Document
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[redacted]

From: [redacted]
Sent: Thursday, February 10, 2011 2:05 PM
To: [redacted]
Subject: Solyndra

Dear [redacted]

Treasury staff has learned from the Office of Management and Budget that the Department of Energy is close to implementing a set of adjustments to the Solyndra Loan Guarantee Agreement in response to Solyndra's financial condition. We understand that these adjustments may include subordination of Solyndra's $535 million reimbursement obligation to DOE and possibly the forgiveness of interest. Unless DOE has other authorities, these adjustments may require approval of the Department of Justice pursuant to 31 USC 3711 and 31 CFR Part 902. Unless other authorities exist, this statute rests with DOJ the authority to accept the compromise of a claim of the U.S. Government in those instances where the principal balance of a debt exceeds $100,000. Let me know if you need the name of a contact at DOJ.

Will you be referring the contemplated adjustment to DOJ or are there other authorities that DOE is using to compromise this debt?

Please let us know if the FFB can be of any assistance as you move forward. If you need to modify any FFB agreements, please let me know.

Sincerely,
[redacted]

Document 73

From: [redacted]
To: [redacted]
Cc:
Subject: CRB Presentation
Date: Monday, December 15, 2008 11:19:46 AM
Attachments: Three Highest Priorities 12.16.08.doc
Importance: High

[redacted]

Attached is the draft presentation for the CRB tomorrow that provides an update on Solyndra, Front-End and Nuclear. Let me know if you have additional information that should be included - or changes.

Thanks!

[redacted]

TITLE XVII LOAN GUARANTEE PROGRAM
THREE HIGHEST PRIORITIES THROUGH JANUARY 15, 2008

I. PRESENTATION OF THE SOLYNDRA PROJECT TO THE CRB FOR APPROVAL BY JANUARY 15TH.

Due Diligence: Proceeding on schedule. LGPO and GC will meet with Solyndra and its associated advisors on December 17-18 to discuss and negotiate terms and conditions.

Independent Engineer: On December 22nd, the independent engineer will provide the LGPO with an outline of their engineering report and will also identify issues. A draft engineering report is expected the week of January 5th.

Marketing Consultant: will not be available through "sources sought" by January but the LGPO has obtained two "off the shelf" studies which will be sufficient for the CRB including an European study and a domestic study. We will make the independent marketing consultant study a condition precedent (CP) to ultimate closing. The same will be the case for the NEPA FONSI report, a CP to closing.

Outside Counsel: Outside counsel is on-board as of December 11th.

Term Sheet Template: has not been agreed with GC which is an integral part of the approval documentation and forms the basis of the final negotiations with the client.

II. FRONT END NUCLEAR RECOMMENDATION TO THE CRB BY JANUARY 15TH.

Independent Engineer: LGPO staff travelled to OakRidge December 9-12 to launch the independent engineer study for both USEC and AREVA.

NEPA: A DOE NEPA regulation (10 CFR Part 1021, Section 216) report is required for the Front End Solicitation due to the oversubscription of a limited allocation available among the applicants. The LGPO NEPA staff assures that this report can be completed by January 15th without the necessity for any outside assistance.

Programmatic Counsel: GC support is required to assist in the due diligence process. Specifically, assistance is required to review the completed Part II submissions as well as structuring issues. LGPO will provide GC Friday December 5, 2008 with a recommended list for programmatic counsel as well as a proposed scope of work. This effort must be handled on a programmatic basis, there is insufficient time to handle this through the "sources sought" process. Programmatic counsel must be identified and on board within the week of December 15, 2008 latest to meet the January 15th schedule and can be funded by the LGPO or the GC office.

III. NUCLEAR POWER FACILITIES RECOMMENDATION TO THE CRB BY JANUARY 15TH TO PROCEED ON DUE DILIGENCE FOR A SELECTED NUMBER OF THE APPLICANTS.

Status of Applications: Part II applications are due on Friday December 19th. To date, the LGPO has received one Part II application. LGPO will commence work on the Part IIs on a rolling basis as they are received.

Programmatic Consultants: Since approval is being sought to proceed with due diligence only, there is not the need for programmatic consultants with the exception of the need for GC involvement and support.

Programmatic Counsel: GC support is required to assist in the evaluation of the Part II applications. Particular nuclear experience is desired and therefore, this requirement must be serviced by some form of programmatic counsel funded either by the LGPO or the GC office. This issue must be resolved within the week of December 15, 2008 latest to meet the January 15th schedule.

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[redacted]

From: [redacted]
Sent: Thursday, August 20, 2009 4:35 PM
To: [redacted]
Cc:
Subject: RE: Solyndra: Responses to Credit Analysis Questions

[redacted] -- I think that you have overlooked the major factor in the response regarding the model artifact that might point to a potential liquidity issue in September 2011. That is, for this period of time the Project has not yet reached Project Completion, as defined in the agreements. Liquidity at the Project level is simply not relevant during this period, as the duty for the parent to deliver a completed Project still applies, and the parent guarantee is to meet all cost overruns until Project Completion has been achieved. This would include any operational shortfalls during that period. By the time Project Completion will be declared, the project will have accumulated some $123 million in cash ($60 million of which will be in a debt service reserve account).

Project costs as defined in the Rules explicitly include "costs of design, engineering, startup, commissioning and shakedown." Until the declaration of Project Completion, the project remains in the startup, commissioning and shakedown phase, and therefore under the parent guarantee. You will recall that the documents also require a prefunding of a facility in support of that guarantee of $30 million over and above the budgeted project cost (which itself includes overrun contingencies of over $65 million). There is no need for establishing some separate temporary "liquidity facility" between the parent and project to meet an imagined need during the pre-completion phase that would not otherwise covered by the negotiated deal.

After investing over $1 billion in cash equity at the parent and project levels, the equity investors will simply not permit any potential projected short term liquidity shortfall to prevent reaching Project Completion.

Note also that there are essentially no working capital requirements at the project level. Production materials are funneled through the parent, and not held at the project company. Finished inventory is immediately forwarded to and inventoried at the parent. The project company does have responsibility for direct purchase of some minor amounts of material and for payment of utilities. These are all budgeted for and accounted for in the model as operational costs.

[redacted]
Loan Guarantee Program
Department of Energy
[redacted]

-----Original Message-----
From: [redacted]
Sent: Thursday, August 20, 2009 3:28 PM
To: [redacted]
Subject: FW: Solyndra: Responses to Credit Analysis Questions

[redacted]

Thanks for requesting the additional information. I would like your analysis of the materials presented.

In order to move this forward, I think we have the following next steps:

1. I will look at the property tax information against the issue raised by RW Beck in January.

2. We can adjust the income tax assumption to 30%. The result should be de minimus, but we should use that assumption from PWC.

3. The issue of Working Capital remains unresolved. First, it seems clear that the cost overrun equity commitment would support cost overruns and ineligible project costs. However, the issue is cash balances, not cost. John seems to agree that the model runs out of cash in Sept. 2011 even in the base case without any stress. This is a liquidity issue. Secondly, given the implications above, it is difficult to assume in a default scenario that any other entity would be able to assume management of the project company without any working capital. As a practical matter, this is not feasible and leads to questions of ability to run the project company as a stand alone entity. Finally, how can we advance a project that hasn't funded working capital requirements nor seems to have any provision for funding working capital requirements and that generates a working capital shortfall of $50M when working capital assumptions are entered into the model? This is a serious issue we need to resolve as a credit matter. It also simply won't stand up to review by oversight bodies. Are there provision in the agreements that provide access to working capital provided by the parent (e.g., a liquidity facility)? I don't think the cost overrun commitment accomplishes this, but perhaps an inter-company line of credit would.

4. We still do not have a lender case. In order to move forward, I have gone ahead and built one. I will send it under separate cover. I need you to confirm it and to include it in the due diligence update. Moving forward, the deal team needs to provide this case. Notwithstanding the working captal issue above, the lender case supports the conclusions you've made and addresses the LGPO policy requirement of having a lender case.

Thanks.

-----Original Message-----
From: [redacted]
Sent: Thursday, August 20, 2009 2:24 PM
To: [redacted]
Cc: [redacted]
Subject: Solyndra: Responses to Credit Analysis Questions

[redacted]

In response to questions related to the credit analysis of the Solyndra Fab 2 project, we have prepared the responses below.

The current Solyndra Fab 2 Base Case Projections have changed since the original model was presented, and the DOE Loan Origination team, Fitch Ratings and RW Beck have reviewed the updated model. The terms of the Project Sales Agreement require that Solyndra, Inc. purchase 100% of the output of the Project as it comes off the manufacturing line; hence, "Inventory" is now assumed to be zero. Consequently, working capital requirements for the project are modest, and for modeling purposes the Accounts Receivable and Accounts Payable are set at a net zero.

Solyndra is informed that testing the Base Case under stress conditions results in essentially nil cash at Fab 2 in September 2011, and any assumption of a delay in collecting Accounts Receivable from Solyndra would be an unbudgeted cash drain on the Solyndra Fab 2 Project, potentially resulting in a cost overrun. This analysis is correct assuming that the Project has not otherwise come in under budget elsewhere and that none of the Project's budgeted contingency was available to pay for this cost overrun. However, it should be noted that September 2011 falls well before Fab 2 has achieved "Project Completion," which is forecast to occur in April 2012. Project Completion as defined by the Common Agreement includes factors related to Physical Completion, Operational Completion and Financial Completion.

DOE bargained for a 100% Solyndra, Inc. guarantee to pay for any cost overruns beyond the $733 million Project Cost prior to Project Completion, and further requires Solyndra, Inc. to pre-fund a restricted cash account of $30 million to cover any potential cost overruns. The Base Case Projections show that Fab 2 will have accumulated approximately $123 million of cash at the time of Project Completion when Solyndra, Inc.'s guarantee would be released. Of the $123 million of cash at Fab 2, approximately $60 million funds the full Debt Service Reserve Account. No cash dividends can be made until certain milestones are achieved after Project Completion, which assures the liquidity of the Project. Solyndra believes that it has included all of the Project Costs that it reasonably anticipates in the $733 million budget.

Additionally, considering the magnitude of the import of Fab 2 to Solyndra, Inc.'s business and the substantial equity commitment made by Solyndra, Inc. to the Project, there exist tremendous incentives for Solyndra, Inc. to ensure a successful Project.

Solyndra has modeled a 25% income tax rate for Solyndra Fab 2 so that the Project can pay for the income tax that its activities engender.

Solyndra believes that it will pay a 25% effective income tax rate on a consolidated basis for its worldwide operations, and Solyndra assumes this rate in all of its forecasts. At the request of DOE, Solyndra's auditors, PricewaterhouseCoopers provided an opinion dated August 6,
2009 that states that a range of 24%-30% was appropriate for Solyndra, Inc., which Solyndra believes substantiates its estimate of 25%. Due to the operating losses forecast for Solyndra Fab 2 during its initial ramp of commercial production, the Base Case Projections indicate that Fab 2 will not have a tax liability until its NOL's have been exhausted in June 2012. The Base Case Projections as submitted to DOE are fully-functional, and changing the income tax rate from Solyndra's estimate of 25% to the high-end of the reasonable range (30%) as indicated by PwC reveals only a modest impact to the Project. Cash balances at Fab 2 in June 2012 are forecast to be approximately $136 million, including an approximately $60 million debt service reserve account. Any change to the income tax rate has no material impact on
the Project's liquidity. The impact of a 30% income tax rate
assumption is only seen in a minor reduction of 0.1 to the Debt Service Coverage Ratios, as noted below

At the lowest Debt Service Coverage Ratios period calculated for the year 2015, the Base Case Projections show that only $81 million of the FFB loans remain outstanding and Fab 2 will have generated in excess of $500 million of cash. A liquidation of Fab 2 at the end of 2015 would generate substantially more than $81 million (according to the analysis performed by Fitch Rating). At this low point, Fab 2 is forecast to generate 160% of the required cash to make debt payments. Hence, Solyndra concludes that DOE enjoys a very secure position at this point in time even with a 30% income tax rate. While Solyndra believes that a 25% income tax rate is appropriate, a summary analysis of the effects of a 30% income tax rate is attached for DOE's consideration.

The Base Case Projections include all property taxes. The property tax is combined with a number of Facilities-related expenses in the worksheet named "Model Assumptions" in the Base Case Projections. A scan of Row 146 reveals episodic spikes in Facilities costs, which correlate to the underlying property tax assumptions. A copy of the detailed line item assumptions that comprise the Facilities budget is attached for DOE's consideration. Specific line items related to property tax are highlighted in green color (please see Rows 102, 105,
106 and 134 in the "Facilities Budget" file). A summary review of this Facilities Budget worksheet will review that property tax is modeled in significant detail.

Please contact me to discuss any questions you may have related to the foregoing. Thank you.

Regards,

[redacted]

****

[redacted]

SOLYNDRA, INC.

47700 Kato Road

Fremont, CA 94538

[redacted]

www.solyndra.com

Document

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[redacted]

From: [redacted]
Sent: Wednesday, February 23, 2011 3:33 PM
To: [redacted]
Subject: RE: Treatment of Solyndra restructuring

Thank you [redacted]

From: [redacted]
Sent: Wednesday, February 23, 2011 1:55 PM
To: Silver, Jonathan; [redacted]
Cc: [redacted]
Subject: Treatment of Solyndra restructuring

Thank you for working with us to better understand the details of the Solyndra restructuring. Based on the information you have provided to support DOE's stated position that Solyndra is in "imminent default" and DOE's analysis that the restructuring would leave DOE in a better position if the borrower does ultimately default, OMB has determined that the restructuring constitutes a workout, rather than a modification, under OMB Circular A-11, Section 185.

In the future, to the extent that such circumstances occur in this or other DOE financings, DOE will be required to demonstrate that the borrower is in "imminent default" and provide reasonable analysis that any actions taken will produce a better return to the Government than those actions assumed in the baseline cashflows in order for the action to qualify as a workout, rather than as a modification.

Thanks again.

Regards,
[redacted]

[redacted]
Assistant Director for Budget
Office of Management and Budget
[redacted]

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Loan Programs Office

U.S. Department of Energy

JANUARY 2 0 1 1

Recovery Analysis under Forced Liquidation Scenario

- DOE assessed the value of its recovery under the following three situations:
  - Forced liquidation in December 2010 of the collateral securing existing loan. Such liquidation would be based on a sale of assets.
  - Forced liquidation after completion of the project (the proceeds from the restructured loan will be sufficient to achieve project completion). Such liquidation would be of the Solyndra entities as a going concern.
  - Performance of the project under the Consolidation Plan (which includes the restructured loans).

Recovery Analysis under Forced Liquidation Scenario

- Recovery on DOE's collateral in December 2010 in a forced liquidation was estimated at between [redacted]
- Estimated recovery rate of between [redacted]
- Liquidation analysis follows:

	Original Cost	Liquidation %	Liquidation Value
Building	[redacted]		
Land (2 parcels)			
Equipment			
Cash (Pre-funded equity)			
Total			

Recovery Analysis Under Going Concern Analysis

- Forced liquidation after completion of the project provides the following results:
  - Based on a low multiple of [redacted], DOE obtained a conservative enterprise value of [redacted] in 2011 assuming a projected EBITDA of [redacted] in 2012, the recovery rate to DOE would be between [redacted]
  - At a more appropriate level of [redacted] (still lower than its peer, Evergreen), and an associated value of [redacted] the recovery rate would be [redacted]

Recovery Analysis Under Going Concern Analysis

- The two largest US-based publicly traded solar manufacturing companies, First Solar and Sun Power, are currently valued at [redacted] and [redacted] respectively. Evergreen Solar, Inc. a still unprofitable, smaller, and weaker player in the market is currently valued at about 25 [redacted]
- Appropriate valuation of the Borrower as a going concern dictates the use of forward trading multiples for PV companies and to look at what other thin-film PV manufacturers are willing to invest in order to construct new capacity Permits DOE to liquidate the project as a going concern (i.e., sale of equity interests in the borrower).
- Given the prevailing range of [redacted] EBITDA range used for DOE's analysis would appear conservative and appropriate.

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November 10, 2011

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: Energy Policy Act of 2005 Section 1702 Interpretation

Dear Congressman Waxman:

The letter responds to the request made by your staff to provide you with my views concerning the interpretation of Section 1702 of the Energy Policy Act of 2005, focusing specifically on the question of whether Section 1702 of the Act gives the Department of Energy ("DOE") the authority to subordinate a guaranteed loan to other debt incurred by a project in a post-default, restructuring situation. In particular, I was asked to comment on whether the February 15, 2011, opinion of Susan Richardson, Chief Counsel of the Loan Programs Office, entitled Solyndra Restructuring (hereafter referred to as the "Opinion") is supported by the statute.

As I explained to your staff in connection with responding to this request, I have no confidential information about the facts of the Solyndra loan guarantee, and I have not had access to the Solyndra loan guarantee documents. My knowledge of the matter comes from what has been publicly reported. In addition, while I have represented several clients in DOE loan and loan guarantee matters, I have not had occasion previously to consider the question of DOE's authority to subordinate a guaranteed loan in a restructuring. Finally, as I also explained to your staff, Susan Richardson is someone whom I know. I have not, however, discussed the Committee's request for my views or the substance of what follows with Ms. Richardson or anyone else at DOE.

I have concluded that the Opinion is supported both by the statute and by DOE's interpretation of Section 1702 as reflected in 10 CFR Part 609, the regulations governing the loan guarantee program, and the associated rulemaking proceedings. (It is noteworthy that the initial rulemaking was concluded during the prior Administration, and I believe that the subsequent amendments were also concluded before the Solyndra loan restructuring issues arose.) The Opinion is also supported by commercial practice with respect to the restructuring of loans that are in default.

Starting with the statute itself, Section 1702(d)(3) states: "The obligation shall be subject to the condition that the obligation is not subordinate to other financing." Had Congress sought to prohibit subordination of a guaranteed obligation at any time, under any circumstances, one might expect the provision to be phrased in more definitive terms, such as: "The obligation shall not be subordinated to other financing." Three aspects of Section 1702(d)(3) suggest that Congress had a more limited intent. First, Section

1703(d)(3) is presented as one of three conditions that must be met prior to the issuance of a loan guarantee. The three conditions are presented as determinations the Secretary must make before issuing the loan guarantee. This is reinforced by the phrasing "the obligation is not subordinate to other financing." The use of the present tense "is" suggests a requirement at a particular point in time, i.e., the point at which the guarantee is issued. Finally, I agree with the Opinion that the use of the term "condition" as it appears in the context of Section 1702(d)(3) is reasonably understood to refer to a "condition precedent," that is a condition that must be met prior to issuance of the guarantee.

I find it significant that DOE plainly understood Section 1702(d)(3) in this light when it undertook the rulemaking to implement the loan guarantee program in 2007. In 10 CFR 609.10(d), DOE set out a long list of requirements that DOE must ensure are satisfied "[p]rior to the execution of a Loan Guarantee Agreement," that is, conditions precedent. Included in that list were the statutory requirements set out Section 1703(d)(1), (d)(2) and – of interest here – (d)(3). Following the structure of the statute, the rule used the present tense "is," describing the required condition as: "Any Guaranteed Obligation is not subordinate to any loan or other debt obligation. . . ." 10 CFR 609.10(d)(13).[1] A requirement that must be satisfied as a condition precedent to the issuance of a loan guarantee is not necessarily a requirement that must prevail regardless of what occurs thereafter, and neither the statute nor the regulations elsewhere state that the non-subordination requirement must be met at all times.

DOE repeated this understanding of the statute as distinguishing between what is required before a loan guarantee is issued and what requirements apply in the event of default in a 2009 rulemaking amending 10 CFR Part 609: "section 1702(d) addresses certain threshold requirements that must be met before the guaranty is made; and section 1702(g) addresses the Secretary's rights in the event of default of the loan." 74 Fed. Reg. 63544, 63545 (2009). DOE went on to note that the structure of the statute "key[ed] its particular provisions to the sequence of stages that are foreseeable in the loan guarantee relationship." Id. It is noteworthy that Section 1702(g), which deals with default, does not contain language prohibiting subordination.

Two other aspects of DOE's loan guarantee rulemaking provide indirect support for the conclusion that the non-subordination requirement, which clearly must be met before a loan guarantee is issued, does not prohibit DOE from agreeing to subordination if the borrower defaults and a loan must be restructured. The regulations provide that, where the loan guarantee agreement or any applicable intercreditor agreement so provides, in the event of default, a lender and the Secretary may agree to a workout strategy and/or a plan of liquidation. 10 CFR 609.15(h). There are no limitations in that provision on what a workout strategy might include. In particular, the rule does not preclude subordination of the guaranteed debt as a component of a workout strategy.

Finally, it is significant in my analysis that, in amending the loan guarantee rules in 2009, DOE eliminated a restriction that would have required it to hold a first lien position on all assets of a project receiving a loan guarantee. In making that change, DOE explained that its "original reading of the statue was in tension with the financing structure of many commercial transactions in the energy sector," involving for example ownership by tenancy-in-common or co-lenders or co-guarantors – commercial structures that some who had planned to apply for loan guarantees needed to employ if their projects were to go forward. DOE concluded that the statute did not strictly require the first lien requirement and that imposing a restriction that was not consistent with commercial practices would have had the effect of

[1] As originally adopted in 2007, 10 CFR 609.10(d)(13) also required that DOE have a first lien on all project assets. That requirement was removed in 2009, as discussed below.

limiting the ability of the loan guarantee program to serve its intended purposes. 74 Fed. Reg. at 63545-46.

Likewise here, interpreting the statute to prohibit subordination of the guaranteed debt, even where additional new money is necessary as part of an effort to reduce the losses associated with a default, would not be consistent with commercial practice. A lender providing additional funding to a transaction already in default routinely insists that its debt be superior to earlier incurred debt because such later debt is being incurred at a point at which it has become apparent that the risk associated with a project is higher than anticipated at the time of the original financing and neither the existing lenders nor the equity has elected to provide the additional funds. Given this commercial expectation that, in a default situation, earlier incurred debt would expect to be subordinate to later incurred debt, had DOE reached any other conclusion about its authority under Section 1702, it would have sharply constrained DOE's ability to undertake any meaningful restructuring of guaranteed loans, a result that would likely increase taxpayer risk from projects that run into unexpected financial difficulties. While in the case of Solyndra, even the additional money injected into the project as a result of the restructuring proved to be insufficient to save the project, one would expect that in other cases, an infusion of additional debt could help to rescue a project and thereby protect taxpayer interests.

In short, I conclude from the statute, the loan guarantee regulations, and DOE's prior interpretations of Section 1702 that, had it expressly considered the question of its authority to subordinate its guaranteed debt in a post-default restructuring before the Solyndra default situation arose, DOE likely would have reached the same conclusion reflected in the Opinion, and that its conclusion is legally supported.

I hope the foregoing analysis is helpful to you in your deliberations.

Very truly yours,

Mary Anne Sullivan

Mary Anne Sullivan

Partner
maryanne.sullivan@hoganlovells.com
D 202/637-3695

Document
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From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Wed Sep 02 14:54:16 2009
Subject: RE: Solyndra

Hello all,

OMB has found no problems with the subsidy cost model submitted by DOE this morning. We're ok with signing off on the estimate of [redacted] We are assuming that for accounting purposes that you prefer to send the apportionment request through the system to us. Let me know if your understanding is different.

Thanks to all for their hard work on this, including [redacted] during his annual leave.

[redacted]