



March 2, 2011

The Honorable Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Registration of Municipal Advisors;
File No. S7-45-10, Release No. 34-63576

Dear Ms. Murphy and Members of the Commission:

Thank you for the opportunity to comment on the proposed permanent rule governing the registration of municipal advisors ("Rule"). These comments are submitted in response to File No. S7-45-10, and Release No. 34-63576 of the Securities and Exchange Commission ("SEC" or "Commission") regarding the registration of municipal advisors. Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended Section 15B of the Securities Exchange Act of 1934 (the "Exchange Act") to require municipal advisors to register with the SEC.

Background

ACES Power Marketing LLC ("APM") from its inception has remained consistent with its business model, which is: (1) to act as agent for its clients and not as principal; and (2) to completely align its interests with its clients by not having its own book of business. APM is owned by 18 generation and transmission cooperatives. APM's client base consists primarily of not-for-profit and municipal physical electric power market participants that are load serving entities. APM's clients include electric generation and/or transmission cooperatives, other electric cooperatives, municipal and other public power agencies, investor owned utilities, independent power producers, commercial/industrial customers and other energy market participants. APM's primary business is providing clients with energy risk management and physical wholesale electric power and natural gas transaction services to assist them in obtaining reliable power supplies and hedging price/cost stability. APM provides real-time around-the-clock power trading, as well as energy scheduling, analysis of transmission congestion, origination and meteorology. APM's strength is its ability to move physical power from the generation source to where it is needed within and across many geographic regions of the country. As an adjunct to these activities, APM has acquired extensive operational expertise in developing forward energy commodity hedging strategies for its clients.

These clients all qualify as "eligible contract participants" as defined in Section 1a(12) of the Commodity Exchange Act. APM is regulated by Federal Energy Regulatory Commission

("FERC") through its Market Based Rate Authority process and is further subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC") and operates in conformance with a no-action letter issued by the CFTC. The SEC's proposed rule may unintentionally sweep under its jurisdiction many companies like APM that have absolutely nothing to do with the purchase, sale, issuance, or the provision of advice regarding municipal securities. Rather, APM's role is to help municipal entities who participate in the wholesale energy markets (including the energy swap markets) to define through policy a wide array of risks that are unacceptable for their individual risk tolerance, and then to help protect these municipal entities from unacceptable risk exposures to: counterparties, master agreements, market price volatility, trading operations, and policy compliance. Consequently, the interests of APM and its municipal clients are aligned.

Municipal Financial Products

The Rule is significant in that it expansively broadens the activities that now fall within the purview of the SEC. In particular, the broad definition of "municipal financial products" will capture many companies that do not engage in matters involving the purchase, sale or advice regarding the securities of a municipality.

The Rule defines a "municipal financial product" to mean a "municipal derivative" which in turn is defined to mean "any swap" as that term is defined under section 1a(47) of the Commodity Exchange Act ("CEA") (7 U.S.C. § 1a(47)). The Rule defines a "municipal derivative," in part, as "any swap (as defined in Section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)) ... to which a municipal entity is a counterparty." This definition is overly broad as it encompasses far too many types of advisory entities and transactions without any particular focus. This expansive definition significantly exceeds the realm of securities and in so doing, potentially subjects, to the jurisdiction of the SEC, many entities that provide advice to municipalities, but do not engage in any aspect of the securities field. Under the Rule, any person who intends to provide advice to a municipality regarding a swap must first register as a municipal advisor. The concern is that a person must register regardless of the type of swap transaction advice that may be contemplated and irrespective of the relationship between the municipal entity and the person seeking to offer advice.

The Commission is urged to consider exclusions on both: (1) the types of swaps that trigger registration under the municipal advisor regime, and (2) the types of relationships between the municipal entity and the person who is providing the advice that trigger registration as a municipal adviser. An appropriate limitation on the types of swaps that are considered municipal derivatives could effectively achieve the Commission's objectives. Limiting the definition of municipal derivatives to security based swaps would more clearly focus the Commission on the desired objectives of fraud deterrence and consumer protection in the realm of municipal securities markets.

In the Rule, the Commission excludes from the definition of "municipal advisor" (1) engineers who are providing engineering advice and (2) attorneys who are providing legal advice or

services of a traditional legal nature. The Commission should consider the exclusion of other fiduciaries from the definition of “municipal advisor,” specifically, agents of the municipal entity. Federal and state common law recognize the principal-agent fiduciary relationship. This relationship imposes both the duty of loyalty, duty of care, duty of obedience and duty of good faith dealing that the Commission expects to exist between the municipal entity and an advisor. The principal and the agent’s interests are aligned such that the agent acts in accordance with the directions of the principal. In this mutually beneficial relationship the interest of the agent and the principal are aligned as one and the agent, at the direction and discretion of the principal, may serve as the principal’s proxy. This unique relationship is established by law and satisfies the Commission’s interest in ensuring that a fiduciary duty and accompanying accountability exists between a municipal entity and a person providing advice to that municipal entity. Based upon this relationship, it is appropriate for the Commission to consider an exclusion from the definition of “municipal advisor” for agents.

The Commodity Trading Advisor Exclusion

The Rule would provide only a partial exclusion for commodity trading advisors. By only excluding a person registered as a commodity trading advisor who is providing advice related to swaps or an associated person of the commodity trading advisor who is providing advice related to swaps, the Commission’s exclusion is incomplete. An entity operating under the jurisdiction of the Commodities Futures Trading Commission (“CFTC”) may have been granted a waiver, no-action letter or other remedy from the CFTC regarding registration as a commodity trading advisor. By limiting its exclusion to registered commodity trading advisor, and not honoring a waiver, no-action letter or other remedy from the CFTC, the SEC will place additional burdens on a commodity advisor in contradiction to relief that may have been granted by the CFTC. Instead, the SEC should honor a waiver, no-action letter or other remedy from the CFTC regarding the requirement to register as a commodity trading advisor. It is important to note that relief from registration as a CTA does not relieve an entity from the other jurisdictional requirements of the CFTC. The Commission should include these entities within its exclusion for commodity trading advisors to give full effect to the exclusion.

Through Section § 4m(1) of the CEA, the CFTC has established a “private advisor” limited exemption from commodity trading advisor registration. Under this exemption, a person does not have to register as a commodity trading advisor if it has not provided commodity trading advice to more than fifteen (15) persons during the preceding twelve (12) months and does not hold itself out to the public as a commodity trading advisor. The SEC should implement a similar exemption for purposes of determining when an entity must register as a municipal advisor. Creating an exclusion for providing advice to a “de minimus” number of entities would help distinguish between entities whose principal business is that of a municipal advisor and others.

Eligible Commercial Entity Exclusion

The Commission should exempt from the definition of “municipal derivative” any swaps where referencing or derived on the underlying commodities in which the municipal entity satisfies the

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functional and financial criteria similar to that of an “eligible commercial entity” as that term is defined in Section 1a (17)(A) of the CEA. (7 U.S.C § 1a (17)(A)). Accordingly, we recommend that any swap in a commodity entered into by a municipal entity, that:

“in connection with its business

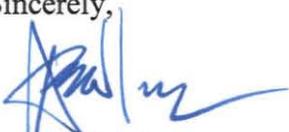
- has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity; or
- incurs risks, in addition to price risk, related to the commodity;

should be an exempt swap under the definition of ‘municipal derivative.’”

Conclusion

For the foregoing reasons, I ask respectfully that the Commission consider making the changes suggested above to the proposed rules.

Sincerely,

A handwritten signature in blue ink, appearing to read 'David J. Tudor', with a stylized flourish at the end.

David J. Tudor
President and CEO

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