



November 9, 2011

The Honorable Mary L. Schapiro  
Chairman  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Submitted via email

**RE: Municipal Advisor Registration Proposal – S7-45-10**

On June 9, 2011, on behalf of its 1,100 members, representatives from the Solar Energy Industries Association (SEIA) met with Mary Simpkins, Dave Sanchez, John McWilliams, Daniel Gien, and Yue Ding from the Division of Trading and Markets to discuss the Securities and Exchange Commission's (SEC or Commission) proposed rule on the registration of municipal advisors as it applies to solar energy companies. After conferring with our members, SEIA is providing insight to the SEC Staff about the solar energy industry and its interactions with municipalities.

In addition, SEIA would like to take this opportunity to submit brief comments on this proposed rule. We acknowledge that these comments are being filed past the prescribed comment date and apologize for the delay. We became aware of this proceeding and its implications for the solar industry only after the comment period had closed. Given SEIA's interest in this proceeding and the absence of any unjust prejudice or delay, we respectfully request that the Commission accept these comments.

This rule will generally not apply to municipal solar installations, which are often small or rely on power purchase agreements, and thus do not require municipalities to sell securities or bonds to pay for the solar projects. However, for those instances in which municipalities must sell securities and bonds to pay for the solar installations, SEIA respectfully requests that solar energy companies be included in the final rule's engineering exemption, as intended by Congress.

## **I. About SEIA**

Established in 1974, the Solar Energy Industries Association (SEIA) is the national trade association of the U.S. solar energy industry. Through advocacy and education, SEIA is working to build a strong solar industry to power America. As the voice of the industry, SEIA works with its 1,100 member companies to make solar a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public on the benefits of solar energy.

## **II. Solar Energy Use by Municipalities**

SEIA represents 1,100 companies throughout the solar supply chain, including installers, utilities, developers, and contracting firms. Fully eighty percent of SEIA's members are small businesses as defined by the Small Business Administration.<sup>1</sup> In fact, most of SEIA's members that install solar panels or solar heating and cooling systems for municipalities are small businesses with only a handful of employees. These small businesses are often responding to requests for proposals (RFPs) from municipalities, which invite companies to bid and reward the lowest bidder with the contract.

Once a solar company is selected in an RFP process, the solar company will negotiate a contract with the municipality. As part of the contract process, solar companies provide municipalities with general information on solar energy and educate them on photovoltaic and solar heating and cooling installations and their associated costs, savings and financing options. Together, this information comprises the energy information a municipality needs to make an informed decision. For instance, when describing the difference between a photovoltaic system and solar heating and cooling, solar companies must discuss the associated costs and savings of these technologies so a municipality can choose from among various engineering options. In addition, solar companies will often provide an estimated payback analysis to the municipalities so the municipalities can see the cost savings that a solar installation provides over the term of the contract.

Most municipalities have an advisor or a facilities expert who represents them in these contract negotiations. In addition, solar companies recommend that municipalities contact their Certified Public Accountants or financial advisors prior to signing a long-term contract to purchase electricity.

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<sup>1</sup> See <http://www.sba.gov/content/size-standards>.

The RFPs often solicit solar installations that range in size from 100 kilowatts (kW) to five megawatts (MW), which can cost a municipality from \$100,000 to over a million dollars if the system is paid for upfront.<sup>2</sup> However, rather than purchase the solar equipment outright, municipalities will often sign a power purchase agreement (PPA).<sup>3</sup> A PPA allows a solar company to install a solar project on a municipal building in exchange for the municipality agreeing to purchase the energy produced over the next 20 years or more. Under this arrangement, there is little to no upfront cost to the municipality.

### **III. The SEC's Jurisdiction Is Limited to Securities Transactions**

The SEC's mandate is to regulate the securities market, and prevent corporate abuses.<sup>4</sup> The SEC's jurisdiction generally revolves around the issuance, trading and selling of financial instruments such as municipal securities or bond proceeds. Congress has never given the SEC jurisdiction over non-securities areas.

As stated above, municipal solar projects vary in size and thus cost. However, because most municipalities do not purchase a solar installation upfront, but rather enter into a power purchase or lease agreement with the solar company, municipalities usually do not need to engage in securities transactions or sell bonds to pay for the solar system. Because no securities are involved, the SEC would not have jurisdiction over these municipal solar project transactions, and therefore the Commission cannot require the solar companies involved in these transactions to register as municipal advisors.

### **IV. Solar Energy Providers Should Be Included in the Engineering Exemption**

As defined in the proposed rule, a municipal advisor under the Dodd-Frank Act includes "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and certain swap advisors that engage in municipal advisory

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<sup>2</sup> For example, the Township of Brick, New Jersey recently contracted to have a 125kW roof-mounted solar photovoltaic system and a 12kW ground-mounted solar photovoltaic system installed at the Brick Township Municipal Complex. The project was \$235,000 under budget, and cost the city \$765,000, which came directly out of the City's 2009 budget. See <http://www.twp.brick.nj.us/content.asp?ContentId=2052>.

<sup>3</sup> For example, in Patton, California, the Patton State Hospital parking lot canopy's 1,644 solar photovoltaic panels generate 280 kilowatts of peak power. The project came online in 2006 after the state filed a power purchase agreement. See <http://www.green.ca.gov/EnergyPrograms/Pattonsolar.htm>. The Sunset Reservoir Project, in San Francisco, California, hosts a 5 megawatt system. The city signed a 25-year PPA, which enables San Franciscans to receive clean solar power with no upfront cost, operating expense, or maintenance burden. See <http://www.recurrentenergy.com/resources/sfsunsetfaqs.php#top>.

<sup>4</sup> Securities Exchange Act of 1934 (as Amended Oct. 5, 2010).

activities.”<sup>5</sup> The definition of municipal advisor explicitly excludes “a broker, dealer, or municipal securities dealer serving as an underwriter, as well as attorneys offering legal advice . . . and engineers providing engineering advice.”<sup>6</sup> However, the SEC, as shown below, has very narrowly interpreted the engineering exemption. The SEC should expand its engineering exemption to include solar energy companies because (1) the minimal financial information solar companies provide municipalities is purely informational and incidental to the engineering advice; and (2) the SEC’s current, narrow interpretation of the engineering exemption diverges from Congress’s intent.

According to the SEC’s interpretation, a large swath of activities undertaken by engineering firms, including those conducted by solar energy service providers, would fall into the category of municipal advisory activities. These would include, “cash-flow modeling or the provision of information and education relating to municipal financial products or the issuance of municipal securities, even if those activities are incidental to the provision of engineering advice.”<sup>7</sup>

Nor does the rule “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.”<sup>8</sup> Yet, these purely informational and education activities are essential to helping municipalities understand their engineering alternatives when choosing a solar system. Without this information, municipalities cannot make an educated decision about the system that best meets their solar energy needs and budget. Thus, it is often impossible and impractical to separate the cost and savings information from the engineering information. As such, solar companies that are acting in an engineering role, and that provide cost and savings information integral to solar engineering information, should be included in the final rule’s engineering exemption.

Second, the SEC’s final municipal advisor registration rule should include solar energy companies in an expanded engineering exemption because the SEC did not follow congressional intent when it narrowly defined the engineering exemption. Since the SEC issued the proposed rule, several Members of Congress have submitted comments to the agency highlighting the Commission’s overly restrictive engineering exemption. For example, a letter from Indiana’s congressional delegation said, “[s]hould the proposed rule maintain its overly narrow interpretation of the engineering exemption, we foresee a severe disruption of energy

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<sup>5</sup> 76 Fed. Reg. 828 (Jan. 6, 2011).

<sup>6</sup> *Id.* at p. 829.

<sup>7</sup> *Id.* at p. 834.

<sup>8</sup> *Id.*

services projects with government entities (the largest consumers and wasters of energy) and upheaval of the energy services industry - resulting in fewer energy savings projects nationwide.”<sup>9</sup>

U.S. Senate Committee on Finance Chairman Baucus echoed these comments. He also referenced previous SEC testimony before the Committee that suggested the volume of new registrants under the program would likely be small. In his letter, he said, “the SEC has ignored an explicit exemption contained in Section 975 for ‘engineers providing engineering advice’ to municipal entities . . . [T]he Commission must strike a balance that ensures that the 260 ‘non-broker-dealer financial advisors’ referenced in Ms. Haines’ testimony register with the SEC but does not force thousands of unsuspecting individuals to comply with yet another regulatory burden that would be detrimental to the very municipal entities we are trying to protect.”<sup>10</sup> Thus, Members of Congress have stated that the SEC is not following Congressional intent, and should expand the engineering exemption to include energy services companies.

#### **V. The Proposed Rule, if Enacted, Would Be Overly Burdensome and Cost Prohibitive**

As discussed above, many of SEIA’s members are small businesses with only a handful of employees. Many of these employees are responsible for both negotiating contracts with municipalities, and providing engineering support and installing the solar equipment on municipal buildings. It would be difficult for these smaller companies to meet the burdensome registration and record-keeping requirements of the proposed rule. Indeed, if the final rule applies to solar energy providers, the municipal advisor registration could prove to be so burdensome as to deter small businesses from responding to municipal RFPs. With fewer companies responding to municipal RFPs, there may be less competition to drive contract prices down. This would detrimentally affect municipalities that are trying to enhance their energy security while simultaneously working within restrictive budgets. Accordingly, on behalf of its 1,100 members, SEIA urges the Commission to include solar energy companies in the final rule’s engineering exemption, as intended by Congress.

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<sup>9</sup> Indiana Congressional Delegation Letter to Finance Committee on Proposed Rules (<http://www.sec.gov/comments/s7-45-10/s74510-845.pdf>)

<sup>10</sup> Chevron & Honeywell Comments on History of Engineering Exemption and Letter from Chairman Baucus to SEC (<http://www.sec.gov/comments/s7-45-10/s74510-833-attachb.pdf>)

Thank you for your consideration of these comments.

Respectfully submitted,



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