

Via Email: rule-comments@sec.gov

October 13, 2010

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

**Re: *Temporary Registration of Municipal Advisors,*
Release No. 34-62824; File No. S7-19-10 (Sept. 1, 2010)**

Ladies and Gentlemen:

This letter is submitted by Bingham McCutchen LLP on behalf of the National Association of Energy Service Companies (“NAESCO”) in response to the request for comments by the Securities and Exchange Commission (the “Commission”) on the Commission’s Exchange Act Release Number 62,824 (Sept. 1, 2010) (the “Interim Temporary Release”) adopting Rule 15Ba2-6T (the “Interim Temporary Rule”) under the Securities Exchange Act of 1934 (the “Exchange Act”).

NAESCO numbers among its members some of the most prominent companies in the world in the clean energy services industry, including Honeywell, Johnson Controls, Siemens, Trane, Comfort Systems USA Energy Services, and Schneider. Its members also include many of the nation's largest utilities: Duke Energy, Pacific Gas & Electric, Southern California Edison, and the New York Power Authority. In addition, NAESCO members include affiliates of several utilities including ConEdison Solutions, FPL Energy Services, Pepco Energy Services, Constellation Energy Projects and Services and Energy Systems Group. Prominent national and regional independent members include AECOM Energy, NORESKO, Onsite Energy, EnergySolve Companies, Ameresco, UCONS, Chevron Energy Solutions, Synergy Companies, Wendel Energy Services, Control Technologies and Solutions, Clark Realty Capital, McClure, and Lockheed Martin. NAESCO member companies deliver between \$4 and 5 billion in energy efficiency projects annually to institutional, commercial, residential and industrial customers nationwide. NAESCO was founded in 1983 and regularly participates in regulatory proceedings regarding energy efficiency programs, and is a member of regulator-appointed energy efficiency program review and evaluation groups in several states.

The clean energy services industry, in which NAESCO members are significant providers of energy efficiency goods and services, serves a vital role in the US economy by providing engineering solutions that provide efficient, low-cost,

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state-of-the-art power and energy efficiency services to its clients. A clean energy services company typically will review a client's current energy sources and uses, and then will propose engineering solutions designed to reduce the client's energy expenditures and upgrade the physical infrastructure. If the client accepts the proposal, then the clean energy services company will build and install the clean energy project. Clean energy projects may involve new power sources such as solar and wind energy, and typically involve energy efficiency retrofitting (such as improved lighting and lighting controls, HVAC, energy management systems, motors, insulation, plumbing and wiring) of existing infrastructure.

The clients of clean energy services companies may include state and local governments as well as federal government agencies, non-profit organizations and private businesses. Clean energy engineering solutions not only reduce harmful air and water pollution and greenhouse gas emissions, but also reduce our country's reliance on expensive fossil fuels imported from unstable and often hostile foreign sources. Clean energy engineering solutions provide high-quality sustainable jobs for US employees, and Congress and the administration have made clean energy projects a focal point of their efforts to recover from the nation's current economic difficulties. In addition, clean energy engineering solutions also can provide immediate cost-savings for its clients, particularly for cash-strapped state and local governments.

Energy Service Companies (ESCOs) such as those that belong to NAESCO are hired by clients for their technical and managerial expertise. They are typically paid out of the energy savings generated by the projects they have designed and installed. The projects are typically financed by third parties with whom the client enters into an independent relationship. The clean energy services company often guarantees a level of savings which is paid by the client to the financing entity to cover its debt service. The clean energy services company may provide information to its clients about the range of financing structures that may be appropriate for the project and the customer, and may, if the client wishes, provide introductions to potential financial providers. However, if the client chooses to pursue a financing alternative that involves a securities offering, the client typically relies on a separate municipal advisor, not the clean energy services company, for individualized financing advice about that offering.¹ The customer's own municipal adviser, counsel, and

¹ Of course, a clean energy services company could recommend that a municipal entity choose a financing solution that does not involve issuance of municipal securities or purchase of a municipal financial product, without triggering registration as a municipal advisor. As discussed below, many clean energy financing solutions, such as sale lease-back arrangements and preferred provider or performance contract arrangements, do not involve issuance of municipal securities or purchase of a municipal financial product.

procurement group or finance team provide the customer with the direct advice about prospective financing choices and structures and determine the ultimate choice of financing provider.

Section 975(e)(4) of the Dodd-Frank Act, pursuant to which the Commission has adopted the Interim Temporary Rule, specifically exempts “engineers providing engineering services” from the definition of the term “municipal advisor.” We believe that clean energy engineering solutions are exactly the type of engineering services that Congress meant to exclude from the coverage of this new regulatory scheme. We submit this comment letter with the hope that the Commission will interpret appropriately the “engineering services” exclusion from “municipal advisor” regulation and will not defeat Congress’ clear intent by deeming activity which is incidental to engineering services as requiring municipal advisor registration.

The Commission, in the Interim Temporary Release, defines many terms relevant to municipal advisor registration, but it does not define the term “advice” in the context of municipal entities. We urge the Commission to distinguish purely informational and educational activities which do not rise to the level of advice from individualized advice about the appropriate investment for a particular state or local government entity. Moreover, a clean energy services company should not also be required to register as a municipal advisor simply because it provides cash-flow modeling and other similar information that is inextricably linked to the engineering analysis, even if that modeling is individualized to the municipal entity. We also urge the Commission to define “advice” to exclude feasibility studies that are a necessary part of any engineering projects, including clean energy services projects.

This distinction between information and advice is particularly important in the clean energy services industry. There are a variety of financing options for clean energy engineering projects. Typically, many state and local government entities are not aware of all of the programs available from which they could finance clean energy projects. Many of those financing options, including preferred provider or performance contract agreements, operating leases with investment tax credits and lease-purchase agreements with certificates of participation, do not involve the issuance or use of municipal securities.

However, there are a variety of federal government programs, such as Build America Bonds (BABs), Qualified Zone Academy Bonds (QZABs), Qualified School Construction Bonds (QSCBs), Qualified Energy Conservation Bonds (QECBs), and Clean Renewable Energy Bonds (CREBs), that do involve (in the case of a state or local government) the issuance of municipal bonds. The fact that there

are so many federal programs to encourage the use of clean energy testifies to the strength of the federal policy in support of clean energy. Many states also have clean energy incentive programs, some of which do involve issuance of bonds, and some of which do not. As relevant here, it is vitally important that clean energy services companies be able to provide information and education about the available financing programs, without that educational process itself triggering registration as a municipal advisor.

Clean energy services companies may provide their clients case studies of how other entities (municipal or not) have implemented clean energy projects and about different financing alternatives. They may assist a municipal entity in modeling various financing alternatives. In some cases, those financial models may indicate that some of the alternatives appear preferable to others, and the clean energy services company may recommend that the municipal entity discuss one or more of those alternatives with its municipal advisor. However, in general the municipalities do not rely on recommendations from clean energy services companies concerning the choice of a particular financing alternative - that is a decision for the municipality to make, usually with the assistance of its municipal advisor.² If the municipal entity decides that a securities offering is the preferred financing alternative, then the clean energy services company may work with the municipality and its municipal advisor to assist it in understanding the cash flows that may result from the underlying project. There is no separate fee for these types of informational material; in the words of the Investment Advisers Act, they are “solely incidental” to the clean energy engineering services and does not involve “special compensation.”

In our experience, when a municipal entity proceeds with a securities offering to finance a clean energy services project, it generally engages a municipal advisor to advise on structuring that securities offering. The municipal entity looks to the municipal advisor for individualized advice about the securities offering, not to the clean energy services company, to which it is looking for advice about engineering design solutions and project implementation costs. After the passage of the Dodd-Frank Act, it is now clear that these municipal advisors have a fiduciary duty to act solely in the best interests of the municipal entity in connection with a securities offering. There will be no “regulatory gap” if the Commission holds, as it should, that there is no need for the clean energy services company also to register as a municipal advisor, so long as the municipal entity has a municipal advisor who is representing it in connection with a securities transaction.

² A clean energy services company may recommend a non-securities financing alternative to a municipal entity, such as a sale-leaseback transaction or performance contract - but those non-securities financing alternatives do not implicate municipal advisor status.

The line between general informational materials and individualized investment advice is familiar in both broker-dealer and investment adviser regulation. Requiring a clean energy services company to register as a municipal advisor simply because it provides general informational materials will have the counter-productive effect of discouraging those companies from providing this important educational service at all. Moreover, because municipal entities invariably ask about the different available financing alternatives, if the Commission were to deem these informational efforts to require registration as a municipal advisor, then the Commission would make it much more difficult for clean energy services companies to rely on the “engineering services” exclusion in the statute.³ Such a result would be contrary to the plain intent of Congress in adopting that exclusion. We understand the Commission staff has given informal guidance that the understanding of a reasonable municipal entity would be significant in determining whether information rises to the level of “advice.” Therefore, if a clean energy services company clearly labels its materials as intended only for informational purposes, and states that the municipal entity should consult with its own municipal advisor in determining what alternative is most appropriate for its own situation, then the Commission should conclude that the informational materials do not rise to the level of “advice.”⁴

Even if the financial modeling prepared by the clean energy services company is individualized, it should not be deemed to constitute “advice” requiring municipal advisor registration, so long as the municipal entity has its own separate municipal advisor on whom it is relying for financial advice. The policy concern that Congress expressed in Section 975 of the Dodd-Frank Act - that a municipal entity will have independent financial advice concerning securities transactions or financial products provided by an entity with a fiduciary duty to the municipal entity - is fully addressed if the municipal entity has a municipal advisor. It is not necessary for the Commission to require that clean energy services companies also register as municipal advisors, and such a requirement would substantially undercut the engineering services exception in Section 975.

More generally, while the Interim Temporary Release does not provide any guidance concerning what constitutes “advice,” we believe that term should be

³ In some jurisdictions, requests for proposal are required as a statutory matter to seek information concerning potential financing alternatives.

⁴ Several of the clean energy bond programs listed above are limited in size, and require municipalities to obtain an allocation from the Treasury Department and the IRS, or their state government. Clean energy services companies may assist a municipal entity in applying for such an allocation - the municipality typically will need the assistance of its engineers in supplying technical information to obtain the necessary bond allocation. We submit that assisting a municipality by providing technical information in the application for a bond allocation should not trigger “municipal advisor” status.

understood to require individualized advice that a particular municipal financial product, or a particular issuance of municipal securities, is appropriate for a particular municipal entity. This definition would be consistent with the application of FINRA's suitability rule in the broker-dealer context, as well as the definition of "investment supervisory service" in the investment adviser context. We recognize that in the broker-dealer context there are certain types of advice (notably research reports) which are not individualized and are required to meet only a "reasonable basis" test; however, we are not aware of any similar products in the municipal finance area: the needs and financial situations of different municipal entities are too disparate for any such generalized advice to be helpful. We urge the Commission to clarify that the registration requirement for municipal advisors only applies to firms that give individualized advice to municipal entities about the issuance of municipal securities or the purchase of municipal financial products, including individualized financial models, and does not apply to clean energy services firms who are primarily providing information about financial alternatives incidental to their engineering services.⁵ Otherwise the Commission will leave open a large area of uncertainty about how the new requirements are intended to apply.

Similarly, we urge the Commission to clarify that providing uncompensated introductions to potential underwriters or other potential financing participants does not constitute a "solicitation" that would trigger registration as a municipal advisor. Once again, clean energy services companies provide a valuable role in terms of educating municipalities about the different entities that are active in the clean energy finance business. Some firms active in clean energy finance are not well known in the broader markets, and new participants enter and leave the clean energy market with regularity. Clean energy services companies, who are constantly active in the market, offer a significant benefit to municipal entities by being able to introduce them to potential financing sources about which the municipal entities otherwise would not have been aware.⁶ So long as the clean energy services company is not being paid by the financing companies to make these introductions (and is not being paid by the municipal entity to arrange the financing), we do not believe mere introductions raise the policy concerns or potential conflicts of interest that Congress

⁵ We note that the phrase "municipal financial product" is defined by reference to an undefined phrase "municipal derivatives." The term "derivative" can apply to a variety of different instruments, some of which are regulated as securities, some of which are regulated as commodity futures, and some of which are regulated as both. We urge the Commission to provide a definition of "municipal derivative" for the purposes of Form MA-T.

⁶ As part of these introductions, the clean energy services company may forward a financing proposal prepared by the potential underwriter or other financing participant. But it is clear that the proposal comes from the underwriter, not the clean energy services company, and the municipal entity is relying on financial advice from the underwriter, not the engineering firm.

intended to address in Section 975 of the Dodd-Frank Act.⁷ Similarly, the Commission regulates “cash solicitation” activity under Investment Advisers Act Rule 206(4)-3, but it does not regulate unpaid introductions. We believe Congress was aware of this long-standing distinction when it adopted the “solicitation” prong of the “municipal advisor” definition. The Commission should clarify that an uncompensated introduction does not constitute a “solicitation” for the purposes of the Interim Temporary Rule.

In the alternative, if a clean energy services company provides a municipal entity with introductions to multiple different potential financing sources, and does not make an individualized recommendation about which potential financing source is most appropriate for that municipal entity, then those introductions should not be considered a “solicitation.” In the absence of an individualized recommendation to a municipal entity, a clean energy services company should not be considered to have made a “solicitation” merely because it helped introduce the municipal entity to multiple potential financing sources. Otherwise the Commission will have the unintended consequence of making it more difficult for municipal entities to find financing for clean energy projects. Once again, a clean energy services company should be permitted to make it clear that it is providing the list of potentially interested parties available to provide financing as an educational matter, it is not making an individualized recommendation concerning those parties, and that the municipal entity should consult its own municipal advisor in choosing among those potential financing sources. Under those circumstances, because a reasonable municipal entity would understand that it is not receiving individualized advice about which potential financing source is most appropriate, the clean energy services company should not be deemed to have engaged in a solicitation on behalf of any of those financing sources.

Finally, the Commission has included “preparation of feasibility studies” on Form MA-T as one of the activities in which municipal advisors engage. We note that, as the Interim Temporary Release acknowledges (at n.25 and accompanying text), this activity lacks any support in Section 975 of the Dodd-Frank Act itself, the provision that authorizes the Interim Temporary Rule. In any clean energy services project, a feasibility study (determining the potential energy efficiency measures, costs of implementation, energy usage reductions, and project cost payback) is an integral part of the engineering analysis. As part of that feasibility study, the clean energy services company necessarily estimates the cost of the proposal, and projects

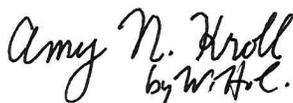
⁷ Of course clean energy services companies ultimately do receive compensation for their projects - but they do not get paid separately (either by municipal entities, or by the firms providing financing) for making introductions. In the terms of the Investment Advisers Act, the introductions are solely incidental to the engineering activities, and there is no special compensation for those introductions.

the cash flows of the savings that the project is expected to produce.⁸ These feasibility studies necessarily are individualized to the particular municipal entity; in other words, they are not general informational materials. Part of the feasibility study may project how the clean energy services proposal would support different possible financing alternatives. As a practical matter, it is impossible to do clean energy services projects, or any other engineering projects, without first preparing feasibility studies.

If the Commission means to suggest that engaging in such a feasibility study constitutes “municipal advisor” activity, then we would argue that this is directly contrary to Congress’ intent in excluding “engineering services” from the definition of municipal advisor activity. The Commission should treat a feasibility study in support of a proposed engineering project as “solely incidental” to the engineering project, and not as an activity that triggers municipal advisor status.⁹ We urge the Commission to drop “feasibility studies” from the list of municipal advisor activities on Form MA-T. Or, at a minimum, the Commission should clarify that engaging in feasibility studies in support of engineering services does not trigger “municipal advisor” status under the Interim Temporary Rule.

Once again, we appreciate the opportunity to submit these comments. We recognize that the clean energy engineering services industry may be somewhat outside of the Commission’s core expertise, and we are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Respectfully Submitted,


Amy Natterson Kroll


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⁸ The projections of cash flows may take the form of pro forma financial statements, assuming the implementation of the clean energy project and the realization of the expected cost-savings.

⁹ In some situations a clean energy services company may charge a separate fee for a feasibility study; in other cases the feasibility study is included in the final cost of the completed clean energy project. However, in our experience, clean energy services companies never charge separately for cash flow analyses that are included in the feasibility study. The cash flow analysis (which is the only part of the feasibility analysis relevant to the choice of financing) is truly “solely incidental” to the engineering solutions being proposed, and there is no “special compensation” for the cash flow analysis portion of the feasibility study.

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