STATE OF VERMONT
DEPARTMENT OF FINANCIAL REGULATION

SECURITIES DIVISION

In the Matter of:	)	
	)	**Docket No. 14-023-S**
The Vermont Solar / Utility No-Action	)	
("SUN") Exemption	)	

ORDER

General Background

This Order provides a self-executing registration exemption, known as the Vermont Solar / Utility No-Action Exemption (the "SUN Exemption") for certain community solar projects ("CSPs") that would otherwise have to register with the Department of Financial Regulation (the "Department"). Accordingly, the SUN Exemption is necessary to provide CSPs relief from securities registration under the Vermont Uniform Securities Act (the "Act").

A self-executing registration exemption means one can use the exemption without any filings or approval from the Department so long as the exemption's requirements are met.

The SUN Exemption provides Issuers with a flexible road map balancing the dual policy objectives of protecting Vermont's investment community while promoting the development and consumption of renewable energy. By providing a straightforward registration exemption, the Department is playing a proactive role in protecting Issuers from possible "downstream" legal risk that a dissatisfied Investor lodges a complaint with the Department or files a lawsuit alleging they were sold an unregistered security.

The SUN Exemption does not relieve Issuers from complying with the federal securities laws or the securities laws of other states, if applicable, or from complying with other applicable Vermont law such as Vermont's Consumer Protection Act. Issuers should also be mindful that the Act's anti-fraud provisions are still applicable under the SUN Exemption.

"CSP" means a solar electric generation facility, which is a group net metering system (pursuant to 30 V.S.A. §§ 219a and 219b) located in or near a community served by an interconnecting electric company subject to public service board jurisdiction. In a CSP, multiple ratepayers jointly own, lease, or otherwise invest in a single solar photovoltaic facility (i.e., using a single meter to measure output) and receive net metering credits on their electric bill based on their allocation of the energy produced and sold by the system.

"Investor" means a CSP participant who commits money or other value to an Issuer with a reasonable expectation of receiving net metering credits in excess of the committed money or value.

"Issuer" means a CSP owner who seeks Investors to participate in a project by arranging net metering credits to be exchanged for money or other value.

Vermont Securities Law

Under the Vermont Uniform Securities Act a "security" is defined, in pertinent part, to include an "investment contract." 9 V.S.A. § 5102(28). Further, since the seminal U.S. Supreme Court case of *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946), the definition of an investment contract has received a great deal of attention from courts and regulators.

Howey involved the sale of land containing citrus trees coupled with "service contracts" to cultivate and market the crops, with an allocation of the net profits going to the purchaser. The U.S. Supreme Court determined this arrangement constituted an investment contract and therefore a security, and in doing so laid out the test most often used to analyze potential investment contracts. The Court found that an investment contract is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *S.E.C. v. W.J. Howey Co.*, 328 U.S. at 298–99.

Since *Howey*, both courts and regulators have used the *Howey Test* to analyze non-traditional financial transactions in determining whether the transactions constitute investment contracts.

The Vermont Legislature indicated acceptance of the *Howey Test* by enumerating the test in our statutory definition of a security:

> [The term security also] includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a 'common enterprise' means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors[.]
>
> 9 V.S.A. § 5102(28)(D).

Therefore, like the federal *Howey Test*, Vermont's investment contract test has four elements: (i) there must be an "investment"; (ii) in a "common enterprise"; (iii) with the "expectations of profits"; (iv) that are "derived primarily from the efforts of a person other than the investor." If an investment in a CSP meets each prong of Vermont's investment contract test, the Department will consider it to be a security.

Community Solar Projects as Investment Contracts

The following provides guidance for each of the *Howey Test* prongs:

Investment

An investment means an Investor commits any amount of money or value to an Issuer for his/her right to participate in the CSP. However, from an economic realities perspective, those CSPs in which an Investor is fronting the development cost (and thereby bearing the enterprise risk) deserves closer examination than those CSPs in which the Issuer is fronting the development cost and the Investor can exit the CSP through a termination right. This distinction is addressed by providing multiple exemptions with varying degrees of oversight depending on the economic realities of the specific CSP structure.

Common Enterprise

A common enterprise exists when there is an enterprise in common among an Issuer and multiple investors who are offered substantially similar investment terms. The arrangement must contemplate multiple investors; a one-on-one contract between two parties is insufficient. The similar-investment-terms requirement means that the Issuer offers essentially the same opportunity to multiple investors. Accordingly, net metering projects involving the sale or lease of solar panels on a residential or commercial property for a single customer's benefit is not a security because it is a one-on-one commercial transaction lacking multiple investors.

Expectation of Profits

A reasonable expectation of profits exists when the cumulative value of net metering credits is anticipated to exceed the amount of money or other value an Investor commits to an Issuer.

Derived Primarily From the Efforts of a Person Other Than the Investor

This prong requires an examination into the level of control retained by the Investors. In essence, if there is a "passive investment" made by an Investor into an enterprise, this prong is met; however, if the enterprise is structured so that Investors own the CSP and retain control, this prong would not be met.

For an example of such an ownership enterprise, see CommunitySun, LLC, S.E.C. No-Action Letter (August 29, 2011), a copy of which may be found at https://www.sec.gov/divisions/corpfin/cf-noaction/2011/communitysun082911-2a1.htm.

CSP agreements meeting each prong of Vermont's investment contract test are investment contracts and those CSP Issuers must either: (i) register the security offering; (ii) seek a specific exemptive order; or (iii) comply with the SUN Exemption. CSPs that do not meet each prong of Vermont's investment contract test are not securities and do not need to register or comply with the SUN Exemption, but should be mindful of federal securities laws, the securities laws of other states and complying with other applicable Vermont law.

SUN Exemption Overview

A one-size-fits-all exemption would not advance the dual policy objectives of protecting Vermont's investment community while promoting the development and consumption of renewable energy.

For example, certain CSP structures place some or all of the enterprise risk on the Investors, and therefore, require greater oversight, while other structures require minimal oversight because little to no enterprise risk is placed on the Investors. Accordingly, the Department has developed four exemptions tailored to the economic realities of the most common CSP developments. A brief policy overview of each follows:

Consumer Exemption: Under this exemption interests in CSPs are exempt from Vermont's registration requirements if: (i) no upfront payments are required; (ii) payments are made in reasonable installments over time (i.e., payments are not frontloaded); and (iii) Investors have the right to exit the CSP through a termination right. CSPs developed in this manner put little to no risk on the Investor and do not require additional regulatory oversight by the Department.

Financing Exemption: This exemption applies to all CSP developments in which Investors participate in the financing of the development through deposits, upfront payments, long term commitments without a low cost termination right or by providing a photovoltaic panel purchased through the Issuer. This exemption is the most fulsome as the Investor is saddled with some or all of the enterprise risk and an Investor should be made aware of the benefits, burdens and risks associated with participation. Accordingly, this exemption outlines the information an Investor must have access to before he or she enters into the transaction.

Commercial Exemption: Under this exemption businesses and governmental entities participating in CSPs are categorically exempt from registration requirements. This exemption is broad because business and governmental entities typically are commercial purchasers who do not need the full protection of Vermont's securities laws.

De Minimis Exemption: Under this exemption small scale CSPs are exempt from registration so long as the Investors have a pre-existing, substantive relationship with each other and the project is not generally advertised or solicited. This exemption attempts to carve out small discrete groups of neighbors, friends or family who collectively decide to develop a CSP and seek a solar developer to assist them. This type of development may not meet the "efforts of others" prong of Vermont's investment contract test, and therefore, would not be a security; however, the exemption exists to provide clarity and a safe harbor by providing a straightforward exemption for this project type.

WHEREAS, 8 V.S.A. § 10 permits the Commissioner to supervise the business of organizations that offer financial services and products to assure the solvency, liquidity, stability and efficiency

of all such organizations, to assure reasonable and orderly competition, thereby encouraging the development, expansion and availability of financial services and products advantageous to the public welfare; and

WHEREAS, the Commissioner finds it is in the public welfare and consistent with the policy of the Act to exempt CSP investment contracts from the Act's registration provisions under certain conditions.

NOW, THEREFORE, IT IS ORDERED, pursuant to 9 V.S.A. §§ 5203 and 5605, that CSP investment contracts shall be exempt from the registration requirements of 9 V.S.A. §§ 5301-5305, 5504, and each individual who represents an Issuer or participating utility in an offer or sale of a CSP investment contract shall be exempt from the requirements of 9 V.S.A. § 5402(a) ("Vermont's Registration Requirements") if the offer or sale of the CSP investment contract is conducted in accordance with one of the following exemptions and the general conditions:

I. **Consumer Exemption**: CSP developments that comply with the following terms shall be exempt from Vermont's Registration Requirements:

   a. Financing: The Investor shall not provide any upfront financing, nor purchase any photovoltaic panels from the Issuer for the purpose of taking part in the CSP, prior to the CSP's ability to initiate output of the anticipated net metering benefit;

   b. Payments: The payment terms of the governing contract shall consist of a series of installment payments either on specific dates or upon certain events. The installment payment terms can fluctuate depending on market or environmental factors or can be fixed; provided, however, that the installment payments are reasonably spread out over the term of the contract such that the Investor is paying for their participation in the CSP over the term of the contract as the CSP generates net metering credits as opposed to a contract that front-loads payments during the first few years; and

   c. Termination: The Investor shall have the right to terminate upon notice not to exceed three months or immediately upon payment of an amount not to exceed three months of payments.

II. **Financing Exemption**: CSP developments in which Investors participate in the financing of the development through deposits, upfront payments, long term commitments without a low cost termination right or by providing a photovoltaic panel purchased through the Issuer, shall be exempt from Vermont's Registration Requirements; provided, the following conditions are met:

   a. Termination and/or Assignability: Investors shall have the right to exit the CSP through one of the following methods:

      i. The governing contract shall include a buyout provision allowing the Investor to exit the CSP upon notice not to exceed three months and the

Issuer shall repurchase the interest or the photovoltaic panel at the current fair market value; or

ii. The governing contract shall provide the Investor the right to transfer or assign his or her interest in the CSP with no penalty or fee applied; provided, however, that such assignment shall conform to the Public Service Board's standards and procedures for net metering systems, as well as the participating utility's rules and regulations for electric service.

b. Payments Under Contract: The front page of the governing contract shall provide a summation of the total payments to be made over the full term of the contract.

c. Legend: The front page of the governing contract shall provide the following legend in capitalized, bold, 12-point font:

THIS AGREEMENT, AND YOUR PAYMENTS MADE HEREUNDER, ENTITLE YOU SOLELY TO NET METERING CREDITS, WHICH MAY ONLY BE USED TOWARD YOUR PERSONAL CONSUMPTION OF ELECTRICITY. YOUR NET COST OF ELECTRICITY MAY BE REDUCED AS A RESULT OF ENTERING INTO THIS AGREEMENT DEPENDING ON THE AMOUNT OF ELECTRICITY GENERATED BY THE SYSTEM AND FLUCTUATIONS IN THE MARKET PRICE FOR ELECTRICITY. HOWEVER, YOU WILL NOT OTHERWISE BE ENTITLED TO ANY PROFIT (THROUGH EARNINGS, CAPITAL APPRECIATION OR OTHERWISE) RELATED TO THE COMMUNITY SOLAR PROJECT OR ENTERING INTO THIS AGREEMENT.

d. Clear and Prominent Disclosure:

i. Comprehensive disclosure materials shall be provided, either as part of or accompanying the governing contract, detailing clearly and prominently the potential costs and risks of participating in the CSP.

ii. All marketing and advertising materials shall clearly and prominently contain a risk disclosure substantively similar to the following: "Participating in this project involves risk of loss that an investor should be prepared to bear. Please contact [provide Issuer's contact information] for the disclosure documents containing a full description of such risk";

iii. The disclosure materials provided shall clearly and prominently disclose which party shall be entitled to applicable federal, state and local tax credits or rebates, if any;

iv. The disclosure materials provided shall clearly and prominently disclose which party shall be responsible for property taxes and other federal, state or local tax levies, if any;

v. The disclosure materials provided shall clearly and prominently disclose which party shall be entitled to applicable environmental attributes and renewable energy credits, if any; and

vi. The disclosure materials provided shall clearly and prominently disclose whether or not the Issuer will establish a reserve maintenance fund to pay for ongoing service to the solar array, and if so, the specifics as to how the reserve maintenance fund is expected to meet the cost of future maintenance.

e. Maximum Development Revenues: The maximum revenues collected from Investors in the CSP during any twelve month period shall not exceed $2,000,000 per project.

f. Certification of Services Provided: In the governing contract the Issuer shall certify that the participating utility responsible for calculating the value of the net metering credit and applying the credit to the Investor's electricity bill has entered into a contract with the Issuer to provide such services.

g. "Bad Actor" Disqualification: An Issuer must comply with Vermont's "bad actor" standards as promulgated in Regulation S-2014-1 § (h) effective June 16, 2014, a copy of which may be located at:

http://www.dfr.vermont.gov/sites/default/files/Final%20Securities%20Regulation%20%28VSBOE%20%29.pdf.

III. Commercial Exemption: CSP investment contracts entered into between an Issuer and an incorporated entity and/or state or local governmental or quasi-governmental entity shall be exempt from Vermont's Registration Requirements.

a. Incorporated entities shall include: (i) a general, close or professional for-profit or non-profit corporation; (ii) a benefit corporation; (iii) a limited liability company or a professional or low profit limited liability company; (iv) a general, limited or limited liability partnership; and (v) a mutual benefit enterprise or cooperative.

b. Governmental or quasi-governmental entities shall include: (i) any state or local government; (ii) any agency, department or similar branch of any state or local government; (iii) any entity owned or controlled by any state or local government; and/or (iv) a local school board.

c. A CSP with a mixture of incorporated entities and/or governmental or quasi-governmental and residential Investors shall proceed as follows: (i) those governing contracts pertaining to an incorporated entity and/or governmental or

quasi-governmental Investor shall be exempt under this Commercial Exemption; (ii) those governing contracts pertaining to a residential Investor shall comply with one of the other SUN Exemptions.

IV. **De Minimis Exemption**: A CSP consisting of ten (10) or less Investors shall be exempt from Vermont's Registration Requirements; provided, the Investors have a preexisting, substantive relationship and participation in the CSP shall not be marketed by any form of general solicitation or advertising.

V. **General Conditions**:

a. Anti-Fraud Authority: Nothing in this Order alters the obligation of Issuers under Section 5501(2) of the Act, which renders it unlawful to "make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." In addition, Issuers must otherwise comply with the anti-fraud provisions of the Act, as well as any applicable federal and state securities laws. With the exception of the legend requirement, no format for disclosure is prescribed. However, Issuers should attempt to balance any discussion of the potential rewards with a discussion of possible risks. Issuers should take care to ensure that oral statements to prospective purchasers about the offering are consistent with the disclosures contained in any marketing materials and the governing contract.

b. Record Retention: An Issuer availing themselves of the SUN Exemption shall retain appropriate records to support the determination it is entitled to such an exemption for the duration of the CSP.

c. Broker-Dealer Registration Exemption: An Issuer and a participating utility, and employees of both, shall be exempt from broker-dealer and broker-dealer agent registration requirements when marketing, offering or selling CSP investments that are exempt under the SUN Exemption; provided, however, that an Issuer and participating utility shall be responsible for providing adequate training to its employees to: (i) prevent material misrepresentations and/or omissions pertaining to the benefits and risks of CSP participation; and (ii) ensure their employees fully understand the terms and conditions of the CSP governing contract, including its financing.

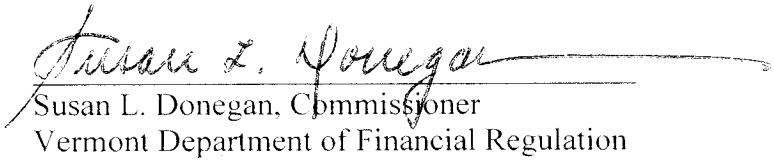
d. Corporate Registration with the Vermont Secretary of State: Each Issuer of a CSP located in Vermont that relies on the SUN Exemption shall either be incorporated under the laws of the State of Vermont or properly registered with the Vermont Secretary of State to conduct business within the state.

e. Certificate of Public Good: In the event a CSP is not installed by the expiration of the certificate of public good issued by the Vermont Public

Service Board, then the associated CSP investment contracts shall be null and void.

Effective date. This Order shall become effective upon signature. The Commissioner reserves the authority under 9 V.S.A. § 5605(a) of the Act to amend or repeal this Order.

Dated at Montpelier, Vermont this 21st day of July, 2014.



Susan L. Donegan, Commissioner
Vermont Department of Financial Regulation