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From: "Jenney, Frederick E." [REDACTED]
To: Kenneth Cestari [REDACTED]
Subject: Solyndra Restructuring/Contractual and Legal Analysis
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Attachments: RestructuringAnalysis Memo - 1.DOC, RestructuringAgmts, Statute & Regs - 2.DOC

<<RestructuringAnalysis Memo - 1.DOC>> <<RestructuringAgmts, Statute & Regs - 2.DOC>>
Greetings --
Here is a rough draft of this analysis, together with a compilation of source materials that might be useful.
Regards,
-- Rick
Frederick E. Jenney
Morrison & Foerster LLP

[REDACTED]

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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]

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

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

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]"

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 default⁵;
(ii) it is in the public interest to permit the borrower to continue to pursue

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

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:

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)]

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.

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 corresponding 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 workout 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]