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February 22, 2011

Via Email (rule-comments@sec.gov)

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

**Re: Securities Exchange Act Release Number 34-63576;
Registration of Municipal Advisors**

Dear Ms. Murphy:

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 United States Securities and Exchange Commission (the "Commission" or the "SEC") on the Commission's Exchange Act Release No. 63576 (December 20, 2010) proposing new Rules 15Ba1-1 through 15Ba1-7, and related forms (the "Rules") under the Securities Exchange Act of 1934 (the "Exchange Act") (together the "Proposing Release" or the "Proposed Rules") with regard to registration of "municipal advisors."

I. BACKGROUND.

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. NAESCO member companies deliver between \$4 and 5 billion in energy efficiency projects annually to institutional, commercial, residential and industrial customers nationwide.¹

¹ NAESCO numbers among its members some of the world's leading energy services companies, including: AECOM Energy, Ameresco, APS Energy Services, Burns & McDonnell, CCI Group, CM3 Building Solutions, Chevron Energy Solutions, Clark Energy Group, Clear Energy Contracting, Comfort Systems USA Energy Services, ConEdison Solutions, Constellation Energy Projects and Services, Control Technologies and Solutions, Eaton Corporation, Energy Focus, Energy Solutions Professionals, EnergySolve Companies, Energy Systems Group, Excel Energy, FPL Energy Services, Green Campus Partners, Hess Corporation, Honeywell, Johnson Controls, McClure Energy, Novatech Energy Services, NORESO, NXEGEN, Onsite Energy, Pepco

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The energy service industry serves a vital role in the US economy by providing engineering solutions that furnish low-cost, state-of-the-art power and energy efficiency services to its customers. Public sector entities have long looked to energy service companies to address their deferred maintenance and infrastructure needs while generating sufficient energy and cost savings at their facilities to cover the cost of funding clean energy and other engineering projects. The customers of energy service companies may include state and local governments as well as federal government agencies, non-profit organizations and private businesses. An energy service company typically will review a customer's current energy sources and uses, and then will propose engineering solutions designed to reduce the customer's energy expenditures and upgrade the physical infrastructure. If the customer accepts the proposal, the energy service company will build and install the energy project. Energy projects may involve providing 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. In order to provide these engineering services, energy service companies employ personnel with expertise in both the technical and managerial aspects of engineering projects.

Energy service companies produce for prospective customers a large amount of general informational and educational material about potential energy projects. This information is used to prepare requests for proposals ("RFPs") for engineering projects intended to generate savings for the prospective customers. This information and educational material also helps communicate the extensive, often-time confusing, and ever-evolving range of government programs (discussed below) as well as utility, federal and state incentives that may be in place to encourage and subsidize clean energy projects.

If a prospective customer wishes, or is mandated by state RFP requirements, energy service companies may provide introductions to potential financial providers or third-party advisors with the expertise to guide a municipal entity through the financing decision-making process. Many clean energy financing solutions, such as lease lease-back arrangements and preferred provider or performance contract arrangements, do not involve issuance of municipal securities or purchase of a municipal financial product, and thus are entirely outside of the SEC's jurisdiction. If the prospective customer chooses to pursue a financing alternative that involves a securities offering, the customer typically relies on a third-party municipal advisor (traditionally a financial advisor), not the energy service company, for individualized financing advice about that offering. The customer's

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Energy Services, Schneider Electric, Siemens Industry, Synergy Companies, Trane, UCONS, and Wendel Energy Services. Its members also include many of the largest utilities in the United States: Duke Energy, the New York Power Authority, Pacific Gas & Electric, and Southern California Edison.

own municipal advisor, counsel and procurement group or finance team will be engaged and called upon to provide the customer with direct advice about prospective financing choices and structures and to determine the ultimate choice of financing provider.²

In addition, in many states, municipal entities must bring in third parties to assess the accuracy of information about funding provided by a prospective energy service provider. Energy service projects typically are financed by third parties with whom a municipal entity customer enters into an independent relationship. An energy service company often guarantees a level of savings that the customer pays to the financing entity to fund an energy project. The energy service company receives “progress payments” out of the funding during the implementation of the project it has designed and installed, but at all times, the energy service company, like all other providers of engineering services, is providing services, not advice. It is a seller of goods and services on an arms-length basis. It is not a seller of municipal financing products or other municipal advisory services. Indeed, energy service companies cannot sell their goods and services subject to a fiduciary standard of care, any more than any other seller of lighting, power, insulation, or other engineering infrastructure services can function in a commercial setting under that heightened duty of care.

II. SUMMARY OF NAESCO’S POSITION.

The statutory definition of “municipal advisor” specifically excludes “engineers providing engineering services.”³ However, the Commission’s proposed Rule 15Ba1-1(d)(v), and the commentary in the Proposing Release, effectively would place outside of the statutory exclusion the majority of situations in which engineering firms, such as energy service companies, work with state and local governments to develop and implement energy savings and other projects.

NAESCO and its members urge the SEC to recognize that the services they provide to municipal entities are exactly the kinds of engineering services that Congress meant to exclude from the coverage of the new regulatory scheme for municipal advisors. The Commission should recognize that engineering includes a continuum of services, discussed below, including the provision of general and specific information about financing options for energy projects, preparation of studies including information about cash-flows and other financial projections, and identification of, and introduction to brokers, dealers, municipal advisors (including financial advisors) and municipal securities dealers with expertise in financing energy service projects.

² Municipal advisors, however, are not always available or initially called to discuss financing alternatives, particularly when the project is under consideration by a smaller school district, university or municipality. Municipal advisors will be engaged (almost always) in the event that a municipal entity chooses to pursue a securities financing.

³ Exchange Act Section 15B(e)(4)(C).

As discussed below, if the SEC were to adopt the proposed approach to the definition of municipal advisor and municipal advisory services, a provider of engineering services, like an energy service company, will be required to register as a municipal advisor if it provides general information regarding financing options for engineering projects, project-specific information regarding financing options for engineering projects, and/or referrals to unrelated brokers, dealers, investment advisers, municipal securities dealers and municipal advisors, such as financial advisors, that could provide individualized advice about financing options for engineering projects. Congress did not intend for the Commission to use rulemaking to nullify the statutory exclusion for engineers providing engineering services. NAESCO therefore urges the SEC to adopt final rules for municipal advisor registration that recognize that the full range of activities provided by energy service companies are part of the engineering services included in the engineering exclusion.

As discussed in detail below, NAESCO proposes that the Commission address any concerns about energy services companies' activities by requiring disclosure of potential conflicts of interest, rather than by shoehorning energy service companies into the municipal advisor registration regime.

Finally, NAESCO urges the Commission to provide at least six months between adoption of the final rules and their effective date. NAESCO members, and likely many other providers of non-financial services, will need time to evaluate the final rules to determine whether any of such entities' activities give rise to inadvertent municipal advisor status. If so, these companies will have to evaluate how to restructure their businesses and then will need time to implement the restructuring, prior to the effective date of final rules.

III. THE ENGINEERING EXCLUSION FROM THE DEFINITION OF MUNICIPAL ADVISOR ENCOMPASSES ACTIVITIES THAT ARE INEXTRICABLY LINKED TO ENGINEERING PROJECTS.

The Commission requests comments on the engineering exclusion, specifically:

- Whether there are activities that are “incidental to the provision of engineering advice” or “inextricably linked to engineering advice” that can only be performed by an engineer that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products.
- Whether it is appropriate to exclude from the engineering exclusion engineers preparing feasibility studies including analysis beyond engineering

aspects of a project such as, among other things, analysis of issuance of municipal securities.⁴

The services NAESCO members provide are all part of, or inextricably linked to, the “engineering services” expressly covered by the statutory exclusion. NAESCO previously wrote to the Commission to urge it to recognize that activities encompassed in the “engineering services” exclusion include: (1) informational and educational discussions of financing options, (2) feasibility studies addressing financing options for engineering projects in response to RFPs, and (3) introductions to financiers and other third parties that can facilitate understanding of the financial options available for engineering projects.⁵

In the Proposing Release, the Commission recognizes that engineers provide advice as part of engineering services, but narrowly defines the advice that the engineering exclusion would cover to the unspecified “costing out of engineering services.”⁶ The Commission proposes to exclude from “engineering advice” any “cash-flow modeling” or any “education relating to municipal financial products or the issuance of municipal securities, even if those activities are incidental to the provision of engineering advice.”⁷ Modeling, however, is, in nearly every instance, individualized to a customer’s specific technical needs and financial parameters and is integral to the formulation of advice about engineering services. Therefore, while modeling generated by an engineering firm may provide information used by a municipal advisor in formulating its advice, the engineering firm’s preparation of this information by itself is not municipal advisory activity. The Commission should recognize that the “engineering services” exclusion includes cash-flow modeling and other similar information, as these activities are inextricably linked to the engineering analysis underlying development of an energy project.

Energy service companies may be the initial source of information for many state and local government entities with regard to a variety of options for funding energy service projects, not at all limited to municipal securities or “municipal financial products.”⁸

⁴ Proposing Release at 50.

⁵ See letter from Amy Natterson Kroll and W. Hardy Callcott, Bingham McCutchen LLP, on behalf of NAESCO, to Elizabeth M. Murphy, Secretary, Commission, dated October 12, 2010.

⁶ While the Commission refers to “costing out of engineering services,” the intent of this phrase is not clear to NAESCO’s members. Therefore, NAESCO requests that the Commission provide clarification of its intent with regard to this phrase.

⁷ Proposing Release at 39.

⁸ For example, 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

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Energy service companies, because they are constantly involved in selling energy projects, are ideally situated to explain these different options to state and local government entities that may not have current information about these many programs. Without this information, state and local governments may never learn about programs and incentives that are specifically designed for their benefit.

Many of the 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. Energy service companies should not be required to register as municipal advisors simply because they gather and provide information about financing options that is otherwise publicly available. Despite the specificity of information that may be provided related to a particular set of project elements (rather than generalized information and education), it still is directly and inextricably linked to “engineering services” as engineering advice. Therefore, as solely incidental to engineering services, this information should be covered by the statutory exclusion from the definition of “municipal advisor.”

NAESCO urges the Commission to confirm that these activities are inextricably linked to engineering services and therefore will not cause energy service companies to be designated as municipal advisors.

IV. DISCLOSURE WILL ADDRESS ANY CONFLICT OF INTEREST CONCERNS.

NAESCO believes that the services its members provide, including those described in this letter, are not in any way the services Congress intended to regulate when it enacted the system for registration and regulation of municipal advisors. NAESCO understands, however, that a municipal entity may benefit from certain information about limitations imposed by statute or by generally accepted market practices on energy service companies in providing information to municipal entities related to a proposed energy service project. Therefore, NAESCO proposes to develop language to be provided to municipal entities that states, in principle:

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(CREBs), that 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 service companies be able to provide information and education about the available financing programs, without that educational process itself triggering registration as a municipal advisor.

- That an energy service company is not a municipal advisor.
- That an energy service company is not a fiduciary and does not provide any information, advice or services under a fiduciary duty of care.
- That financial information about municipal securities or other municipal financial products (as defined in the statute) is provided for informational and educational purposes only.
- That an energy service company will be compensated for the energy services provided and not for providing financing information (or, that compensation will be received for performing other functions).
- That the municipal entity should obtain the advice of a financial advisor, municipal advisor or other third party qualified to advise the municipal entity regarding any of the information provided by the energy service company about municipal securities or municipal financial products (as defined in the statute).
- When applicable, that the energy service company is affiliated with a recommended financial advisor, municipal advisor, broker, dealer, municipal securities dealer or investor adviser.
- When applicable, that the energy service company will receive compensation from a financial advisor, municipal advisor, broker, dealer, investor adviser or municipal securities dealer.

NAESCO asks that the Commission confirm that such disclosure would address any concerns the Commission may have regarding energy service company activities.

V. PROVISION OF GENERAL INFORMATION IS NOT MUNICIPAL ADVISOR ACTIVITY.

The Proposing Release includes as municipal advisory activities the provision of general information about municipal financing products and about the issuance of municipal securities.⁹ The Commission should recognize that the provision of general information under any circumstances is not “advice” and, in particular, the provision of general information not tailored to any particular entity should not be defined, in any instance, as municipal advisory activities. The Commission should, in NAESCO’s view, clarify that educational materials that clearly are identified and presented as informational only, and

⁹ Proposing Release at 39.

that direct a municipal entity to discuss the information with the entity's third-party municipal advisor, are outside the scope of municipal advisory activities.

The line between general informational materials and individualized investment advice is well-developed in both broker-dealer and investment adviser regulation. The SEC Staff's recent Study on Investment Advisers and Broker-Dealers made exactly this distinction between personalized advice and general informational materials.¹⁰

Municipal entities invariably ask energy service companies about different available financing alternatives. If the Commission were to deem these informational efforts to be municipal advisory activities, energy service companies and other engineering firms would be reluctant to, or might cease to, provide more than minimal information for fear of triggering municipal advisor status. For instance, as described earlier, energy service companies often have information about financing options for energy solutions that are not securities. Municipal entities often are not aware of the financing options available, absent information energy service companies provide. A constraint on the ability of energy service companies to share information with municipal entities would, in NAESCO's view, be contrary to the plain intent of Congress in adopting the engineering exclusion and would make it more difficult for municipal entities to learn about the full range of options available to them.

In our experience, when a municipal entity determines to finance an energy service project with proceeds from a securities offering, it generally engages an expert financial advisor or other third party to advise on structuring the offering. The municipal entity looks to that expert financial advisor or other third party for individualized advice about the securities offering, not to the energy service company to which it is looking for advice about engineering design solutions and project implementation costs. There will be no "regulatory gap" if the Commission excludes from municipal advisory activities the provision of general educational information about financing of projects, including information about various municipal financial products options and issuance of municipal securities, especially when a municipal entity ultimately retains an expert financial advisor, or other third party, to advise and represent the municipal entity in connection with any securities transaction.

VI. CLEAN ENERGY SERVICE COMPANIES MUST BE PERMITTED TO PROVIDE STUDIES AS PART OF THEIR ENGINEERING SERVICES.

The Commission proposes to include the preparation of "feasibility studies" in municipal advisor activity under the Proposed Rules. As the Commission itself acknowledged when it adopted Rule 15Ba2-6T "Temporary Registration as a Municipal Advisor," including a "feasibility study" as part of the definition of municipal advisor activity lacks

¹⁰ Study on Investment Advisers and Broker-Dealers, (January 2011) at 123.

any support in Exchange Act Section 15B(e)(4)(C).¹¹ The Proposing Release bootstraps this unauthorized expansion of the definition of municipal advisor in a way that effectively eliminates the statutory exclusion for engineering services.

The Commission would interpret municipal advisory activities to include preparation of studies for customers with any information beyond the “engineering aspects of the project.” In particular, as proposed, the inclusion of any information about municipal financing products or the issuance of municipal securities in these studies would constitute municipal advisory activities.¹² The Proposing Release refers to these studies as “feasibility studies” and cites to the definition of “feasibility study” found in the glossary provided by the Municipal Securities Rulemaking Board (“MSRB”).¹³ The MSRB defines feasibility studies to include studies that “provide details of the physical, operating, economic or engineering aspects of the proposed project” and also may include “a user or other rate analysis to provide an estimate of revenues that will be generated for the purpose of substantiating that debt service can be met from pledged revenues.”¹⁴

In any energy service project, an integral part of the engineering analysis is a study determining the potential energy efficiency measures, costs of implementation, energy usage reductions and project cost payback over a prescribed period of time. As part of the study, an energy service company estimates the cost of the proposal, and projects the cash flows of the savings that the project is expected to produce. These studies necessarily are individualized to a particular project and will show how different financing alternatives may be used for an energy service proposal. As a practical matter, if the Commission concludes that any study that includes these factors constitutes municipal advisory activity, then the Commission will preclude most, if not all, providers of engineering services from relying on the engineering exclusion in the statute.

Furthermore, many state statutes explicitly recognize the role of cost projections in their statutory description of engineering services and, in fact, *require* energy service companies, and other providers of engineering services to municipal entities, to articulate within their responses to RFPs the options for financing proposed projects, and also to include studies with cash flow modeling, not limited to engineering cost alternatives. For instance, Arkansas defines a qualified provider of energy service as one experienced in

¹¹ Exchange Act Interim Temporary Release No. 62824 (September 1, 2010) Interim Release, 75 Fed. Reg. 54,465, at n. 25 and accompanying text.

¹² Proposing Release at 39-40.

¹³ Proposing Release at n. 138.

¹⁴ *Id.*; See MSRB Glossary of Municipal Securities Terms, available at <http://www.msrb.org/msrb1/glossary.db.asp?scl=f>.

the design, implementation, financing and installation of energy cost savings measures.¹⁵ Nevada requires energy service respondents to requests for qualification to discuss their “ability to access long-term financing.”¹⁶ In Wisconsin an energy service company that is a qualified provider must provide a local governmental unit with a report containing, among other things, “estimates of all costs of . . . design, engineering, maintenance, repairs and financing,”¹⁷ and in Montana local governments must evaluate in energy service company proposals the respondent energy service company’s “ability . . . to integrate existing financial resources, such as utility rebates and intercap loans, into projects.”¹⁸ Similarly, Kentucky requires energy service proposals to provide “proposed methods and costs of financing,”¹⁹ and Idaho requires that respondents to RFPs demonstrate their “ability to assess the availability of long-term financing.”²⁰ Many states, including, but not limited to, Arkansas, Georgia, Illinois, Minnesota, North Carolina, Pennsylvania, Virginia, West Virginia, South Dakota, New Jersey, and Colorado, also require energy service companies submitting project proposals to provide information on debt service in their RFP responses.²¹

To address these statutory requirements, NAESCO members may provide to municipal entities the studies described above, and/or case studies of how other entities (municipal or not) have implemented energy projects using different financing alternatives. NAESCO members also may assist a municipal entity in modeling various financing alternatives, with resulting data indicating that one or more of the alternatives appear preferable to others. NAESCO members also may recommend that a municipal entity discuss one or more of these alternatives with its municipal advisor.

Neither the feasibility studies nor the cash flow modeling described above are advice or recommendations about financing options. Rather, they provide information that municipal entities may use, usually in conjunction with the assistance of municipal advisors, to evaluate financing options for a project. If a municipal entity decides that a

¹⁵ ARK. CODE ANN. §19-11-1202(4)(B)(2010).

¹⁶ NEV. REV. STAT. § 332.360(4)(j).

¹⁷ WIS. STAT. §66.0131(2)(b).

¹⁸ MONT. CODE ANN. § 90-4-1104(2009).

¹⁹ KY. REV. STAT. ANN. §45A.352(2)(c)(2010).

²⁰ IDAHO CODE ANN. §67-5711D(1)(h)(2005).

²¹ ARK. CODE ANN. §19-11-1205(a)(1)(A)(2010); GA. CODE ANN. §13-10-113(2006); ILL. COMP. STAT. 110 ILCS 62/10 (2010); ILL. COMP. STAT. 50 ILCS 515/10 (2010); ILL. COMP. STAT. 105 ILCS 5/19b-2 (2010); MINN. STAT. §123B.65 (2010); MINN. STAT. §471.345 (2010); 01 N.C. ADMIN. CODE 41B.0508; 62 PA. CODE §3753 (2010); VA. CODE ANN. §18-5-9a(c)(2010); W. VA. CODE §18-5-9a(c) (2010); S.D. CODIFIED LAWS §48-52-670A(2019); N.J. STAT. ANN. §52:27D-483 (2010); COLO. REV. STAT §24-30-2002(3) (2010).

securities offering is the preferred financing alternative for a particular project, then the energy service 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. But again, this activity is necessary for the municipal entity to understand the cost of a proposed engineering project, not to assist it in selecting financing options. We note further, that many state statutes actually require municipal entities to enlist independent third parties to offer an independent evaluation of and recommendation of any financing alternatives discussed in these studies and RFP responses. For example, New Jersey requires that, "prior to the adoption of [a] plan, the contracting unit shall contract with a qualified third party to verify the projected energy savings to be realized from the proposed program,"²² and Illinois requires that a third party evaluating a proposal "not have any financial or contractual relationship with a qualified provider or other source that would constitute a conflict of interest."²³ Texas actually requires that the third party itself be an engineer, who reviews the "cost savings projected,"²⁴ affirming that engineering services must include the studies described above.

NAESCO urges the Commission to recognize that these studies and the information provided to municipal entities as a result of the studies, are "inextricably linked" to the engineering services provided by energy service companies and other engineering companies and therefore should be covered by the exclusion for engineering services. Nothing in the Exchange Act authorizes the Commission to regulate "feasibility studies" at all. To include "feasibility studies" in the definition of municipal advisor activity, and then to define "feasibility studies" so broadly as to include studies necessary to launch virtually any engineering project -- indeed, including information legally required to be contained in engineering RFP responses in a large number of states -- would be directly contrary to Congress' intent in excluding "engineers providing engineering services" from the statutory definition of municipal advisor.

VII. UNCOMPENSATED INTRODUCTIONS TO POTENTIAL FUNDING SOURCES AND OTHER THIRD PARTIES CANNOT BE DEFINED AS SOLICITATION.

The statutory definition of municipal advisor includes third party marketers and solicitors,²⁵ and proposed Rule 15Ba1-1(e) defines "municipal advisory activities"

²² N.J. STAT. ANN. § 40A:11-4.6.

²³ 50 ILL. COMP. STAT. § 15/10.

²⁴ TEX. GOV'T. CODE ANN. § 2166.406.

²⁵ Exchange Act Section 15B(e)(4)(B). The Commission states in the Proposing Release, and we seek confirmation, that solicitations by a party on behalf of its affiliate municipal advisor, broker dealer or municipal securities dealer, would not fall within the definition of municipal advisor and would not trigger a registration requirement. Proposing Release at 30.

generally to include “solicitation of a municipal entity.” Section 15B(e)(9) of the Exchange Act specifically defines “solicitation of a municipal entity,” however, as limited to solicitation for “direct or indirect compensation” on behalf of an unrelated broker-dealer, municipal securities dealer, investment adviser or municipal advisor. The Commission proposes that any third-party solicitor that seeks business on behalf of an unrelated broker-dealer, municipal securities dealer, municipal advisor or investment adviser should be a municipal advisor,²⁶ and that solicitation of a single investment would require registration as a municipal advisor.²⁷ The Commission requests comment on whether its proposed interpretations regarding solicitor status require further clarification or modification. In addition, the Commission requests comment on whether a *de minimis* level of solicited investment should be allowed prior to requiring a solicitor to register as a municipal advisor.²⁸ The Proposing Release does not specifically address whether the Commission would include as solicitors energy service companies and other engineering companies that introduce municipal entities to prospective unrelated municipal advisors, underwriters or other funders in connection with engineering or other infrastructure projects or in connection with general educational information as discussed earlier in this letter.

In response to NAESCO’s earlier comment letter, the Commission states in the Proposing Release that compensation should not factor into the determination of whether an engineering services company must register as a municipal advisor.²⁹ However, this position ignores the clear language of Section 15A(e)(9) itself, which only covers solicitations for unrelated third parties and for which “direct or indirect compensation” is received. The plain language of the statute compels the conclusion that uncompensated introductions do not constitute “solicitation.” Furthermore, even if energy service companies or other engineering companies are compensated for the engineering services they provide, the compensation is not directly or indirectly for procuring financing or financing advisory services from a third party. The Commission should clarify that introductions by energy service companies will not cause the companies to be “solicitors” covered by the statutory category within the definition of “municipal advisor.”

NAESCO supports a registration requirement for third-party solicitors that are paid directly or indirectly specifically to introduce municipal entities to unrelated financial institutions. The Commission should refine its approach, however, to capture only those entities that receive compensation for introductions (like “finders”) or for investment (like “cash solicitors”). Without this refinement, the broad brush approach to “solicitors”

²⁶ Proposing Release at 24.

²⁷ *Id.* at 46.

²⁸ *Id.* at 45-46.

²⁹ *Id.* at 33.

in the Proposing Release will chill significantly the provision of information to municipal entities about funding options and sources and will preclude energy service companies and other providers of services to municipal entities from providing important information about experts that can advise on and fund infrastructure projects.³⁰ Moreover, such a broad brush approach would be clearly inconsistent with the language of the Exchange Act.

VIII. REGISTERED MUNICIPAL ADVISORS ARE HELD TO A FIDUCIARY DUTY ONLY WHEN THEY ARE ENGAGED IN MUNICIPAL ADVISORY ACTIVITIES.

The Commission should confirm in its final rulemaking that if an entity is required to register as a municipal advisor, only its municipal advisory activities will be subject to a fiduciary standard of care.³¹ In addition, the Commission should confirm that municipal advisory activity can be carried out through a registered subsidiary or affiliated entity of an energy service company or other infrastructure provider without causing the provider itself to be a municipal advisor. This subsidiary or affiliate, as a registered municipal advisor, would be the only entity subject to the applicable regulations and statutory fiduciary duty with regard to its municipal advisory activities.

IX. THE PROPOSING RELEASE RAISES ADDITIONAL ISSUES OF CONCERN.

NAESCO does not object in principle to a brochure or other disclosure document, such as those required of registered investment advisers, for registered municipal advisors.³² The Commission, however, should tailor carefully any brochure or other disclosure document requirement to ensure that the information to be disclosed relates only to the municipal

³⁰ For instance, some firms active in energy finance are not well known in the broader markets, and new participants enter and leave the energy market with regularity. Energy service companies 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 be aware. So long as an energy service company is not being paid by the financing companies to make introductions (and is not being paid by the municipal entity to arrange financing), these mere introductions should not raise the policy concerns or potential conflicts of interest that Congress seeks to address by including solicitors in the definition of "municipal advisor."

NAESCO also notes that the Commission regulates "cash solicitation" activity under Investment Advisers Act Rule 206(4)-3, but it does not regulate unpaid introductions. Congress was aware of this long-standing distinction when it adopted the "solicitation" prong of the "municipal advisor" definition, and included the concept of compensation as part of that definition.

³¹ See Section 15B(c)(1) of the Exchange Act.

³² See Proposing Release at 146-147.

advisor activities of the provider, rather than broadly requiring companies to disclose information unrelated to municipal advisory activities.

Furthermore, NAESCO asks the Commission to consider several additional and generally deleterious consequences that would result from adoption of the interpretations in the Proposing Release.

First, an energy service company that must register as a municipal advisor will find itself regulated by a financial services regulator. Whether that regulator is the SEC, the MSRB, FINRA or a banking regulator, it will have little or no understanding of the predominant engineering activities and services offered by the energy service company. Therefore, regulation of energy service companies' municipal advisory activity is likely to be unnecessarily burdensome (both to the regulator and for the regulated entities), without commensurate public benefit.

In addition, licensing or similar qualification requirements for municipal advisor personnel likely will not take into account the limited nature of the municipal advisory activities of employees of energy service companies and other engineering companies that are deemed municipal advisors. Licensing and qualification requirements likely will focus on municipal finance, not energy service or other engineering activities. As discussed at length in this letter, while energy service company employees may provide information to municipal entities about financing options, and may conduct studies that address financial options, energy service companies and their employees sell and provide energy services. Therefore, energy service company employees may have difficulty obtaining the required licenses and related qualifications if the engineering services they provide are nonetheless deemed municipal advisory activity.

Finally, NAESCO supports the many letters already submitted to the Commission in response to the Proposing Release urging the Commission to revise the proposed position that appointed members of boards of municipal entities, other than those who are ex officio, will be "municipal advisors."³³ Employees of NAESCO members often are invited by municipal entities to serve as appointed board members based on their expertise in energy services. The position in the Proposing Release likely would cause these individuals to resign from their appointed board positions in order to avoid municipal advisor status. This would deprive municipal entities of much valued and valuable expertise. We suggest that this proposal, like much of the Proposing Release,

³³ See *id.* at 41. See e.g., letter from Rick Farrell, Executive Director, Council of Infrastructure Financing Authorities to Elizabeth M. Murphy, Secretary, Commission, dated February 17, 2011; letter from Brett E. Liet, National Council of High Education Loan Programs, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated February 16, 2011; Letter from Don Drum, Executive Director, Public Employee Retirement System of Idaho, to Elizabeth M. Murphy, Secretary, Commission, dated February 16, 2011.

Elizabeth M. Murphy
February 22, 2011
Page 15

requires further consideration of the unintended consequences for municipal entities before the Commission adopts final rules in this area.

X. CONCLUSION

In summary, NAESCO urges the Commission to recognize when it adopts final rules with regard to municipal advisor registration that the activities provided by energy service companies as described in this letter are covered by the statutory and regulatory exclusions from the definition of "municipal advisor" for engineers providing engineering services and to reflect this in the final rules.

If you would like to discuss the comments in this letter, please do not hesitate to contact Terry E. Singer, Executive Director of NAESCO (202-822-0950), or either Hardy Callcott (415-393-2310) or Amy Natterson Kroll (202-373-6118) counsel to NAESCO with regard to this matter.

Respectfully Submitted,


Amy Natterson Kroll


W. Hardy Callcott /s/AMC