

## E-ALERT | Congressional Investigations and Clean Energy

September 2, 2011

### SOLYNDRA BANKRUPTCY PROMPTS CONGRESSIONAL INVESTIGATION AND A RENEWED FOCUS ON FEDERAL SUPPORT FOR RENEWABLE ENERGY COMPANIES

The bankruptcy announcement of a solar energy company closely associated with President Obama has prompted the expansion of a congressional oversight investigation, brought a renewed focus on federal involvement in the renewable energy industry, and increased the legal and political risks for companies in this segment.

#### SOLYNDRA

On August 31, 2011, Solyndra, a major manufacturer of rooftop solar panels, announced that it was suspending operations, laying off 1,100 employees, and filing for bankruptcy. As a result of the bankruptcy, the United States will likely lose millions in a federal loan guarantee that it provided to the company.

Before its bankruptcy, Solyndra had been frequently highlighted by the Obama administration for its innovation and strong prospects. Solyndra was the first company to receive a federal loan guarantee from the Department of Energy (DOE) following the 2009 stimulus legislation. Vice President Biden and Energy Secretary Chu participated in the groundbreaking of Solyndra's plant in 2009. And last year, President Obama visited the Solyndra facility and highlighted its role in economic growth and job creation. The administration had other ties to Solyndra as well – a major investor in the company, George Kaiser, raised more than \$50,000 in campaign contributions for the President's 2008 campaign.

#### CONGRESSIONAL INVESTIGATIONS

Solyndra also garnered significant attention from congressional Republicans, who questioned the advisability of the loan guarantee. In February 2011, as Solyndra's prospects weakened and it canceled a planned expansion and stock offering, the chairmen of the House Energy and Commerce Committee and its Subcommittee on Oversight and Investigations, Rep. Fred Upton (R-Mich.) and Rep. Cliff Stearns (R-Fla.), wrote to Energy Secretary Chu requesting a wide variety of documents and communications related to the Solyndra loan guarantee.

When the company announced its bankruptcy this week, Reps. Upton and Stearns immediately initiated a new inquiry – this time directed at the White House. On September 1, 2011, they sent a letter to Kathy Ruemmler, President Obama's White House Counsel, requesting all communications related to the loan guarantee. Significantly, they requested communications between the White House and investors in Solyndra, presumably hoping to find communications with President Obama's campaign contributors.

In their letter, Reps. Upton and Stearns provided a glimpse into the information they gathered from the Energy Department inquiry earlier this year. They state, "[w]e have learned from our

investigation that White House officials monitored Solyndra's application, and communicated with DOE and Office of Management and Budget (OMB) officials during the course of their review in 2009." The chairmen also stated that DOE and OMB officials "were aware of the White House's interest in the Solyndra loan guarantee," and they noted "that a major investor in Solyndra, George Kaiser, was a bundler for President Obama's 2008 campaign."

## IMPLICATIONS FOR RENEWABLE ENERGY COMPANIES

A central question in the congressional investigation is whether the Department of Energy properly assessed the risk to the United States of the loan guarantee provided to Solyndra. The Center for Public Integrity, a nonprofit organization devoted to investigative journalism, recently reported that the Energy Department decided to support the Solyndra loan guarantee "even before final marketing and legal reviews" were completed. In addition, the Center reported that OMB officials diverged from DOE's assessment and concluded that the Solyndra loan guarantee was significantly more risky.

If these reports prove true, they could spur congressional investigations into a wide variety of federal loan guarantees for renewable energy companies in the solar market and more broadly.

Since regaining the majority in the House of Representatives in 2010, congressional Republicans have increasingly used their oversight powers to investigate the Obama administration. To date, these investigations have resulted in only minor skirmishes, but Republicans will have stronger incentives to pursue investigations going into next year, when President Obama is campaigning for reelection. Moreover, the traditional Republican disinterest in investigating companies – because of the party's pro-business stance – is likely not to restrain investigations of the renewable energy industry, which is seen as more closely aligned with the politics and policies of the Democratic party.

## STRATEGIES FOR RENEWABLE ENERGY COMPANIES

It is advisable for renewable energy companies to review loan guarantees, other federal funding, and overall involvement in the political process for factors that may present risks in a congressional oversight investigation. When assessing such risks, companies need to assess risk with respect to both the substantive justifications and underpinnings of the company's relationship with the federal government and the unique challenges presented by congressional investigations in which quasi-legal proceedings are driven by political motivations and carry substantial public relations and reputational risks.

## COVINGTON & BURLING'S SUBSTANTIVE EXPERTISE

Covington & Burling's professionals have a leading practice representing clients in the renewable energy industry and deep experience representing companies and individuals in congressional oversight investigations. Our clients have included many Fortune 100 and 500 companies, and we have handled investigations conducted by nearly every committee in Congress. Our experiences range from massive investigations involving multiple hearings and tens of thousands of pages produced to Congress, to investigations that never reached the public because of our efforts to diffuse Congress's interest in our client. We have prepared numerous CEOs and other senior corporate officers to testify before congressional oversight panels. Our congressional investigation practice draws on the firm's significant experience in criminal law, litigation, government relations, political law, and specific regulated industries, including our renewable energy practice. Our lawyers are particularly adept at balancing the legal, public relations, regulatory, and reputational risks associated with a congressional investigation. Our team includes veterans of the House and Senate, the White House, and numerous federal agencies, on a bipartisan basis.

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