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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Mailroom 202 225-9974

Facsimile 202 225-9974

Message 202 225-6881

<http://oversight.house.gov>

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LAWRENCE J. BRADY
STAFF DIRECTOR

October 22, 2012

The Honorable Steven Chu
Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Mr. Secretary:

The Committee on Oversight and Government Reform continues its oversight of the U.S. Department of Energy's (DOE) loan and loan guarantee programs, including awards to Fisker Automotive and Solyndra. In light of recent information, it has become clear that the DOE's poor stewardship of the Solyndra DOE loan will likely lead to taxpayer losses that far exceed \$535 million.¹ Specifically, I understand that, as Solyndra approached insolvency, alongside of the prioritization of a new loan above the DOE's loan, DOE also agreed to sacrifice its ownership rights in the event of bankruptcy.² These terms were agreed to in return for a relatively small loan of \$75 million from the original investors and private lenders.³ When considering the tax implications, this loan restructuring positioned the original investors so that they could recover an enormous share of their losses in the failed Solyndra investment through future tax deductions.

DOE's failure will likely cause taxpayers to suffer an additional loss of up to \$341 million bringing the total taxpayer loss as high as \$849 million.⁴ More troubling is that, according to press reports, the Office of Management and Budget (OMB) understood and warned of the tax implications to this deal.⁵ In other words, the White House, through its budget office, was in a position to know that it was handing out nearly a billion dollars in tax breaks, worth nearly \$350 million in future income, in return for a relatively tiny \$75 million loan that extended Solyndra's life by just a few months.

¹ Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16, Oct. 16, 2012.

² *Id.*

³ *Id.*

⁴ Amy S. Elliott, *News Analysis: Solyndra's NOLs Post-Bankruptcy—Setting the Record Straight*, TaxAnalysts, Sept. 20, 2012; Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16.

⁵ Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16.

Background

Solyndra filed for Chapter 11 bankruptcy protection on September 6, 2011.⁶ However, Solyndra's deteriorating financial condition was clear to DOE in the months before the company filed for bankruptcy. In fact, DOE released the last tranche of Solyndra's loan money just months before its bankruptcy in an attempt to keep the company solvent through the midterm elections.⁷ By this point, Solyndra had already defaulted on the loan.⁸

DOE made a last ditch effort to extend the life of the failing solar manufacturer by agreeing to modify the terms to its \$535 million loan in order for Solyndra to receive an additional private loan of \$75 million. Specifically, Solyndra's largest investors, Argonaut Ventures LLC (Argonaut) and Madrone Partners LP (Madrone), loaned \$75 million in return for successfully diminishing DOE's loan priority and eliminating DOE's equity interest in the case of Solyndra's bankruptcy.

In what is described in greater detail below, the loan restructuring affected tax implications beyond what would result from a simple reduction in priority relative to another lender. The restructuring eliminated DOE's ability to gain ownership over the majority of Solyndra in the event of bankruptcy and opened the door for a major tax windfall to benefit Argonaut and Madrone.

Specific Details to Restructuring of the DOE Loan to Solyndra

Argonaut, the investment division of the George Kaiser Family Foundation, was Solyndra's largest stockholder, owning 35.73 percent of the company.⁹ George Kaiser is a Tulsa, Oklahoma billionaire, who made his fortune in the oil business, and he also happens to be a major fundraising bundler for the campaign to re-elect President Obama.¹⁰ Madrone was Solyndra's second largest shareholder, owning 11 percent of the company.¹¹

In February 2011, DOE approved a deal whereby Argonaut and Madrone would loan \$75 million to Solyndra in exchange for priority status over DOE in recouping repayment. This restructuring also disproportionately improved Argonaut-Madrone's standing in bankruptcy vis-à-vis DOE, particularly with regard to equity interests upon default.¹² The reduced standing of the DOE's claim is reflected in a *TaxAnalysts* article:

⁶ Tom Hals & Dan Levine, *Solyndra Investor Sought Tax Breaks as Bankruptcy Loomed-Filing*, Reuters, Oct. 10, 2012.

⁷ Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16, Oct. 16, 2012.

⁸ *Id.*

⁹ Amy S. Elliott, *News Analysis: Solyndra's NOLs Post-Bankruptcy—Setting the Record Straight*, TaxAnalysts, Sept. 20, 2012; Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16, Oct. 16, 2012.

¹⁰ Carol D. Leonnig & Joe Stephens, *Top Obama Donor George Kaiser Says He Didn't Play Politics to Win Government Loan*, Wash. Post Sept. 2, 2011.

¹¹ Amy S. Elliott, *News Analysis: Solyndra's NOLs Post-Bankruptcy—Setting the Record Straight*, TaxAnalysts.

¹² Opinion, *The Solyndra Memorial Tax Break*, Wall St. J. at A16, Oct. 16, 2012.

[B]ankruptcy lawyers who have looked at Solyndra's plan of reorganization have expressed surprise that the shareholders (with interests in Holdings, a class 9 claim) come out unimpaired and are able to capture the tax benefits while more senior creditors (like DOE, whose loan in part constitutes a class 4 claim) are impaired with an estimated recovery of zero.¹³

The unusual lack of recovery to a more senior claim could only result if DOE sacrificed more than just its priority position as the senior-most lender when it restructured the loan to attract the additional \$75 million loan. In fact, it appears that DOE effectively waived any potential equity interest in Solyndra prior to bankruptcy.¹⁴

Further highlighting Argonaut-Madrone's tax strategy, the manner in which they invited other lenders to participate in the \$75 million tranche is illuminating. Argonaut-Madrone provided that, to the extent other lenders participated, they would receive a potential ownership interest in Solyndra through warrants; however, if Solyndra failed, these warrants would revert to Argonaut-Madrone.¹⁵ This reversion of warrants enabled Argonaut-Madrone to maximize their share of ownership of the net operating losses (NOL), while minimizing the additional dollars they themselves would need to invest in Solyndra.¹⁶ In effect, by inviting others to participate in the loan, Argonaut-Madrone reduced the extent to which it would need to risk additional funds in the souring Solyndra investment, while increasing the ability to gain equity interests upon default.

DOE's approval of this loan restructuring allowed the Argonaut-Madrone holding company to capture the NOLs in the Solyndra bankruptcy.¹⁷ DOE is expected to recover a minimal amount of its initial \$535 million loan, while the Internal Revenue Service (IRS) warns that the government may be out up to another \$341 million due to Argonaut-Madrone's tax write offs. As IRS stated to the United States Bankruptcy Court in Delaware:

... However, if it is assumed solely for purposes herein that Reorganized Holdings will have \$875 million to \$975 million of taxable income prior to expiration of the net operating loss carryforwards and that the entirety of Holdings' estimated net operating loss carryforwards are available to be applied against Reorganized Holdings' income without limitation, and if it is further assumed that the highest current federal corporate income tax rates of 35% applies, then Reorganized Holdings would benefit from a reduction in federal income tax liability of \$306 million to \$341 million.¹⁸

¹³ Amy S. Elliott, *News Analysis: Solyndra's NOLs Post-Bankruptcy -Setting the Record Straight*, TaxAnalysts.

¹⁴ *See id.* ("Solyndra's existing equity holders maintain their interests in the reorganized entity, Holdings, so 'as far as I can tell, any shifts in equity have occurred outside the [bankruptcy] plan,' he said.")

¹⁵ Opinion, *The Solyndra Memorial Tax Break*, Wall St. J.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *In re: Solyndra LLC*, Trial Motion, Memorandum and Affidavit, U.S. Bankruptcy Court, D. Delaware, Sept. 4, 2012.

As the IRS made clear above, these NOLs provide Argonaut-Madrone with up to nearly a billion dollars in tax deductions, unless the IRS succeeds in opposing this outcome. However, the *TaxAnalysts* article indicates that the IRS has a tough case ahead of it.¹⁹ If the IRS fails, these deductions will offset income from profitable businesses that they invest in, reducing Argonaut-Madrone's tax burden by up to \$341 million dollars.²⁰

What is most puzzling is that an OMB staffer warned that the government "is better off liquidating the assets today than restructuring under DOE's proposal."²¹ This implies the Administration understood the tax implications of the lopsided deal yet proceeded nonetheless.

The Committee is also concerned that DOE may have similarly failed to protect taxpayers in the case of other companies that obtained DOE loans and then restructured those agreements to attract outside capital.

Fisker Automotive obtained an Advanced Technology Vehicles Manufacturing (ATVM) Program loan for \$528.7 million on April 23, 2010. Fisker's delays in launching its first vehicle, the Karma, in the United States led DOE to freeze the loan and renegotiate the financial covenants with Fisker in June 2011. Fisker recently acknowledged that its more affordable American-built automobile, the Atlantic, would not launch until late 2014 or 2015.²²

Like Solyndra, DOE allowed Fisker to find additional private investors after failing to adhere to financial covenants.²³ However, the details of how these investments affected underlying terms to the original DOE loan are unclear. As the Committee continues to conduct oversight on Fisker's ATVM loan, DOE is withholding important documents regarding these loans.²⁴ Given DOE's noncompliance, the Committee cannot assure taxpayers that, in the case of bankruptcy, a similar subordination of taxpayer interests will not occur.

To help the Committee understand these matters, please provide the following documents:

1. Provide all documents and communications produced or received by DOE between September of 2010 and April of 2011, including e-mails, referring or relating to the tax implications of the restructuring of the Solyndra loan.
2. Provide all communications between DOE and 1) OMB and 2) Treasury, referring or relating to the tax implications as they relate to the restructuring of DOE loans to Fisker and all other 1705, 1703 and ATVM DOE loans that were restructured or modified after origination.

¹⁹ Amy S. Elliott, *News Analysis: Solyndra's NOLs Post-Bankruptcy—Setting the Record Straight*, *TaxAnalysts*.

²⁰ *Id.*

²¹ Opinion, *The Solyndra Memorial Tax Break*, *Wall St. J.*

²² Deepa Seetharaman, *Fisker Atlantic Sedan Production Pushed Back at Least Two Years*, *Reuters*, Oct. 15, 2012.

²³ Deepa Seetharaman, *Fisker Raises \$100 MM to Fund Development*, *Reuters*, Sept. 17, 2012.

²⁴ Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Hon. Steven Chu, Secretary, U.S. DOE, Feb. 10, 2012.

The Honorable Steven Chu
October 22, 2012
Page 5

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We ask that you provide the requested information as soon as possible, but no later than 5:00 p.m. on **November 5, 2012**. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Joseph Brazauskas or Peter Haller of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Darrell Issa", written over a horizontal line.

Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

DAV BURTON, INDIANA
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2157 RAYBURN HOUSE OFFICE BUILDING

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Phone: (202) 225-5074
Facsimile: (202) 225-3874
Modem: (202) 225-5051

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.