applicable Regulations provide:

(d) No provision of this regulation shall be construed to preclude forbearance by the Holder with the consent of the Secretary for the benefit of the Borrower.[15] [Applicable Regulations §609.15(d)]

IV. PROPOSED NEW STRUCTURE

A. Borrower Payments to Collateral Agent

1. *Tranche A would be funded as, and Tranche E would be converted into, Fab 2 Indebtedness.*

   a. The Tranche A lenders (and, if they subscribe to the deal, the Tranche C lenders) would agree to fund their loan under the terms of the relevant Note Purchase Agreements and the Common Agreement.

   b. Fab 2 will become liable on the existing Tranche E debt

2. *The Tranche B & Tranche D payments will run directly to DOE, and will together embody the secured reimbursement obligations now in Article 10 of the Common Agreement*

3. *All Borrower payment priority would be addressed in the Intercreditor Agreement.*

   a. The priority of the payments to the lenders would be adjusted as per the terms of the Intercreditor Agreement.

   b. All Fab 2 payments will be run through the Collateral Agent to ensure proper allocation.

B. No Change to DOE Payments to FFB

1. *Existing Fab 2 Indebtedness payable to FFB (Tranche B and Tranche D) would be left undisturbed.*

   a. The Borrower will remain liable on the existing Tranche B and Tranche D indebtedness, and the contractual arrangements with FFB will be left undisturbed.

   b. However, Fab 2 will make all payments with respect to Tranche B and Tranche D to the Collateral Agent for payment to DOE, as described below.

2. *FFB would have no role in the restructuring, because the Borrower's and DOE's obligations would be unchanged.*

   a. FFB would not be a party to the Intercreditor Agreement and would otherwise not be a party to the restructuring documents.

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15 See also 42 USCS §16512(g)(2)(C).

b. DOE [would acknowledge that it will] make payments to FFB under the DOE guaranty in accordance with the terms of the existing amortization schedule under the FFB Promissory Note so that the expected payment stream to FFB would not be disturbed.

C. Effect of DOE Payments in advance of Borrower reimbursements

1. DOE payments will be made in advance of Borrower reimbursements

a. The total principal amount of DOE payments to FFB ("DOE Payments") will equal the total principal amount of the Borrower's payments to DOE ("Borrower Payments")

b. However, the principal portion of DOE Payments will be due in advance of the coresponding principal portion of Borrower Payments.

c. As a result of the timing difference, because a larger principal amount will be outstanding on the Borrower Payment than on the DOE Payments, it is likely that the total interest amount due to DOE will be greater than the interest paid by DOE to FFB

2. DOE is making debt service payments to FFB as Loan Servicer; to the extent the Borrower does not make a corresponding payment, those debt service payments become guarantee payments.

[Discuss]

3. Changes to reimbursement arrangements could be deemed to constitute forbearance by DOE.

a. Fab 2 would acknowledge its obligation to pay DOE (via the Collateral Agent) for its own account in respect of Tranche B & D payments made by DOE under the DOE Guarantee, and in exchange DOE would agree to accept repayment under the modified interest rate, amortization schedule and related terms of the restructured debt as per the term sheet.

b. This could be accomplished by either (i) entering into a Reimbursement Agreement, or (ii) amending the existing reimbursement obligations in the Common Agreement.

4. Borrower payments on Tranches B & D will be credited dollar-for-dollar to reduce the Borrower's obligations under the FFB Note.

a. The payments on Tranches B & D will be credited dollar-for-dollar to reduce the Borrower's obligations under the FFB Promissory Note.

D. Security Interests

1. Existing Security Agreements would not be substantially modified, and all collateral would remain pledged to DOE

a. The existing security agreements in favor of DOE (including both (x) the existing deeds of trust and the personal property security agreements, and (y) the pledge

by Solyndra, Inc. of its membership interests in Fab 2) would not be substantially modified except:

(i) certain modifications to specific covenants, representations and remedies provisions will be made to take into account the new collateral that will be subject to the security interests in favor of DOE and all the other lenders in respect of the intellectual property, equipment and other assets being sold or contributed by Solyndra, Inc. to Fab 2; and

(ii) [to the extent that the granting clause in favor of DOE covers indebtedness in addition to the principal, interest and indemnity payments, etc. owing under the existing loan documents, the granting clause would be modified so that there would be no lien securing additional debt].

2. *Other Lenders would enter into new security agreements.*

The Tranche A lenders and the Tranche E lenders would enter into a new set of security documents (including new personal property security agreements, deeds of trust and membership pledges) to secure obligations owing to each of them by Fab 2. These would be substantially the same as the collateral documents running in favor of DOE, as amended.

3. *DOE and all other Lenders would be secured by the same collateral.*

As a result of the foregoing, all of the Tranche A, Tranche B, Tranche C (if funded), Tranche D and Tranche E Debt would be secured by a perfected security interest in and lien on the same collateral (being all the assets of and membership interests in Fab 2).

4. *The Collateral Agent would act as collateral agent for all of the lenders.*

Pursuant to the terms of the Intercreditor Agreement, U.S. Bank would agree to act as collateral agent for all of the lenders. In addition, U.S. Bank would agree that, notwithstanding the fact that under the terms of the existing deeds of trust and personal property security agreements in favor of DOE, U.S. Bank is acting as collateral agent solely for the benefit of DOE, the provisions of the Intercreditor Agreement would supersede those so that any exercise of remedies by U.S. Bank and any distribution of proceeds by U.S. Bank would always be consistent with the terms of the Intercreditor Agreement.

5. *All lien priority would be addressed in the Intercreditor Agreement.*

The priority of the liens of the lenders would be adjusted as per the terms of the Intercreditor Agreement.

E. Prepayments

[address prepayment mechanics]

V. TREATMENT OF NEW STRUCTURE UNDER OMB RULES

A. Modifications Under OMB FCRA Rules

1. *If the proposed changes to the transaction structure are deemed a "modification", additional budget authority must be provided.*

   a. OMB Circular A-11 provides:

   "An outstanding direct loan (or direct loan obligation) or loan guarantee (or loan guarantee commitment) cannot be modified in a manner that increases its cost, unless budget authority for the additional cost has been provided in advance in an appropriations act. If the modification is mandated in legislation, the legislation itself provides the budget authority to incur a subsidy cost obligation (whether explicitly stated or not)." [OMB Circular A-11, Section 185, Page 10]

   b. [Discuss implications]

2. *Changes in the terms of an existing loan, forbearance, interest rate reductions, and extensions of maturity all constitute modifications*

   a. OMB Circular A-11 provides:

   "(r) ***Modification*** means a Government action that (1) differs from actions assumed in the baseline estimate of cash flows and (2) changes the estimated cost of an outstanding direct loan (or direct loan obligation) or an outstanding loan guarantee (or loan guarantee commitment). . . . A Government action may change the cost directly by altering the terms of existing contracts, selling loan assets (with or without recourse) or converting guaranteed loans to direct loans by purchasing them from a private lender. . . . Examples of changes in the terms of existing loan contracts are forgiveness, forbearance, interest rate reductions, extensions of maturity, and prepayments without penalty. . . . If the baseline cost estimate does not assume an action, and the cost would be increased or decreased as a result of that action, the action is a modification." [OMB Circular A-11, Section 185, Page 9-10]

   b. OMB Circular A-11 provides:

   "Modifications do not include a Government action that is assumed in the baseline cost estimate, as long as the assumption is documented and has been approved by OMB. For example, modifications would not include routine administrative workouts (see section 185.3(ab)) of troubled loans or loans in imminent default. . . . The baseline subsidy estimate must include all anticipated actions by the Government, lenders, and borrowers that are permissible under current law and that affect the cash flow. Subsequently, if the cost estimate of an action by the borrower, lender, or the Government differs from what is anticipated in the documented baseline subsidy estimate, then the difference in cost is included in a reestimate. Assumptions underlying the subsidy estimates must be

documented to assist in determining whether an action is a modification or a reestimate." [OMB Circular A-11, Section 185, Page 10]

c. OMB Circular A-11 provides:

"There are situations where it is not clear whether a Government action constitutes a modification or a reestimate. These situations should be judged on a case-by-case basis by OMB in consultation with the agency. They could include actions by the Government that are not addressed in existing contracts, management changes that are within an agency's existing specific authority for the loan program, and broad changes in agency policy (e.g., loan sale policy). In general, if the possibility of the action was explicitly included in the cash flows for the baseline subsidy estimate, and this can be documented, it would most likely be a reestimate. If not, it would most likely be a modification." [OMB Circular A-11, Section 185, Page 10]

d. OMB Circular A-11 provides:

"Modifications produce a one-time change in the subsidy cost of *outstanding* direct loans and loan guarantees. The effect of the Government action on the subsidy cost of direct loan obligations and loan guarantee commitments made after the date of the modification, if there is any effect, is not a modification. Instead, the effects are incorporated in the initial cost estimates for subsequent direct loan obligations and loan guarantee commitments." [OMB Circular A-11, Section 185, Page 10]

B. Workouts Under OMB Rules

1. If the proposed changes to the transaction structure are deemed to be a "Work-out", there is no change to subsidy cost.

a. OMB Circular A-11 provides:

"(ab) ***Work-outs*** mean plans that offer options short of default or foreclosure for resolving troubled loans or loans in imminent default, such as deferring or forgiving principal or interest, reducing the borrower's interest rate, extending the loan maturity, or postponing collection action. Work-outs are expected to minimize the cost to the Government of resolving troubled loans or loans in imminent default. They should only be utilized if it is likely that the borrower will be able to repay under the terms of the workout and if the cost of the work-out is less than the cost of default or foreclosure. For post–1991 direct loans and loan guarantees, the expected effects of work-outs on cash flow are included in the original estimate of the subsidy cost. Therefore, to the extent that the effects of work-outs on cash flow are the same as originally estimated, they do not alter the subsidy cost. If the effects on cash flow are more or less than the original estimate, the differences are included in reestimates of the subsidy and are not a modification." [OMB Circular A-11, Section 185, Page 12]

VI. [ADD]