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**Via Email rule-comments@sec.gov**

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

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

Dear Ms. Murphy:

This letter is submitted by the Federal Performance Contracting Coalition 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."

FPCC members are Energy Service Companies that do business with the Federal government, and many also with state and municipal governments. They include Ameresco, Constellation Energy Services, Chevron, FPL Energy Services, Honeywell, Johnson Controls, Lockheed Martin, Noresco, Siemens Government Services, Inc. and Trane/Ingersoll Rand.

The energy services industry, in which our members are major providers of energy efficiency goods and services, serves a vital role in the US economy by providing engineering solutions that provide efficient, low-cost, state-of-the-art power and energy efficiency services to its clients. Our Energy Service Company (ESCO) members typically will review a client's current energy sources and uses, propose engineering solutions designed to reduce the client's energy expenditures, upgrade the physical infrastructure, finance or arrange for financing of the upgrades, and guarantee energy savings from those upgrades. 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.

Energy services companies provide a large amount of general informational and educational material about potential clean energy projects, so that potential clients may formulate their RFPs. This information and education addresses the large, confusing and ever-evolving range of government programs (discussed below) that encourage and subsidize clean energy projects. At the RFP stage, clean energy services companies often provide information

to a client about the range of financing structures that may be appropriate for the project. Finally, if the client wishes, clean energy services companies may provide introductions to potential financial providers; once again, the universe of such financial providers is broad and changes over time. 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.<sup>1</sup> The customer's own municipal advisor, counsel, and 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.

## **I. SUMMARY OF FPCC POSITION**

The statutory definition of "municipal advisor" specifically exempts "engineers providing engineering services."<sup>2</sup> However, the Commission's proposed Rule 15B1-1(d)(v), and the commentary in the Proposing Release, effectively would negate Congress' intent in adopting the engineering exemption by attaching conditions to that exemption which would exclude the large majority of situations in which engineering firms actually work with state and local governments. The FPCC urges 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 SEC should recognize that engineering advice excluded from municipal advisory activities necessarily includes a continuum of services, discussed below, including 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.

As discussed further 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 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 brokers, dealers, investment advisers, municipal securities dealers and municipal advisors, such as financial advisors, that could provide information about financing options for engineering projects. *Congress did not intend for the Commission to nullify the statutory exclusion for engineers providing engineering advice and therefore urges the SEC to adopt final rules for municipal advisor registration that are consistent with Congress' clearly expressed intent to exclude engineering services.*

## **COMMENTS**

### **II. DEFINITION OF MUNICIPAL ADVISOR AND THE SCOPE OF THE ENGINEERING EXCLUSION GENERALLY**

The Commission requests comments on the engineering exception, specifically:

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<sup>1</sup> 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. 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, and thus are entirely outside of the SEC's jurisdiction.

<sup>2</sup> Exchange Act Section 15B(e)(4)(C).

- Whether there are activities performed by an engineer that are “inextricably linked to engineering advice” that might otherwise constitute advice with respect to the issuance of municipal securities or municipal financial products;
- Whether the interpretation that would include in the definition of municipal advisor engineers preparing feasibility studies concerning municipal financial products or the issuance of municipal securities including analysis beyond engineering aspects of a project is appropriate.<sup>3</sup>

Energy engineering solutions are exactly the type of engineering services that Congress meant to exclude from the coverage of this new regulatory scheme. The services provided by FPCC members are all part of or inextricably linked to the “engineering advice” expressly covered by the statutory exclusion.

The Proposing Release recognizes that engineers provide advice as part of engineering services, but narrowly defines that advice which would be covered by the engineering exclusion as the costing out of engineering services. The Proposing Release would explicitly 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.” FPCC urges the Commission to recognize that cash-flow modeling and other similar information is inextricably linked to engineering analysis, even if that modeling is individualized to a municipal entity. It should therefore not be excluded from “engineering advice.”

Energy services companies may be the only source of information for many state and local government entities about a variety of financing options for energy service projects.<sup>4</sup> Clean energy services companies, because they are constantly involved in the market, are ideally situated to explain these different programs to state and local government entities that may not have current information about these many programs. Without this information, state and local governments may not ever learn about programs that are specifically designed for their benefit. The financing option of performance contract agreements does not involve the issuance or use of municipal securities. Energy service companies should not be required to register as municipal advisors simply because they provide information about financing options. Even if this information sometimes rises to the level of advice (rather than generalized information and education), it constitutes engineering advice solely incidental to engineering services, and should be covered by the statutory exclusion from the definition of “municipal advisor”.

### **III. PROVISION OF GENERAL INFORMATION**

The Proposing Release includes as municipal advisory activities the provision of general information about municipal financing products or the issuance of municipal securities. The Commission should recognize that the provision of general information under any circumstances should not be interpreted as municipal advisory activities. In particular, provision of general information, not tailored to any particular entity, should not be defined as municipal advisory activities. The Commission should clarify that educational materials that are clearly identified and presented as informational only, and direct a municipal entity to discuss the information with the entity’s municipal advisor, are outside the scope of municipal advisory activities.

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<sup>3</sup> Proposing Release at 50.

<sup>4</sup> 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 (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 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.

The line between general informational materials and individualized investment advice is familiar in both broker-dealer and investment adviser regulation. The SEC Staff's recent Study on Investment Advisers and Broker-Dealers (January 2011) made exactly this distinction between personalized advice and general informational materials, and recommended that the Commission engage in a rulemaking proceeding to define this distinction more precisely. *Id.* at p.123.

Municipal entities invariably ask energy services companies about the different available financing alternatives. If the Commission were to deem these informational efforts to be municipal advisory activities, then the Commission would make it much more difficult for energy services companies to rely on the "engineering advice" exclusion in the statute. Such a result would be contrary to the plain intent of Congress in adopting the engineering exclusion.

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 energy services company to which it is looking for advice about engineering design solutions and project implementation costs.

#### **IV. CLEAN ENERGY SERVICES COMPANIES MUST BE PERMITTED TO PROVIDE STUDIES AS PART OF THEIR ENGINEERING SERVICES**

The Proposing Release suggests including "feasibility studies" as municipal advisor activity under the Proposed Rules. As the Commission's Interim Temporary Release acknowledges (at n.25 and accompanying text), including a "feasibility study" as part of the definition of municipal advisor activity lacks any support in Section 15B(e)(4)(C) itself, the provision that authorizes the Proposed Rules. The Proposing Release bootstraps this unauthorized expansion of the definition in a way that effectively eliminates the engineering exclusion, which (unlike the inclusion of feasibility studies) actually is part of the statute.

The Proposing Release would interpret municipal advisory activities to include preparation of studies for clients 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. 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.<sup>5</sup> The MSRB defines feasibility studies to include studies "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."<sup>6</sup>

In any clean energy services project, an integral part of the engineering analysis is a study (commonly referred to as a feasibility study) determining the potential energy efficiency measures, costs of implementation, energy usage reductions, and project cost payback. As part of the study, a clean energy services 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 the particular municipal entity; in other words, they are not general informational materials. And part of a study may project how an energy services proposal would support different possible financing alternatives. As a practical matter, it is impossible to propose or implement clean energy services projects, or any other engineering projects, without first preparing these studies. In other words, if the

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<sup>6</sup> Proposing Release at n.138.

Commission defines a “feasibility study” so that any study that includes these issues constitutes municipal advisory activity, then it will eliminate most if not all engineering projects from the engineering exclusion in the statute. Indeed, many states statutes *require* energy service companies and other providers of engineering services to municipal entities to articulate the options for financing proposed projects, and also to include in proposals for projects studies with cost flow modeling, not limited to engineering cost alternatives.

To address these statutory requirements, clean energy service companies may provide to municipal entities case studies of how other entities (municipal or not) have implemented clean energy projects using different financing alternatives. ESCOs 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 those alternatives with its municipal advisor.

None of the information and case studies, however, should be considered advice or recommendations about financing options. Rather, they provide information that municipal entities may use, usually with the assistance of actual municipal advisors, to evaluate financing options for a project.

The FPCC urges the Commission to recognize these studies and the information provided to municipal entities as a result of the studies, are “inextricably linked” to the engineering advice provided by energy services companies and other engineering companies and therefore should be covered by the exclusion for engineering services. Nothing in the statute 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 advice" from the definition of municipal advisor.

## **V. UNCOMPENSATED INTRODUCTIONS TO POTENTIAL FUNDING SOURCES CANNOT BE DEFINED AS SOLICITATION**

The statutory definition of a municipal advisor includes “third party marketers and solicitors,” and proposed Rule 15Ba1-1(e) defines “municipal advisory activities” generally to include “solicitation of a municipal entity.”<sup>7</sup> Section 15B(e)(9) specifically states that “solicitation” is only covered by the definition if the solicitation is for “direct or indirect compensation”. The Proposing Release notes that any third-party solicitor that seeks business on behalf of a broker-dealer, municipal securities dealer, municipal advisor or investment advisor must register as a municipal advisor.<sup>8</sup> The Proposing Release indicates that it would consider a solicitation of a single investment to require the solicitor to register.<sup>9</sup> The Proposing Release requests comment on whether its proposed interpretations regarding solicitor status require further clarification or modification. In addition, the Proposing Release requests comment on whether a de minimis level of solicited investment or other de minimis levels should be allowed prior to requiring a solicitor to register as a municipal advisor.<sup>10</sup>

The Proposal does not specifically address whether the Commission would include as solicitors energy services companies that introduce municipal entities to prospective underwriters or other funders in connection with

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<sup>7</sup> Proposing Release at note 113.

<sup>8</sup> Proposing Release at 29.

<sup>9</sup> Proposing Release at 46.

<sup>10</sup> Proposing Release at 45-46.

engineering or other infrastructure projects or in connection with general educational information as discussed above.<sup>11</sup>

The FPCC urges the SEC to clarify those activities that would cause an entity to be a “solicitor” covered by the statutory category within the definition of “municipal advisor.” Registration should be required for third-party solicitors that are paid specifically to introduce municipal entities to other financial institutions. The Commission should refine its approach 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” in the Proposing Release will significantly chill the provision of information to municipal entities about funding options and sources and would preclude clean energy service companies and other providers of services to municipal entities from providing important information about experts in funding infrastructure projects.<sup>12</sup> In addition, such a broad approach would be clearly inconsistent with the language of the statute itself.

## **VI. BROCHURE OR OTHER DISCLOSURE DOCUMENT**

The Commission requests comment on whether municipal advisors should be required to create narrative brochures containing information about themselves modeled on the requirements of the brochure rule under the Investment Advisers Act. The Commission also asks for comment on whether any category of municipal advisor should be excluded from any brochure delivery requirement ultimately imposed on municipal advisors.<sup>13</sup>

The FPCC urges the Commission, however, to tailor carefully any brochure or other disclosure document requirement to ensure that the information to be disclosed relates to the municipal advisor activities of the provider, rather than requiring companies, such as energy service companies that may be “inadvertent municipal advisors”, to disclose information unrelated to municipal advisory activities.

## **VII. ADDITIONAL ISSUES**

There are ongoing issues that will result to the FPCC members as a result of an overly restrictive construction of the statutory exclusion from the definition of municipal advisor for engineers providing engineering advice.

First, a clean energy services 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 clean energy services company. Therefore, regulation of those companies’ municipal advisory activity is likely to be unnecessarily burdensome (both to the regulator and for the regulated entities), without commensurate public benefit.

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<sup>11</sup> Proposing Release at 32, n. 109.

<sup>12</sup> For instance, 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. Energy services 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 services company is not being paid by the financing companies to make introductions (and is not being paid by the municipal entity to arrange financing), NAESCO believes mere introductions do 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.

<sup>13</sup> Proposing Release at 146-147.

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 and other engineering companies. Licensing and qualification requirements likely will focus on municipal finance, not energy services or other engineering, activities. As discussed above, 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. These licensing restrictions would have the effect of precluding them from providing services that should be considered engineering advice but for the Commission's interpretation restricting the exclusion for engineers.

## **VIII. CONCLUSION**

In summary, the FPCC urges the Commission to recognize when that the activities we discuss in this letter are covered by the statutory and regulatory exclusions from the definition of "municipal advisor" for engineers providing engineering advice.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jennifer Schafer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jennifer Schafer  
Coordinator, Federal Performance Contracting Coalition