

Client Alert

Government Advocacy & Public Policy Practice Group

September 21, 2011

Congressional Investigation of Solyndra, Inc. and Department of Energy Loan Programs Office *“A colossal failure ... calling into question every loan guarantee that has been issued and ... any future loan guarantees” — Sen. Lisa Murkowski (R-AK)*

The Congressional investigation of Solyndra, Inc., the California solar panel manufacturer that received a \$535 million loan guarantee and recently filed for bankruptcy, is a gathering threat to the entire Department of Energy (DOE) Loan Guarantee Program. The accompanying media firestorm has consumed Solyndra, its executives, and the Obama Administration in recent weeks, and may soon engulf other recipients of DOE loan guarantees. In fact, any company that has received federal funding, particularly under the American Reinvestment and Recovery Act of 2009 (the Stimulus Act), or any company with a pending application for federal assistance, should be attuned to this heightened congressional scrutiny and should conduct appropriate due diligence, including among other actions:

- Be proactive in high risk areas
- Address and resolve significant audit findings
- Identify and address whistleblower complaints
- Maintain appropriate communication and cooperation with key agency officials
- Weigh the benefits and risks of communication with key Members of Congress and Committee staff

Background

Solyndra was the first recipient of government support under the DOE Loan Guarantee Program established under the Energy Policy Act of 2005, which was further modified and expanded by the Stimulus Act. The Obama Administration touted its award to Solyndra (granted to support Solyndra’s financing of the construction of a new solar panel manufacturing facility) as “... part of President Obama’s aggressive strategy to put Americans back to work and reduce our dependence on foreign oil by developing clean, renewable sources of energy” (“*Obama Administration Offers \$535 Million Loan Guarantee to Solyndra, Inc.*” at <http://www.doe.gov/articles/obama-administration-offers-535-million-loan-guarantee-solyndra-inc>, March 20, 2009.)

For more information, contact:

Theodore M. Hester
+1 202 626 2901
theater@kslaw.com

Kenneth S. Culotta
+1 713 276 7374
kculotta@kslaw.com

Margaret O’Neil
+1 212 556 2160
moneil@kslaw.com

Daniel F. Donovan
+1 202 661 7815
ddonovan@kslaw.com

Thomas J. Spulak
+1 202 661 7948
tspulak@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

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In the fall of 2010, Solyndra announced that it was closing one of its facilities, laying off employees, and postponing the expansion of its facilities. From December 2010 through February 2011, DOE, Solyndra, and its investors negotiated the terms to restructure the DOE loan guarantee. The House Energy and Commerce Subcommittee on Oversight and Investigations (the Subcommittee) launched its investigation in February 2011. Solyndra filed for bankruptcy on September 6, and two days later, the Federal Bureau of Investigation, working in conjunction with the DOE Inspector General, executed search warrants on the company's headquarters and on the homes of certain company executives. On September 14, the Subcommittee held a hearing to examine the loan guarantee awarded and subsequently restructured to Solyndra.

Focus of the September 14 Hearing

Subcommittee Members focused at the hearing on whether the DOE and the White House Office of Management and Budget (OMB) had properly protected the taxpayers' interests in reviewing the application, making the award, and subsequently restructuring the loan. Citing from emails produced to the Subcommittee, Members questioned witnesses Jonathan Silver, Director of the DOE Loan Programs Office, and Jeffrey Zients, Deputy Director of the OMB, about whether Solyndra's application had been rushed because of political pressure from the White House and whether they had been aware of Solyndra's financial condition. Members also questioned the wisdom of any additional federal investment in the renewable energy industry. DOE has until September 30 to finalize other loan guarantees currently in process, but Members of the Subcommittee, including Chairman Cliff Stearns (R-FL), called on President Obama to halt any additional awards and to return the \$10 billion remaining in the DOE Loan Guarantee Program account to the Treasury.

What's Next

During the hearing, Subcommittee Chairman Stearns stated that the congressional investigation had expanded to some of the 40 other loans, loan guarantees, or conditional commitments for loan guarantees issued by DOE. Chairman Stearns commented that the Department of Justice might be the appropriate entity to investigate others, given the Subcommittee's resource constraints. Congressman Ed Markey (D-MA) brought the non-renewable energy sector into the fray by urging the Subcommittee to focus on a nuclear energy loan guarantee fifteen times the size of Solyndra's loan guarantee. On September 23, the Subcommittee will hear testimony from Solyndra's President and CEO, its Chief Financial Officer, and a Senior Vice President. Committee investigators are also seeking documents from some venture capitalists who invested in Solyndra.

Other House and Senate Committees are not waiting in the wings. On the day of the Subcommittee hearing, the Chairman of the House Natural Resources Water and Power Subcommittee, Tom McClintock (R-CA), introduced legislation to repeal the Western Area Power Administration's loan authority granted under the Stimulus Act and scheduled a hearing. This week the Chairman of the House Judiciary Committee, Lamar Smith (R-TX), called on Attorney General Eric Holder to appoint an independent bankruptcy examiner to review the circumstances behind Solyndra's bankruptcy. Darrell Issa (R-CA) also announced that the Committee he chairs, Oversight and Government Reform, plans to investigate government loan programs to see if the White House is "picking winners and losers." While questioning DOE nominees during a Senate confirmation hearing last week, the Ranking Member of the Committee on Energy and Natural Resources, Lisa Murkowski (R-AK), declared, "[w]e have a colossal failure within the DOE loan guarantee program, and it's calling into question every loan guarantee that has been issued and clearly any loan guarantees going forward."

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Recommendations

In this environment, any company that has received federal funding, particularly under the Stimulus Act, or any company with a pending application for federal assistance, should anticipate increased scrutiny from Congress, regulators, and the media. King & Spalding's crisis management experience can reduce the adverse impact an investigation or prosecution has on a business or an individual. We have an experienced group of former Congressional investigators, prosecutors, and enforcement officials who are highly skilled in conducting factual investigations in all business contexts. This experience allows us to provide company management and boards of directors with sound legal judgment and to manage the results of investigations both internally and in response to regulators, prosecutors and Congress.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

ⁱ <http://bit.ly/oZuBWY>