The Committee on Energy and Commerce

Internal Memorandum

November 15, 2011

TO: Members, Subcommittee on Oversight and Investigation

FROM: Subcommittee on Oversight and Investigations Staff

RE: Hearing on "The Solyndra Failure: Views from DOE Secretary Chu"

On Thursday, November 15, 2011, at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled "The Solyndra Failure: Views from DOE Secretary Chu." The hearing will focus on the decisions made with respect to the review and approval of the Solyndra loan application, in particular, the Department of Energy's (DOE) decision to restructure the Solyndra loan guarantee in February 2011 and subordinate the first $75 million recovered in the event of a liquidation to two Solyndra investors. The hearing will also examine what DOE knew, or should have known, about Solyndra's financial condition.

I. WITNESSES

One witness will testify at the hearing:

Dr. Steven Chu
Secretary
U.S. Department of Energy

II. DISCUSSION

A. History of the DOE Loan Guarantee Program

Title XVII of the Energy Policy Act of 2005 (EPAct) authorized the Secretary of DOE to make loan guarantees to companies investing in projects that "avoid, reduce, or sequester air pollutants" and "employ new or significantly improved technologies." EPAct listed several categories of projects eligible to receive funding, including renewable energy systems, advanced fossil energy technology, advanced nuclear, and efficient electrical generation.

Congress did not provide funding for the Title XVII Loan Guarantee Program until 2007. In 2007, when it received $4 billion in appropriations, DOE began hiring staff to implement the

program[1] and issued a Notice of Proposed Rulemaking; those regulations were issued in October 2007. Also in 2007, DOE staff began reviewing the 143 pre-applications it had received in response to its initial solicitation and invited 16 of these projects to submit full applications for Title XVII funding. The full applications were submitted in late 2007 and early 2008.

In 2008, the Loan Programs Office (LPO) staff reviewed the full applications and began conducting technical and marketing reviews of the projects. In some instances, DOE programmatic staff assisted in those reviews. By the fall of 2008, the staff had identified certain projects it believed might be ready for review by the DOE Credit Review Board by January 15, 2009. One of those projects was Solyndra. According to certain individuals interviewed by the Committee who worked at the LPO during this time, the LPO had been criticized by Members of Congress for failing to make a loan guarantee in the three years since the office had been created, and this criticism pushed the office to try and complete a project by January 2009. At the time the leading projects were identified in late 2008, DOE LPO and program staff had conducted their own reviews of the projects, but due diligence reviews by independent consultants had not yet begun.

It is important to note that EPAct required borrowers to pay "in full for the cost of the obligation" at the time the loan guarantee was issued. The "cost of the obligation" is also referred to as the "credit subsidy cost" or "estimate." The credit subsidy cost represents the cost of the loan to the taxpayer if the recipient of the guarantee defaults on the loan. The credit subsidy cost reflects several factors, including the cash flows of the loan recipient; the rate of recovery the government expects from the assets pledged as security for the loan; and the risk of default. Depending on the factors associated with a loan guarantee, and the amount of the guarantee itself, the credit subsidy cost can total in the tens of millions of dollars.

B. The Stimulus and Changes to the DOE Loan Guarantee Program

Two factors played a significant role in the operation of the Loan Programs Office from 2009 forward: the passage of the American Reinvestment and Recovery Act (ARRA or "stimulus") and a directive from Secretary Chu to the LPO to take measures to accelerate the review and issuance of loan guarantees.

i. Secretary Chu's Acceleration Policy

According to interviews of LPO staff, when Secretary Chu arrived at DOE in January 2009, he met with LPO staff and reviewed the pipeline of loan guarantee applications and the timetable for review. He also asked what actions needed to be taken in order to accelerate the pace of review and issuance of loan guarantees, including increased staffing in the LPO. Mr. Matthew Rogers, the ARRA Advisor to the DOE, stated in testimony before the U.S. House Committee on Science and Technology in March 2009 that "Secretary Chu has directed us to

[1] At the time the Loan Programs Office was formed in 2007, its staff reported directly to the DOE Chief Financial Officer.

accelerate the process significantly and deliver the first loans in a matter of months, while maintaining appropriate oversight and due diligence to protect taxpayers' interests."[2]

ii. The Stimulus

ARRA made an important change to the DOE Loan Guarantee Program. For certain kinds of projects[3] (referred to as "Section 1705" loan guarantees), the borrower would no longer have to pay the credit subsidy cost. Instead, the stimulus appropriated approximately $6 billion in funding to pay for the credit subsidy costs of these projects.[4] In order to be eligible for this funding, the stimulus required that the projects begin construction no later than September 30, 2011.

The appropriation of this funding in the stimulus was critical to the ability of DOE to issue loan guarantees for clean energy projects because many loan guarantee applicants had been unable to come up with the funding themselves. However, it may have had an unintended effect with respect to the risks associated with a project. When borrowers were required to pay the credit subsidy costs themselves, they were incentivized to review their projects and minimize any potential risks because these risks would result in higher credit subsidy costs. With the government paying the subsidy on behalf of the borrowers, the incentive for the borrowers to minimize risks in the project is diminished, and the primary way for the lender to address any risks posed by the deal is through the loan guarantee agreement, and its covenants and other requirements.

With the appropriation in the stimulus for the credit subsidy costs, the DOE announced the first conditional commitment, to Solyndra, in March 2009. By the time of the September 30, 2011, stimulus deadline, the Loan Programs Office had issued loan guarantees to 28 projects, totaling $16.15 billion, $4 billion of which was closed on the deadline date alone. According to a report issued by the Congressional Research Service, 82 percent, or $13.27 billion, of the Section 1705 loan guarantees support solar projects. The remaining 18 percent support a variety of projects, including biofuels, energy storage, wind generation, transmission, and geothermal electricity.[5]

C. Solyndra

1. Review of the Application and Conditional Commitment

The Majority Staff Memoranda for the September 14, 2011, and October 14, 2011, hearings before the Subcommittee on Oversight and Investigations set forth the chronology of

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[2] A copy of that testimony can be found here: http://energy.gov/sites/prod/files/ciprod/documents/3-19-09_Final_Matt_Rogers_Testimony.pdf .
[3] Only certain renewable energy, electric transmission, and leading edge biofuels systems loan guarantee projects are eligible for funding under the stimulus. Nuclear was not eligible.
[4] Ultimately, Congress transferred $3.6 billion of this funding to other programs, leaving DOE with $2.4 billion for the credit subsidy costs.
[5] U.S. Congressional Research Service. Solar Projects: DOE Section 1705 Guarantees (R42059, October 25, 2011) by Phillip Brown.

the DOE's review of Solyndra's loan guarantee application, as well as the financial problems experienced by the company.[6] The Supplemental Memorandum for the September 14, 2011, hearing also sets forth concerns about how the stimulus and the scheduling of the announcement of the Solyndra loan guarantee may have impacted the review of the application, and how red flags were missed or ignored.[7]

On January 9, 2008, in the final days of the Bush Administration, the DOE LPO convened a Credit Committee to consider the Solyndra loan guarantee application. According to interviews of DOE staff conducted by Committee staff, it was clear to the DOE staff that, by January 2009, the Solyndra application was not ready for conditional commitment because of the number of significant issues that remained unresolved. For this reason, DOE staff interviewed by the Committee was not surprised when the Credit Committee remanded the Solyndra application for "further development," including an "independent market study addressing long term prospects for this specific company."[8]

By February, the stimulus was enacted, and DOE's ARRA Advisor had arrived at the Department. The primary responsibility of the DOE ARRA Advisor was to assist the Department in managing the $35 billion in new funding it had received under the stimulus. Documents produced to the Committee show that the DOE ARRA Advisor met with the LPO staff in February in order to identify additional resources and assistance it needed to reduce the "cycle time for decision-making."[9] During this time, the first draft of the Independent Engineer's report had been submitted, but the LPO had not yet received the Independent Market Report. In addition, Solyndra and the DOE had not resolved the debt to equity ratio in the deal; Solyndra was pushing for an 80-20, debt to equity split, while the DOE was negotiating for greater equity in the deal.[10] The parties also had not resolved whether the deal would be structured as a corporate or project finance arrangement.

Documents produced to the Committee show that on March 6, 2009, the Credit Committee and Credit Review Board (CRB) dates for the review and approval of the Solyndra application had been scheduled, even though the term sheet was still being negotiated with the company.[11] In fact, some emails suggest that the dates of the Solyndra Credit Committee and CRB meetings were coordinated with White House staff. For example, a March 5, 2009, email between LPO staff states, "[h]ot off the press. Dates were reviewed with [the ARRA Advisor]. The wish is to have Solyndra through the CRB in time for the President's speech in California on the 18th."[12] The negotiations between the DOE and Solyndra on the term sheet were concluded on March 10, 2009, and the Solyndra Credit Committee met two days later. Although the Credit

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[6] The September 14, 2011, Majority Memorandum can be found here: http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/091411/Memo.pdf . The October 14, 2011, Majority Memorandum can be found here: http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/101411/Memo.pdf .
[7] The Supplemental Memorandum can be found here: http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/091411/SolyndraStoryFinalMemo.pdf
[8] Solyndra Fab 2, LLC Credit Committee Recommendation, January 9, 2009.
[9] February 12, 2009, email between DOE staff regarding "ACTIONS: Loan Program."
[10] February 22, 2009, email between DOE staff.
[11] March 6, 2009 email between DOE staff.
[12] March 5, 2009, email between DOE staff regarding "Project Processing Timelines."

Committee approved a conditional commitment to Solyndra, the Credit Committee listed 11 follow-up questions which still needed to be addressed, including questions about the parent company's financials, the parent guarantee for the project, and the lack of an analysis of Solyndra's competitors in the market study. Based on interviews with Loan Programs Office staff, it appears that it was not unusual for the Credit Committee to list follow-up concerns, however, the list for Solyndra was more extensive than the lists for other loan guarantees.

On March 17, 2009, the Credit Review Board met to approve a conditional commitment to Solyndra. It is not clear based on documents produced to the Committee whether the Credit Committee's eleven follow-up questions were addressed prior to the CRB's approval of the Solyndra conditional commitment. Following the conditional commitment, Solyndra worked to address the conditions precedent to the closing as well as to raise its equity contribution. During the equity raise period, DOE staff expressed concern about a statement Secretary Chu made to Dow Jones Newswires on July 7, 2009, that "'we've been told' that 'it's imminent they're going to announce this,'" and that ''the loan is theirs, as soon as they get the additional capital that's required by statute.'" In an email dated July 7, 2009, a DOE LPO staff member said that he had "no idea where [the Secretary's] info on the equity raise is coming from, but the conclusion that 'the loan is theirs' doesn't help our negotiation."[13]

2. OMB Review of the Solyndra Application

Prior to DOE's submission of the Solyndra package to OMB for review, White House and DOE staff scheduled the announcement event for the closing of the Solyndra loan guarantee. For example, on August 11, 2009, an advisor in the office of White House Chief of Staff Rahm Emanuel contacted the DOE ARRA Advisor and the Chief of Staff to Secretary Chu to discuss the "potential announcement value" in Solyndra.[14] Over the next few weeks, various options and schedules were discussed; ultimately, the staff decided to plan an event that would feature a speech via satellite by Vice President Biden and an appearance by Secretary Chu.[15]

Just over one week after the White House and DOE began scheduling the Solyndra announcement, a DOE staff member identified a "major outstanding issue" in the Solyndra deal, relating to the working capital and liquidity of the company.[16] The staff member stated that "[t]he issue of working capital assumptions has been a major issue repeatedly raised since December [2008]," and that the company's financial model showed it running out of cash in September 2011. DOE staff discussed this issue over the next four days, and debated whether the parent company's guarantee to pay any project cost overruns would address the working capital issue. On August 24, 2009, DOE staff agreed to address the issue by refining the definition of project overrun costs and adapting Solyndra's financial model.[17]

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[13] July 7, 2009, email between DOE staff regarding "Chu: Solyndra Announcement Imminent."
[14] August 11, 2009, email between White House, OMB, and DOE staff regarding "Solyndra."
[15] August 25, 2009, and August 26, 2009, emails between DOE and White House staff regarding "Solyndra Update."
[16] August 19, 2009, email between DOE staff regarding "Solyndra."
[17] August 24, 2009, email between DOE staff regarding "[redacted] ACTION: Solyndra."

On August 25, 2009, DOE staff briefed OMB staff, and submitted the Solyndra loan guarantee package, proposed credit subsidy estimates, and cash flow numbers for OMB review. It is plain from the documents produced to the Committee that OMB staff felt that they had to rush to complete their review in time for the announcement event at Solyndra's facilities on September 4, 2009. For example, one OMB staff member noted that the credit subsidy model for the Solyndra deal was based on a workout recovery scenario, when it should have been based on a liquidation scenario, but "[g]iven the time pressure we are under to sign-off on Solydra, we don't have time to change the model to assume liquidation."[18] A different OMB staff member even contacted Vice President Biden's office and stated that OMB had "ended up in the situation of having to do rushed approvals on a couple of occasions (and we are worried about Solyndra at the end of the week)."[19] That staffer also emailed his superiors at OMB to recommend that the announcement be postponed.[20]

On September 1, 2009, OMB staff recommended that the Solyndra deal be "notched down," based on the lack of firm performance data on the Solyndra panels and "the weakening world market prices for solar generally." One day later, OMB apportioned the funding for the Solyndra guarantee. The September 4, 2009, groundbreaking event at Solyndra went ahead as scheduled, with an appearance via satellite by Vice President Biden and with Secretary Chu in attendance. In his speech, Secretary Chu thanked Solyndra for "working so closely with the Department of Energy on what will be a shared success story" and stated that "if you build a better solar panel, the world will beat a path to your door. Building a smarter solar panel is exactly what Solyndra has done. Compared to traditional solar panels, Solyndra's innovative thin film systems produce more energy for less money and less hassle." Secretary Chu also noted that DOE had "moved aggressively to get the money out the door," and that DOE was "moving with unprecedented speed to help create new jobs that can't be outsourced . . . ."[21]

3. DOE's Monitoring of the Solyndra Loan Guarantee and Solyndra's Financial Position

Following the closing of the Solyndra loan guarantee, the DOE began authorizing disbursement to the company for the construction of its new facility, "Fab 2." In the first six months after closing, Solyndra received approximately $286 million, or over half of the loan guarantee amount, in disbursements.

Also, immediately after closing the $535 million loan guarantee, Solyndra filed an application for a second loan guarantee.

On March 16, 2010, Solyndra's auditors, PricewaterhouseCoopers, filed an addendum to Solyndra's S-1 Initial Public Offering (IPO) registration. In it, the auditors stated that the

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[18] August 27, 2009, email between OMB staff regarding "Final Solyndra Credit Subsidy Cost."
[19] August 31, 2009, email between OMB and the Vice President's staff regarding "DOE announcement."
[20] August 31, 2009, email between OMB staff regarding "Solyndra update."
[21] Gov. Schwarzenegger Joins Vice President Biden, U.S. Energy Secretary Steven Chu for American Recovery and Reinvestment Act Announcement, U.S. Federal News, Sept. 5, 2009.

"Company had suffered recurring losses from operations, negative cash flows since inception and has a net stockholder's deficit that, among other concerns, raise substantial doubt about its ability to continue as a going concern."[22]

Prompted by the report, OMB staff requested information from DOE about its monitoring of the Solyndra loan guarantee.[23] OMB staff also began expressing concern about the extent of DOE's monitoring.[24] OMB asked DOE to share its monitoring report for Solyndra, which DOE did on April 19, 2010. According to OMB staff, the monitoring reports state that "the project continues to be successful and in accordance with the business plan, despite the parent's recent financial audit. DOE seems to separate the parent from the project in terms of the risk monitoring, but I think the deal is structured in a way that does not support that view."[25] The OMB staff member went on to note that the "parent is the prime equipment supplier and sole purchaser for the project's output," and "[a]lthough the parent has pledged full construction completion support . . . [t]he deteriorating financial status of the parent could impact the ability to fund the construction completion account and increase completion risk for the project."[26]

Solyndra's financial status was also a topic of conversation at the White House, where staff was planning a visit by President Obama to the plant in May 2010. On May 24, 2010, Valerie Jarrett told Vice President Biden's Chief of Staff, Ronald Klain, "[a]s you know, a Going Concern letter is not good. Thoughts?"[27] Klain then asked Secretary Chu's Chief of Staff and the DOE ARRA Advisor to "look at this ASAP and get back to me."[28] The DOE ARRA Advisor responded that the "'going concern' letter is standard for companies pre-IPO" and "[w]e will see these with all the pre-IPO companies that we fund and is not a general concern."[29] The Advisor went on to note market factors impacting Solyndra's condition, including that "they have been counting on an energy bill to pass, including a renewable energy standard to ensure adequate US market size."[30] The advisor reassured White House advisors that the company might "face issues in the 18-24 month window, but the company should be going strong into the fall . . . ."[31] The Secretary's Chief of Staff bolstered that message, stating that the "[b]ottom line is that we believe the company is okay in the medium term, but will need some help of one kind or another down the road."[32] The President's event at Solyndra went forward on May 26, 2010.

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[22] Solyndra. (March 16, 2010). Form S-1 (amended).
[23] *See* April 9, 2010, email between OMB staff regarding "LAST CALL: Pls send your Weekly Report 4/5-4/9 ASAP."
[24] *See* April 13, 2010, email between OMB and the Department of the Treasury staff regarding "Proposed agenda for NEC meeting re: DOE Loan Guarantee Program."
[25] April 19, 2010, email between OMB staff regarding "Solyndra."
[26] *Id.*
[27] May 24, 2011, email between DOE and White House staff regarding "Wanted to share some concerns about the President's visit to Solyndra: Please keep confidential – will you send to Ron."
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] May 24, 2011, email between DOE and White House staff regarding "Wanted to share some concerns about the President's visit to Solyndra: Please keep confidential – will you send to Ron."

In June 2010, Solyndra announced that it had cancelled its planned IPO, and would instead raise capital from its existing shareholders. With the announcement, an OMB staff member stated that the "challenges Solyndra is having should be used to insist that DOE ramp up its monitoring function immediately; if DOE does not stay on top of the project, it risks becoming embarrassing given the high profile S-1, POTUS, and VPOTUS events over the past year."[33] Following this announcement, OMB and Treasury staff continued to work together to analyze DOE's monitoring reports for Solyndra, and collaborated on a list of twelve follow-up items to send to DOE relating to the company's financial status.[34] That list was sent to DOE on July 26, one day before a Loan Guarantee Meeting between Secretary Chu, OMB Director Peter Orszag, and Treasury Assistant Secretary Mary Miller to address "policy issues." One month later, it appears from documents produced to the Committee that DOE had yet to provide the follow-up information requested by OMB.[35]

Also, in summer 2010, OMB staff discussed Solyndra's second application for a DOE loan guarantee. According to DOE's own project status tables that were shared with OMB, DOE expected to hold a Credit Review Board on the second Solyndra loan guarantee application for $499 million on September 16, 2010.[36]

On July 9, 2010, DOE forwarded to OMB a Project Report dated June 25, 2010, for "Solyndra II." That report indicates that the company had made a loan request for $468 million and the DOE status for the project was "in due diligence." The report states that, with respect to due diligence, the technical and legal independent consultants had been selected and the independent marketing report was scheduled to be submitted in early July 2010. OMB staff questioned whether the company's finances could support a second guarantee, noting in a July 13, 2010, OMB Memorandum that "Energy Branch staff expressed concern regarding a second loan guarantee commitment to Solyndra (scheduled for the Credit Review Board in September) due to financial trouble in the project's parent company. While a second loan guarantee to Solyndra could create economies of scale . . . the proposal could add stress to the parent company . . . ."[37]

From OMB's perspective, the second Solyndra loan guarantee remained under DOE consideration two months later. During its weekly call with OMB on September 14, 2010, DOE told OMB that Solyndra would be visiting DOE that week "to discuss their current status and second [loan guarantee] application."

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[33] June 23, 2010, email between OMB staff regarding "DOE Loan Guarantees status update" (emphasis in original).
[34] *See* July 26, 2010, email between OMB, Treasury, and DOE staff regarding "Solyndra Follow Up." The email requested information relating to twelve items, including parent financial statements; actual performance against loan covenants; monthly variance reports; market price and production information; cost data; questions about accounting standards governing going concern statements; changes Solyndra had requested; and data regarding panel efficiency.
[35] *See* August 23, 2010, email between OMB and DOE staff regarding "Solyndra Follow Up."
[36] *See* July 7, 2010, email between OMB staff regarding "LGPO Portfolio Report 7-6-10" attaching "LGP_Portfolio_Tables_070610.xlsx."
[37] July 13, 2011, email between OMB staff regarding "MEMO Energy Loan Guarantee Update Meeting 071310" attaching "MEMO Energy Loan Guarantee Meeting 071310.docx."

4. *Solyndra's Declining Financial Status*

On October 8, 2010, Solyndra executives informed DOE that the company's "situation has changed quite dramatically." Mr. Bill Stover, Solyndra's CFO, informed DOE that it would not be able to raise capital by the end of the year, as it originally had planned to do, and "*without access to FFB loan funds in October, November, and December for work that has been completed, Solyndra would run out of cash in November*."[38]

During October, documents produced to the Committee show that the company was working with its investors and bankers to identify a structure for a deal and potential new capital to bring into the company while DOE analyzed potential financial models for the deal. On October 25, 2010, Solyndra Chief Executive Officer (CEO) Brian Harrison emailed DOE and stated that "Solyndra has received some press inquiries about rumors of problems (one of them with quite accurate information) and we have received in bound calls from potential investors. Both of these data points indicate the story is starting to leak outside Solyndra." [39] Harrison went on to state that he would "like to go forward with the internal communication [to employees regarding layoffs] on Thursday, October 28."[40]

Harrison's email was forwarded to Jonathan Silver, the Executive Director of the DOE Loan Programs Office. Silver, in turn, forwarded the email to Secretary Chu's Chief of Staff, who then forwarded the email to Carol Browner, Ron Klain, and another White House staff member in Browner's office. Browner responded, "[w]hat's the announcement?" to which the Secretary's Chief of Staff responded, "Left you a VM on your cell."[41] On October 30, 2010, advisors for Argonaut Private Equity, Solyndra's largest investor, discussed the status of talks with DOE about the restructuring of the Solyndra guarantee, and noted that "DOE continues to be cooperative and have indicated that they will fund the November draw on our loan (app. $40 million) but have not committed to December yet. They did push very hard for us to hold our announcement of the consolidation to employees and vendors to Nov. 3rd – oddly they didn't give a reason for that date."[42] The 2010 federal elections were on November 2; the following day, Solyndra announced that it was shutting down its Fab 1 facility and laying off workers. Several emails produced by Argonaut to the Committee reference the fact that the layoff announcement was postponed because of the November 2 elections.

In November, Secretary Chu, in response to questions about Solyndra, noted the importance of government support for renewable energy. The DOE also released a statement, stating that "Solyndra now plans to double rather than triple production of solar panels by 2013,

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[38] October 11, 2010, email between Solyndra and DOE regarding "Solyndra advance materials" (emphasis in original).
[39] October 25, 2010, email between Solyndra and DOE regarding "Internal announcement."
[40] *Id.*
[41] October 26, 2010, email regarding "Internal announcement."
[42] October 30, 2010 email between Argonaut staff regarding "One more DoD contact idea," AVI-HCEC-0017729.

and construction for the company's new facility is ahead of schedule."[43] The Secretary did not mention the financial problems then facing the company.

5. Solyndra Restructuring

Solyndra, its investors, and the DOE began negotiations in earnest in early December to determine if a restructuring agreement could be reached that would allow new capital in the company and ensure DOE's continued funding of the loan guarantee.

Although DOE had apparently previously told Solyndra's investors that DOE was not allowed to subordinate its interests, by December 7, 2010, as the negotiations floundered and Solyndra considered filing for bankruptcy, it appears that the DOE suddenly offered to subordinate its interest in the first $75 million recovered in the event of a liquidation to Solyndra's investors.[44] The following day, the Chief Counsel of the DOE Loan Programs Office requested an appointment with the DOE General Counsel, stating that "[w]e have a serious problem with Solyndra and need to brief [the General Counsel] as soon as possible."[45] In an interview with Committee staff, the DOE Loan Programs Office Chief Counsel stated that she was aware that the statute (EPAct) included a provision prohibiting subordination — and this was the reason she requested the meeting with the General Counsel. On December 10, 2010, the DOE Director of the LPO Portfolio Management group circulated a summary of the terms and conditions of the proposed restructuring.[46] The summary set forth the general terms and conditions of the restructuring that were ultimately included in the final agreement, including the subordination of DOE's interest.

While the general terms of the Solyndra restructuring were set by December, and DOE continued to fund Solyndra with disbursements in December and January,[47] OMB staff repeatedly questioned whether the proposed restructuring would result in better recoveries for the government.[48] Over the course of January and early February, OMB staff appears to have concluded that the restructuring was a "modification" under OMB Circular A-11, as it would pose a cost to the government, whereas DOE maintained it was a "workout." In addition, OMB staff also questioned whether the subordination of DOE's interest in recoveries to Solyndra's investors was permissible under the Energy Policy Act of 2005, with one staff member stating that DOE had "stretched this definition beyond its limits."[49] After conference calls between the OMB and DOE General Counsel offices, it was not until January, long after the terms of the restructuring had been set and Solyndra's funding continued, that DOE drafted a legal opinion

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[43] Iris Kuo, Energy Secretary Chu declares 'Sputnik' moment on green race against China, November 30, 2010, at http://venturebeat.com/2010/11/30/what-energy-secretary-chu-says-on-solyndra-the-decline-in-green-investing/.
[44] December 7, 2010, email from Steve Mitchell to George Kaiser, MADR00002970.
[45] December 8, 2010, email between DOE staff, regarding "Meeting with Scott/Solyndra."
[46] *See* December 10, 2010, email between DOE staff regarding "Summary of Solyndra Key Business Terms."
[47] DOE made a $32.175 million disbursement in November 2010, a $17.855 million disbursement in December 2010, and a $16.588 disbursement in January 2011 while negotiations were ongoing.
[48] *See* January 3, 2011, email between OMB staff regarding "Solyndra restructuring update."
[49] December 15, 2010,email between OMB staff regarding "FW: Solyndra."

setting forth its rationale that the subordination of its claims to Solyndra's investors was permissible under the EPAct.

In late January, Secretary Chu and OMB Director Jacob Lew met to discuss the DOE Loan Guarantee Program generally, as well as updates on Solyndra. Just before that meeting, an OMB staff member wrote that "[a]lthough the decision has already been made for OMB not to play an active role in determining what to do with Solyndra, the Director/S-1 meeting tomorrow might present an opportunity to flag to DOE at the highest level the stakes involved, for the Secretary to do as he sees fit (and be fully informed and accountable for the decision)." [50] The staffer went on recommend that Director Lew "make this point to the Secretary" that while "the company *may* avoid default with a restructuring, there is also a good chance it will not." [51]In a memorandum provided to Director Lew in preparation for the meeting with Secretary Chu, OMB staff noted in a section entitled "Opportunities for Improvement" that, "with respect to Solyndra, OMB deferred to DOE in making determinations such as the decision with how to proceed with the Solyndra restructuring."[52]

By early February, it appears that OMB staff had determined that the Solyndra restructuring was a modification and, as such, would result in a cost to the government. In a February 1, 2011, email among OMB staff, one staffer states that, "I am the one that has to convey the modification [to DOE]. I believe the plan is to do that tomorrow."[53] On February 4, Deputy Director Jeffrey Zients asked OMB staff if "we are agreeing with [DOE] on this deal or do we still believe it is a modification?" Another staff member responds that OMB wants "to see the cash flows and then we should have a discussion."[54]

DOE proceeded to submit a new set of cashflows to OMB. One week later, on February 11, 2011, OMB changed its position, and suddenly found that the restructuring now constituted a workout.[55]

On February 22, 2011, Secretary Chu signed a DOE Action Memo dated February 18, 2011, approving the agreement. The Action Memo set forth the terms of the agreement and the structure of the deal, including the fact that DOE's interest in the first $75 million had been subordinated. Solyndra, its investors, and DOE signed the final restructuring agreements on February 23, 2011.

On March 3, 2011, Secretary Chu stated in an interview that DOE was "confident" Solyndra could "'repay the loan,'" and that "'sales have been going up' in recent months."[56]

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[50] January 31, 2011, email between OMB staff regarding "Solyndra optics."
[51] *Id.*
[52] January 31, 2011, email between OMB staff regarding "Action Request: Prep for Meeting with Sec. Chu," attaching "Memo for the Director – Chu Meeting SCE.docx."
[53] February 1, 2011, email between OMB staff regarding "Solyndra."
[54] February 4, 2011, email between OMB staff regarding "Solyndra update."
[55] February 11, 2011, email between OMB staff regarding "Draft email to DOE on Solyndra."
[56] Brian Hansen, DOE 'confident' as it gives Solyndra more time to repay loan; 'sales have been going up', Electric Utility Week, March 7, 2011.

6. Solyndra's Financial Status After Restructuring and Bankruptcy Announcement

Following the closing of the restructuring agreement, DOE continued to fund the Solyndra loan guarantee. At the time the restructuring agreement closed, $468 million of the $535 million loan guarantee had been disbursed. From March through August 2011, DOE authorized an additional $40 million in disbursements to Solyndra. Also during this time, DOE put into place the enhanced monitoring required under the restructuring agreement, including weekly cash flow monitoring, and participating as an observer in board meetings. Mr. Jonathan Silver, the Executive Director of the Loan Guarantee Program, stated in a speech in April 2011 that Solyndra had been "badly misunderstood," and "[t]he plant that we financed . . . was built on time and under budget."[57]

Even with these measures, documents produced to the Committee show that by May 2011 Solyndra was again having working capital issues, and needed to secure a second round of financing by early June. According to a May 5, 2011, Board Call presentation by Solyndra, without additional capital"[t]he alternative is commencement of bankruptcy proceedings."[58]

The option the parties identified to address the working capital shortage was to finance the company's Accounts Receivable. Under this arrangement, Argonaut, one of the hedge fund investors, agreed to purchase the Accounts Receivable for a reduced price. When a Solyndra buyer paid its bill, Argonaut would be paid back and Solyndra would keep the difference between Argonaut's purchase price and the customer's purchase price. The purchase agreement had a $75 million cap, which could be increased to $100 million upon the agreement of the parties.[59] This purchase arrangement, however, would not obviate the need for additional working capital to be injected into Solyndra in August 2011, as anticipated by the February restructuring agreement. At the time Argonaut and Solyndra were negotiating the accounts receivable transaction, the parties anticipated that Solyndra would still need $46 million in funding in August in order to "maintain a workable minimum balance."[60]

Despite the company's continued cash flow problems, DOE continued to make public statements touting Solyndra's prospects. For example, on July 21, 2011, a DOE spokesperson stated that "DOE invested in Solyndra because it developed an innovative solar panel . . . . Innovative projects are, by definition, riskier than mature technologies. There are likely to be bumps in the road in the future. However, the Solyndra story is one of a company that continues to grow by bringing important new solar technologies to the market."[61]

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[57] Abby Gruen, DOE Loan Guarantee Head Jonathan Silver on loan criteria, approvals and investment philosophy, SNL Renewable Energy Weekly, April 22, 2011.
[58] *See* Board Call – May 5, 2011 Financial Position Update.
[59] *See* May 19, 2011, email between DOE staff, regarding "Argonaut Purchase AR Analysis_051611.xls."
[60] *Id.*
[61] Herman Wang, Solyndra defends finances as GOP subpoenas records, Inside Energy with Federal Lands , July 18, 2011.

On July 28, 2011, Solyndra met with its board, including the DOE board observer. At that meeting, Solyndra announced that it planned to revise its Annual Plan to reflect a 19 percent drop in shipments, a 23 percent drop in revenue, and a 10 percent decline in Average Sales Price (ASP).[62] Following this board meeting, the Director of the LPO Portfolio Management group sent an email on August 4, 2011, to LPO Executive Director Jonathan Silver explaining that Solyndra's "cash position is very low and investors appear unwilling to provide $20 million required within the next 10 days."[63] Silver then forwarded the email to Secretary Chu's Chief of Staff.

On August 17, 2011, a briefing for DOE, OMB, and Treasury Department officials and staff was held to discuss an analysis prepared by the investment bank Lazard Ltd., which had been retained by DOE to analyze a potential second Solyndra restructuring. The report noted that Solyndra's investors were unwilling to put additional capital into the company under the current restructuring agreement, and "absent new funding in the near-term, the Company will be forced to begin an orderly wind-down of the business, which in Lazard's best judgment, will likely result in little recovery to the DOE."[64] Copies of Lazard's plan were sent to OMB Deputy Director Jeffrey Zients, Department of the Treasury Assistant Secretary Mary Miller, Jonathan Silver, DOE Deputy Secretary Daniel Ponemon, Secretary Chu's Chief of Staff, and staff in the White House Office for Energy and Climate Change Policy.

Documents produced to the Committee show that negotiations between Solyndra, its investors, and DOE came to a head on August 26, 2011, over whether DOE should advance an additional $5.4 million to the company.[65] On August 27, 2011, a second presentation from Lazard was circulated among OMB, DOE, and Treasury staff in anticipation of a conference call on August 28 to discuss the issue. Following that call, DOE informed Solyndra on August 28, 2011, that it would not provide additional funding to the company. On August 30, 2011, the Solyndra board of directors voted to move forward with bankruptcy proceedings. The company announced its decision on August 31, 2011. The company was the subject of a raid by agents from the Federal Bureau of Investigation (FBI) and DOE Office of Inspector General (OIG) on September 8, 2011.

III. ISSUES

The following issues will be examined at the hearing:

- How did the stimulus and Secretary Chu's directive to accelerate the review of loan guarantee applications impact the review of the Solyndra application?

- Should DOE have better anticipated the financial problems that Solyndra experienced?

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[62] July 31, 2011, email between DOE staff regarding "Board Materials."
[63] August 4, 2011, email between DOE staffregarding "Solyndra."
[64] Discussion Materials, dated August 17, 2011.
[65] According to an August 26, 2011, email between DOE staff, "JS [Jonathan Silver], S2 [Deputy Secretary Poneman], and the WH are discussing whether to further fund the company with another advance."

- Did the DOE take adequate steps to protect the taxpayer when it negotiated the terms and conditions of the Solyndra guarantee and its restructuring?

IV. CONTACTS

If you have any questions about this hearing, please contact Karen Christian or Todd Harrison at (202) 225-2927.