INSECURITY FOR COMMUNITY SOLAR: THREE STRATEGIES TO CONFRONT AN EMERGING TENSION BETWEEN RENEWABLE ENERGY INVESTMENT AND FEDERAL SECURITIES LAWS

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> "There are signs that solar is at a tipping point. . . . This is not a technology that exists only in the minds of dreamers in lab coats. It is here today and ready to go."[1]

> Policy, rather than sunshine, will remain the US's greatest solar resource for the next few years. . . . By the middle of this decade, however, the US retail solar market will be driven by fundamental, unsubsidized competition, which should transform the US into one of the world's most dynamic solar markets.[2]

INTRODUCTION

Recently enacted legislation in Colorado made it possible for

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1. Joel B. Eisen, *Can Urban Solar Become a "Disruptive" Technology?: The Case for Solar Utilities*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53, 60 (2010).

2. Press Release, *US Solar Poised for $100bn Growth Surge*, BLOOMBERG.COM (Oct. 25, 2010), http://www.bloomberg.com/news/2010-10-25/us-solar-poised-for-100bn-growth-surge.html (quoting Milo Sjardin, Bloomberg New Energy Finance's U.S. head of research).

Colorado residents and businesses to buy a proportional interest in a solar generation facility—and the Renewable Energy Credits attributed to it—if the facility is located anywhere within the subscribers' county of residence.[3] Simultaneously, both in Colorado and elsewhere around the country, similar innovative projects have been established both privately and by municipal utilities through the use of cooperatives and Limited Liability Companies (LLCs). These projects allow consumers to purchase shares in solar energy generation facilities located somewhere other than on their rooftops. These types of projects are known as "community solar."[4] The community solar model enables an energy consumer to support solar energy development and reduce her carbon footprint, even if she is unable to install solar panels on her own home because her rooftop is shaded or faces north, because her HOA restricts the installation of solar panels, because she rents, or because she owns an historic home. In addition, the community solar model reduces the high upfront installation costs associated with solar electric energy generation by spreading the costs among a group of consumers.

Technologies that change the way we live, work, and play are an unmistakable part of modern life.[5] Some types of technology—like new models enabling the widespread adoption of solar electric energy—are a critical component of a sustainable energy future. Solar energy technology has taken great strides in recent years and is predicted to experience explosive growth in the next two decades.[6] One way in which entrepreneurs are working to spread solar energy to the general public is through the development of community solar projects like those discussed in this Note. Yet, in working out the kinks, entrepreneurs who have developed community solar projects have encountered a somewhat unexpected regulatory framework: federal and state securities laws. Securities laws are aimed at protecting individual investors from fraud and unscrupulous behavior on the part of investment scheme promoters. The reach of securities regulation is much broader than common investment instruments like stocks, bonds, and debt instruments.[7] Because the penalties for violating securities laws are high, every community solar developer who realizes he or she might be dealing in securities—by marketing a type of investment to consumers—must spend significant time and money to determine the best strategy to

3. COLO. REV. STAT. § 40-2-127 (2011).

4. *See infra* § I.

5. *See* Eisen, *supra* note 1, at 62-63, 65-67 (discussing how "disruptive" technologies replace outmoded ways of doing and thinking, permanently changing the way we live and arguing that for these technologies to be successful, government policies must provide the right kind of support).

6. Bloomberg Press Release, *supra* note 2.

7. *See infra* Section II.

address this issue. A registered public offering is extremely costly, often costing a new company in excess of one million dollars to perform.[8] For this reason, venture capital and other established investment vehicles are likely to try very hard to fit one of the exemptions, such as private placements.[9]

This Note focuses on the tension between the important protections provided investors under the Securities Act of 1933 and the national importance of encouraging innovation in renewable energy, and, in particular, community solar. The Note will first describe the development of specific community solar models in Colorado, Maryland, and Oregon. Second, it will give a basic overview of federal securities laws before turning to the application of those laws to unusual new investments that can be analogized to apply to community solar projects. Third, it will discuss three potential solutions to the securities issue for community solar projects: (a) community solar developers could attempt to avoid the securities laws by carefully structuring their projects in ways that are likely to fall outside the securities laws; (b) developers could attempt to fit community solar projects into one of the exemptions to the securities laws; and (c) developers could engage with attorneys in a focused effort to reduce transaction costs for the industry so that registration with the Securities & Exchange Commission (SEC) would not be prohibitive for community solar projects.

Ultimately, because regulatory certainty is an important piece of what enables technology to change the way we live for the better, any action that state and federal governments can take to provide certainty on the securities issue as it relates to community solar projects will enable entrepreneurs working with solar to help transform the way we consume energy. In addition, because the securities laws serve an important regulatory function and because changing them for a particular industry may be unwise, if legal advisors can help solar entrepreneurs streamline the registration process and reduce transaction costs associated with registration, all parties will benefit.

I. BACKGROUND DISCUSSION OF COMMUNITY SOLAR AND DISTRIBUTED GENERATION

Community solar is a term with varying definitions, but for purposes of this Note "community solar" will refer to "the ability of multiple users—often lacking the proper on-site solar resource, fiscal capacity or building ownership rights—to purchase a portion of their

8. CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW 157 (2008).

9. *Id.* at 157-59.

electricity from a solar facility located off-site."[10] Other community solar models are variations on this idea, often influenced by state and local law.[11] Traditionally, solar installations are placed directly on energy consumers' rooftops. Under this model, the typical consumer is connected to the grid but only pays the utility company the difference between what the solar panels produce and the consumer's total usage—a practice called "net metering."

In contrast, community solar is located off-site. There are multiple benefits unique to community solar. First, there is no need for consumers to personally clean and maintain the solar panels. If panels are not cleaned and maintained regularly, their efficiency drops. Second, there is no need to move the panels when consumers need to install a new roof. Third, a group approach can take advantage of economies of scale; upfront capital costs, such as the transformer, and ongoing maintenance costs, like cleaning and repairs, can be spread over several purchasers, lowering costs per consumer. This, in turn, reduces the solar panels' payback time. And fourth, under some community solar models, consumers actually purchase and own a panel or a number of solar panels. Therefore, they own the means of energy production and are locked into a low energy rate should prices increase in the future. In addition, homeowners in shady areas, homeowners whose roofs lack sun exposure, or renters who do not own their roofs can join a community solar array and support solar energy when they otherwise would be prevented by these circumstances. Finally, depending on the utility company servicing the area, rebates for solar energy may be available to members or subscribers to a community solar project. For example, Holy Cross Energy in Colorado provides a rebate of $1.50 per watt, up to $9,000, for subscribers to the Clean Energy Collective project described below.[12]

Before delving into the details of community solar projects, a brief introduction to solar energy concepts and costs associated with solar installations is appropriate.

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10. Peter Asmus, *Exploring New Models of Solar Energy Development*, 21 THE ELECTRICITY J. 61, 63 (Apr. 2008).

11. *See id.* at 63-64 (listing other definitions adopted by Pacific Northwest users and discussing that, under California law, a community solar project would be an "independent power producer" and would pay the utility the cost of "wheeling," or moving the electricity on the grid, making them less economical).

12. Scott Condon, *Power to the People: Basalt Company Leaps into Solar Power Production*, THE ASPEN TIMES, Jan. 9, 2011, *available at* http://www.aspentimes.com/article/20110109/ASPENWEEKLY/110109884.

A. Introduction to Solar Energy Concepts, Tax Credits, and Costs

Solar electric energy is produced by photovoltaic (PV) panels that convert sunlight to electricity.[13] Currently, panels that are placed directly on residential consumers' homes produce most solar PV generation in the United States. Recent research by Bloomberg New Energy Finance states that the unsubsidized cost of the best solar generation technology is just under $200 per megawatt-hour, which is almost four times that of a coal-fired power plant ($56 per megawatt-hour) and between two and four times the cost of wind power.[14] The Bloomberg researchers therefore contend that for the near future, subsidies will continue to be important to widespread consumer adoption: "[p]olicy measures such as tax credits, capital expenditure grants, generation incentives and renewable electricity credits will remain a key driver of solar uptake in the US for at least the next three years."[15] Current subsidies are fairly generous, and they become more generous depending on where a consumer lives; oftentimes, subsidies can cover between 30 and 65 percent of the cost of a home solar installation.[16]

Taxpayers who buy qualified solar electric property during the tax year enjoy a thirty percent federal tax credit.[17] Qualified solar electric property means "an expenditure for property which uses solar energy to generate electricity for use in a dwelling unit located in the United States and used as a residence by the taxpayer."[18] Several states offer tax incentives for solar investments as well.[19] In addition, a provision in the 2009 American Recovery and Reinvestment Act provided a temporary thirty-percent grant in lieu of a tax credit for renewable energy equipment purchased for use in a trade or business.[20] The program included solar equipment purchased for a business and was extended for

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13. Solar Photovoltaic Technology, NAT'L RENEWABLE ENERGY LAB., http://www.nrel.gov/learning/re_photovoltaics.html (last visited Dec. 10, 2011); NAT'L RENEWABLE ENERGY LAB., GET YOUR POWER FROM THE SUN 2-3 (2003), *available at* http://www.nrel.gov/docs/fy04osti/35297.pdf.

14. Bloomberg Press Release, *supra* note 2.

15. *Id.*

16. Brian Palmer, *For a Big Tax Break, Hit the Roof*, WASH. POST, Oct. 26, 2010, at E3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102504021_2.html (referring readers to a "Solar PV Calculator" that allows consumers to enter their zip code and get information on tax breaks for solar under federal and state law and how much money solar could save them over the years).

17. 26 U.S.C. § 25D (2011).

18. *Id.*

19. *See* DSIRE: Database of State Incentives for Renewables & Efficiency, U.S. DEP'T OF ENERGY, http://www.dsireusa.org (last visited Dec. 10, 2011) (cataloging state tax incentives).

20. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1603(a), 123 Stat. 115 (2009).

an additional year in December 2010; it is now set to expire on December 31, 2011.

Still, one important underlying issue to a discussion of the adoption of solar energy is that solar energy remains costly at the present time. The success of any new power generation system relies on whether its benefits outweigh its costs to consumers.[21] While the environmental benefits of solar are significant, customers' perceptions of whether solar is a good investment may very well determine whether it undergoes widespread adoption.[22] The cost of a typical PV module has fallen by half in the past two years, but solar is still expensive compared with other sources of energy.[23] For solar the expense is concentrated in the upfront installation costs, while ongoing maintenance and input costs are minimal.[24] Upfront costs vary, but can be around $15,000 for a residential home.[25] The cost per megawatt-hour also varies and can depend heavily on how long the PV collectors last (they can last over twenty-five years and, of note, many companies insure their PV collectors for twenty to twenty-five years).[26]

Rooftop solar and community solar are both examples of distributed generation (DG). In contrast to the traditional grid-connected large power plant model, DG refers to power produced in smaller amounts by facilities that are located close to and distributed directly to consumers; excess power may be sent back to the grid.[27] One author defines DG as "power generation technologies below 10 MW electrical output that can be sited at or near the load they serve."[28] Typical DG includes renewable sources like solar panels, fuel cells and possibly wind—if the wind turbines are located in close proximity to the consumers—but also includes internal combustion engines and gas turbines; because it is independent of large power production, DG allows consumers more self-reliance and potentially more reliability.[29]

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21. Anne-Marie Borbely & Jan F. Kreider, *Distributed Generation: An Introduction*, *in* DISTRIBUTED GENERATION: THE POWER PARADIGM FOR THE NEW MILLENNIUM 1, 32-36 (Anne-Marie Borbely et al. eds., 2001).

22. *See id.* at 32 (stating, "The final judgment regarding the installation of any DG system usually comes down to an economic decision").

23. Bloomberg Press Release, *supra* note 2.

24. Unlike the ongoing and increasing cost of fuel, sunlight is free. *See* GET YOUR POWER FROM THE SUN, *supra* note 13, at 8.

25. Palmer, *supra* note 16.

26. *Id.*

27. *Fundamental Smart Grid Patent Issued*, SOLAR NOVUS TODAY (Nov. 9, 2010), http://www.solarnovus.com/index.php?option=com_content&view=article&id=1653:fundamental-smart-grid-patent-issued&catid=41:applications-tech-news&Itemid= 245.

28. Borbely & Kreider, *supra* note 21, at 2.

29. *Id.* at 3; SOLAR NOVUS TODAY, *supra* note 27 (reporting the issuance of a patent in November 2010 to Beacon Power for smart grid technology that allows a distributed generation micro-grid to continue operating when the primary grid fails).

If a home that is partially fueled by solar power is connected to the grid, its use of solar energy will cause its energy meter to run backward; this is called "net metering."[30] If the home produces more solar energy than it can use, the utility may enter a contract with the homeowner to buy the excess power.[31]

B. What is Community Solar?

As defined above, community solar is the ability of multiple users who may lack the ability or desire to install rooftop solar panels to purchase a portion of their electricity from a solar facility located off-site. This section will describe three young community solar projects located in Colorado, Maryland, and the Pacific Northwest to illustrate the similarities, differences, and challenges of community solar development. It will conclude with a brief description of the very young Colorado law authorizing "community solar gardens" for investor-owned utilities.

The first community solar project in Colorado, the Mid-Valley Solar Array, is located about one mile from El Jebel, Colorado.[32] The Mid-Valley Solar Array is a 338-panel installation that is connected to the grid by a local electric cooperative, Holy Cross Energy; it went active in August 2010.[33] It will produce 77.7 kilowatts of energy at its peak.[34] Panels were sold to residents in the Roaring Fork Valley and along Interstate 70; the largest purchase was 87 panels.[35]

The Mid-Valley Solar Array was developed by the Clean Energy Collective ("CEC"), an entity that says it is focused on accelerating the adoption of clean energy solutions.[36] Under the CEC model, customers own their panels. CEC's website states that its starting price to purchase a 320-watt panel is $725.[37] Software developed for CEC monitors the output of each panel, and customers get credit on their electric bills for the portion of electricity produced by their panels. The cost of buying

30. *See* Peter S. Curtiss, *Principles of Control of Distributed Generation Systems*, *in* DISTRIBUTED GENERATION: THE POWER PARADIGM FOR THE NEW MILLENNIUM 185, 188-89 (Anne-Marie Borbely et al. eds., 2001).

31. *Id.* at 187-89.

32. Condon, *supra* note 12.

33. *Id.*

34. Taylen Peterson, *The Country's First Community-Owned Solar Garden*, THE ENERGY COLLECTIVE (Aug. 18, 2010), http://theenergycollective.com/taylenpeterson/41850/country%E2%80%99s-first-community-owned-solar-garden.

35. Condon, *supra* note 12.

36. Mission, CLEAN ENERGY COLLECTIVE, http://www.cleanenergycollective.com/mission.aspx (last visited Dec. 10, 2011).

37. Frequently Asked Questions, CLEAN ENERGY COLLECTIVE, http://www.cleanenergycollective.com/faq.aspx (last visited Dec. 10, 2011).

into the system includes ongoing maintenance and future capital costs, and the panels carry a 50-year warranty. Two larger systems, planned for Rifle and Vail, are in development stages.[38] The Rifle project will host 5,600 solar panels and a capacity of 1.2 megawatts.[39]

In University Park, Maryland, residents developed a similar model independent of utility involvement. University Park Community Solar, LLC, ("UP Community Solar") is a neighborhood solar facility in Prince George's County, Maryland, just east of Washington, DC.[40] It was established by a group of residents who approached a local church as a potential site for a community solar installation because the church had a large roof with good sun exposure. Many of the residents wanted to support solar electric energy, but their rooftops were blocked from the sun by trees. University Park's tree-lined streets make it a popular residential area but make most homes less-than-optimal sites for solar panels. According to the UP Community Solar website, the very trees that form the town's natural canopy are why "the cost of installing a solar system on individual home sites" is prohibitive.[41] "[T]he fact that University Park is located in a forest of oaks, maples and pines, [makes] a centrally located solar plant with wide exposure to the sun [] far more efficient."[42] The residents convinced the church to place solar panels on its roof in exchange for a guaranteed low electric rate from a renewable source for years to come.

It took three years for UP Community Solar to jump through the requisite regulatory and legal hurdles, but in May of 2009 they successfully installed a 21.9-kilowatt system on the Church of the Brethren in University Park. This project is believed to be the first community solar electric system in the United States. It will provide power to the Church of the Brethren on whose roof it is installed and benefits to over thirty members.[43] The project's goal was to attract enough members to cover the $130,000 cost of the project while allowing members to recoup their costs fairly quickly.[44]

UP Community Solar members hope to see a return on investment of seven to eight percent, in part from energy payments from the church and in part because the Potomac Electric Power Company ("PEPCO") is

38. Condon, *supra* note 12.

39. *Id.*

40. *See* What is the University Park Community Solar LLC?, UNIVERSITY PARK SOLAR, http://www.universityparksolar.com (last visited Dec. 10, 2011).

41. Q's & A's, UNIVERSITY PARK SOLAR, http://www.universityparksolar.com/q's_&_a's.htm (last visited Dec. 10, 2011).

42. *Id.*

43. *Residents of University Park Band Together in First Community-Initiated Solar Electric System*, STANDARD SOLAR (Apr. 22, 2010), http://www.standardsolar.com/About-Us/News/First-Community-Initiated-Solar-Electric-System.

44. Q's & A's, *supra* note 41.

required by Maryland law to generate a certain percentage of its energy from renewable sources.[45] One way it does this is by purchasing Renewable Energy Certificates ("RECs") from renewable sources. Recent values for solar RECs in Maryland have ranged from $311 to $360 per megawatt hour (a single REC).[46] UP Community Solar expects to generate enough energy to sell thirty RECs per year.[47]

Under the UP Community Solar model, ownership of the solar array is in an LLC. Community members who wish to participate can buy a membership interest in the LLC.[48] The memberships help pay for initial capital and ongoing maintenance costs. Then, as in any LLC, the income from the enterprise and federal and state tax benefits flow through to the members. Here, members get two primary benefits in return for their membership: payments from the host (the church) for the energy provided to the church building and RECs that they can sell. In addition, they have received the benefit of tax credits and the one-time 30 percent cash grant enacted in the 2009 federal stimulus legislation.[49]

In Ashland, Oregon, a community solar project called Solar Pioneers II bears some similarities to and some differences from the Colorado and Maryland models. Unlike the Colorado and Maryland models, construction of the solar array and the development of the business model was initiated and managed by the city of Ashland's municipal utility. The project was finished in 2008 and has a 63-kilowatt capacity. Under the Ashland model, members buy shares, or fractions of shares, in solar panels.[50] Members receive a payment once per year, for a period of twenty years, that is based on the amount of energy produced by the member's panel.[51] The payment is issued in the form of a credit that is applied to the member's electric bill.[52] The credit can be carried forward each month until it is used. At the end of the year, if the credit is not completely used, the member is paid for the remaining energy at the retail rate. Unlike the Maryland model, the RECs associated with the energy produced cannot be traded or sold by the members; instead, they

45. Billy Parish, *Community Solar Pioneers*, GRIST (Oct. 1, 2010), http://www.grist.org/article/community-solar-pioneers.

46. Q's & A's, *supra* note 41.

47. *Id.*

48. Telephone Interview with David Brosch (Jan. 14, 2011); *see* How Does the Solar LLC Work?, UNIVERSITY PARK SOLAR, http://www.universityparksolar.com (last visited Dec. 10, 2011).

49. *Id.*

50. Ashland Oregon's Solar Pioneers II, NW. CMTY. ENERGY, http://www.nwcommunityenergy.org/solar/solar-case-studies/the-vineyard-energy-project (last visited Dec. 10, 2011).

51. *Id.*

52. *Id.*

are generally retired by the utility on the members' behalf.[53]

Finally, back in Colorado, a recently enacted law allows individuals and businesses to purchase "a proportional interest in solar electric generation facilities" located in their county of residence.[54] The Colorado law names such a solar generation facility a "community solar garden," defined as "a solar electric generation facility with a nameplate rating of two megawatts or less that is located in or near a community served by a qualifying retail utility where the beneficial use of the electricity generated by the facility belongs to the subscribers."[55] The law's legislative declaration states that it is designed to provide Colorado residents and businesses with the opportunity to participate in solar generation beyond rooftop generation, to allow renters and low-income utility customers to "own interests in solar generation facilities," and to allow such interests to be portable and transferable.[56]

A Colorado solar garden may be built and owned by a for-profit or non-profit organization, including an investor-owned utility or a subscriber organization as defined in the statute.[57] A solar garden subscriber receives a proportional interest in the physical facility and a proportional right to the RECs generated by the facility.[58] Solar gardens must have ten or more subscribers, and each subscriber must attribute the solar energy produced by his or her subscription to a physical location in the same county as the solar garden.[59] Subscribers may sell or assign their subscriptions to anyone else who qualifies as a subscriber or subscriber organization.[60] Subscribers may also transfer a subscription to a new address if a subscriber moves within the county.[61] The law also provides a way for investor-owned utilities to satisfy the renewable energy standards required by Colorado statute; community solar gardens qualify as "retail distributed generation" for purposes of the renewable energy standards.[62]

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53. *Id.*

54. COLO. REV. STAT. § 40-2-127 (2011) (created by H.B. 1342, 67th Gen. Assemb., Reg. Sess. (Colo. 2010)).

55. *Id.* at § 40-2-127(2)(b)(I)(A).

56. *Id.* at § 40-2-127(1)(b).

57. *Id.* at §§ 40-2-127(2)(b)(I)(A), (3).

58. *Id.* at § 40-2-127(2)(b)(III).

59. *Id.* at § 40-2-127(2)(b). There is an exception to the one-county rule if the subscriber lives in a county with a population less than twenty thousand; in that case, the solar garden and/or physical locations to which the energy is attributed may be in an adjacent county, also with a population of less than twenty thousand, as long as both areas are served by the same utility.

60. *Id.* at § 40-2-127(2)(b)(III).

61. *Id.* at § 40-2-127(2)(b)(II); Tom Konrad, Comment to *Community Solar Gardens*, CLEAN ENERGY WONK (Mar. 7, 2010, 8:46 PM), http://cleanenergywonk.com/2010/03/07/community-solar-gardens.

62. COLO. REV. STAT. § 40-2-127(2)(b)(I)(B) (2010); *see id.* at § 40-2-124.

Whatever their form, community solar projects are an innovative response to some of the challenges facing widespread solar electric adoption, like the high costs of installation. But these projects are not without significant challenges. Regardless of geographic location and variations in the models used, selling shares in community solar projects may implicate federal and state securities laws. The next section will describe why securities regulation remains one of the biggest question marks for the future success of these projects.

II. CURRENT SECURITIES LAW AND EXEMPTIONS

A. What is a Security?

The federal securities laws were enacted in response to the fraudulent investment schemes and chaotic markets of the 1920s.[63] They were designed to increase information disclosure surrounding the issuance and trading of securities, and they have come to be regarded as two of the more successful legislative accomplishments of the New Deal.[64] Both Acts reflect the policy sentiment that "sunlight is the best disinfectant."[65] The Securities Act of 1933 regulates the initial offering of securities to the public; it requires a registration statement to be filed with the SEC that discloses important information to investors and prohibits the sale of—or offers to buy—any security for which no registration statement has been filed.[66] The registration statement must disclose all information that the SEC determines is "necessary or appropriate in the public interest or for the protection of investors."[67] According to Professor Thomas Lee Hazen, "[t]he reasoning is that full disclosure provides investors with sufficient opportunity to evaluate the merits of an investment and fend for themselves."[68]

The Exchange Act of 1934 cast a broader net. It regulates every aspect of public securities trading, including buyers, sellers, issuers, and the marketplaces in which securities are traded.[69] The Exchange Act is not limited to the initial offering; instead, it regulates securities in an ongoing manner.[70] There are some exemptions to the requirements of both acts; two are discussed in detail below.

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63. THOMAS LEE HAZEN, LAW OF SECURITIES REGULATION § 1.2 (6th ed. 2009) (stating that Wall Street Stock Market Crash of 1929 was "the straw that broke the camel's back").

64. *Id.*

65. *Id.*

66. *Id.*; 15 U.S.C. §§ 77e(a), (c) (1954); *see* Securities Act of 1933, 15 U.S.C. §§ 77a-aa.

67. 15 U.S.C. § 77g(a) (2010).

68. HAZEN, *supra* note 63, at § 1.2.

69. *Id.*; *see* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-pp.

70. HAZEN, *supra* note 63, at § 1.2.

In an attempt to define "security," the Securities Act, the Exchange Act, and state securities statutes contain lists of common financial instruments and arrangements.[71] These definitions are exceptionally long, but because new financial instruments are perpetually being created, the list cannot be exhaustive. Where courts have encountered new investments not expressly listed in the statutes, they have focused on the term "investment contract" in the 1933 Act. *S.E.C. v. W.J. Howey Co.* first articulated what has become the seminal test courts turn to when asked to determine whether an "investment contract" is a security.[72] Thus, courts use the *Howey* test to determine whether an entity is engaged in the issuance of securities.

In *Howey*, the defendant promoters were two corporations that cultivated and managed citrus groves in Florida; in addition, they sold tracts of those groves to the public as investments to help finance future development.[73] Upon selling a tract, the defendants would enter into a service contract with the purchaser that promised to provide the purchaser with "an allocation of the net profits" from the sale of produce but that limited the purchaser's rights and obligations with respect to the actual cultivation of the tract and the marketing of its produce.[74] The defendant citrus-cultivators-turned-investment-brokers denied that they were dealing in securities and argued that they were not obligated to register with the SEC under the 1933 Act.[75]

The Supreme Court seized this opportunity to define "investment contract" under the 1933 Act as "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."[76] The *Howey* test has four parts: (1) an investment of money, (2) in a

71. *See, e.g.*, 15 U.S.C. § 77b(a)(1) (2000) (defining security as "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing"); *see also* WASH. REV. CODE § 21.20.005(12) (2011); COLO. REV. STAT. § 11-51-201(17) (2005) (providing examples of state statutes that are closely modeled after federal definition).

72. S.E.C. v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

73. *Id.* at 295.

74. *Id.* at 296.

75. *Id.* at 297.

76. *Id.* at 298-99.

"common enterprise," (3) an expectation of profits, and (4) based solely on the "efforts of the promoter or a third party."[77] Because the citrus grove scheme persuaded investors to part with their money on the promise of profits but did not involve those investors in the management of the enterprise or cultivation of the land, the Supreme Court concluded that the arrangements were "investment contracts" under the 1933 Securities Act.[78]

The *Howey* Court described its "investment contract" test as a flexible standard that would enable courts to adjust the application of the Securities Act to new, creative entities.[79] "It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[80] The *Howey* test has thus become the seminal framework courts use to determine whether a new, unfamiliar type of entity or arrangement will be treated as a security. The fourth factor in the test—whether the expectation of profit is based solely on the efforts of a third party—has become particularly important in the case law. Many cases are determined on whether the investors are involved in business decisions or, alternatively, whether they are passive and uninvolved. Other cases look to whether the efforts of the promoter are entrepreneurial and managerial to the extent that those efforts are responsible for generating profits, or whether the promoter performs merely "ministerial" functions, with the return on investment being due primarily to external factors like fluctuating market conditions.

Two fairly recent appellate decisions that addressed whether memberships in LLCs were "investment contracts" under the securities laws illustrate the first type of inquiry, in which the court focuses on the level of investor involvement. While courts tend to treat general partnerships with a strong presumption that their membership interests are not securities, courts have "explicitly refused to accord LLC membership interests any such presumption."[81] Instead, courts rely on the *Howey* test to analyze LLC membership interests, in particular emphasizing the extent to which the member is passive, relying on the efforts of others. One observer writes,

> A membership interest [in an LLC] may be a security of the investment contract type if the regulations vest ultimate control in

77. *Id.*
78. *Id.* at 299-300.
79. *Id.* at 299.
80. *Id.*
81. Elisabeth S. Miller, *Are the Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing from Other Forms?*, 42 SUFFOLK U. L. REV. 617, 624 (2009).

> others; if the interests are sold to such large numbers of the general public that the interest does not provide any real control; if a member lacks the business experience and knowledge to exercise management rights possessed by the member; or if a member is, in fact, dependent upon the ability of a promoter or manager because of some unique expertise on the part of the promoter or manager.[82]

Therefore, a court's factual analysis of the members' involvement in the business is extremely important.

In *Robinson v. Glynn*, one of the first federal appellate decisions that addressed whether an LLC membership interest was a security, the Fourth Circuit concluded the LLC membership in question was not an investment contract based on *Howey*.[83] The court placed great weight on the plaintiff's active role in management of the LLC, including his role as company treasurer, his veto power over the incurrence of debt outside the normal course of business or over any action that would dilute his investment, and his power to appoint two members to the board of managers.[84] Quoting *Howey*, the *Robinson* court summarized:

> The question is whether an investor, as a result of the investment agreement itself or the factual circumstances that surround it, is left unable to exercise meaningful control over his investment. Elevating substance over form in this way ensures that the term 'investment contract' embodies 'a flexible rather than a static principle.'[85]

The *Robinson* court concluded that the plaintiff's "level of control" was "'antithetical to the notion of member passivity' required to find an investment contract under the federal securities laws."[86] Therefore, the plaintiff's interest was not a security.[87]

In contrast, in *United States v. Leonard*, the Second Circuit concluded that two LLCs had issued securities based on the same *Howey* factors.[88] In *Leonard*, two LLCs named Little Giant and Heritage Film Group issued investment "units" priced at $10,000 to help finance the production of films.[89] The court concluded that the investment "units" were securities based on a number of factors, many of which highlighted the passivity of the investors. The court stated, "the Little Giant and Heritage members played an extremely passive role in the management

82. *Id.* at 623.
83. Robinson v. Glynn, 349 F.3d 166, 174 (4th Cir. 2003).
84. *Id.* at 171.
85. *Id.* at 170 (quoting *Howey*, 328 U.S. at 299) (internal citations omitted).
86. *Id.* at 171.
87. *Id.*
88. *See* United States v. Leonard, 529 F.3d 83 (2d Cir. 2008).
89. *Id.* at 85-86.

and operation of the companies."[90] For example, the *Leonard* court noted that the investors rarely voted on decisions even though the membership documents gave each investor one vote, the investors did not form committees that they were entitled to form, the investors did not negotiate the terms of the LLC agreement, the investors did not have expertise in the film business, and there were so many investors (a total of six to seven hundred) and they were dispersed across such a wide geographic area that they were dependent on centralized management.[91] In considering all of these factors and circumstances, the court concluded that the defendant LLCs had issued securities.[92]

In both *Robinson* and *Leonard*, the appellate courts refused to articulate a bright line rule for LLC memberships beyond the *Howey* test. Professor Elizabeth Miller writes that in *Robinson*, "the Fourth Circuit noted that LLCs lack standardized membership rights or organizational structures and can assume an almost unlimited variety of forms. Thus, the court declined to state any general rule as to whether LLC interests are investment contracts or non-securities."[93] Of considerable importance to its analysis, the *Leonard* court emphasized "the Supreme Court's repeated instruction to prize substance over form in our evaluation of what constitutes a security."[94] This analysis underscores that the courts remain flexible in their approach to new entities and refrain from articulating hard-and-fast rules, instead preferring to rely on the guidelines set forth in *Howey*. The reader should note that courts apply the four-part *Howey* analysis in the same manner when the alleged investment contract is a membership or ownership interest in a cooperative, association or nonprofit organization.[95]

Faced with a factual scenario in which the promoter's efforts are more administrative than managerial, largely consisting of pre-investment decisions and efforts, some courts in another line of cases have focused on whether the investors' expectation of profit is significantly due to the promoters' efforts.[96] In *S.E.C. v. Life Partners, Inc.*, the D.C. Circuit held that viatical settlements—contracts in which investors purchase the rights to the benefits of life insurance contracts on the lives of terminally ill individuals at a deep discount—are not

90. *Id.* at 89.
91. *Id.* at 89-90.
92. *Id.* at 91.
93. Miller, *supra* note 81, at 624.
94. *Leonard*, 529 F.3d at 90.
95. *Compare* Tenants Corp. v. Jakobson, 503 F.2d 1375 (2d Cir. 1974) (finding a cooperative housing association had issued securities because tenant-shareholders expected a profit and that profit was based on the efforts of a third party), *with* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (holding that shares in a nonprofit housing cooperative were not securities because they did not satisfy the *Howey* test).
96. *See, e.g.*, S.E.C. v. Life Partners, Inc., 87 F.3d 536, 545-48 (D.C. Cir. 1996).

securities because the investors' return on investment predominantly depends not on the promoter's efforts but on how long the insured lives.[97] In *Life Partners*, the promoter arranged the transactions, focusing primarily on choosing which life insurance contracts in which to invest and negotiating the purchase price; after investment, the promoter performed mostly administrative services.[98] After the investment was made, the investor's profit or loss depended on how long the insured lived.[99] The court concluded that the *Howey* test was not satisfied because the promoter's efforts after investment did not have a "predominant influence" upon the investors' profits.[100]

In reaching its decision, the court in *Life Partners* focused on two aspects of the promoter's efforts: first, whether they were entrepreneurial or ministerial in nature and second, whether the efforts were pre-investment or post-investment.[101] The first issue was a highly fact-specific inquiry in which the court considered whether the promoter's efforts were "ministerial," "clerical," and "routine" in nature or, rather, "managerial or entrepreneurial."[102] Because the court found that the promoter's efforts post-investment were largely clerical or ministerial and that they did not have a material impact on the investors' profits, the investments did not satisfy the final *Howey* factor.[103] Such "ministerial" efforts included holding the policy, monitoring the insured's health, paying premiums, assisting an investor in reselling the investment, and the right to change the party designated as the beneficiary of the policy.[104]

With regard to the second question, whether the efforts occurred pre-investment or post-investment, the *Life Partners* court concluded that pre-investment activities have less impact on the ultimate profitability of the investment and cannot by themselves satisfy the final *Howey* factor.[105] The court concluded that if the promoter's efforts are "impounded into the . . . purchase price of the investment, and if neither the promoter nor anyone else is expected to make further efforts that will affect the outcome of the investment, then the need for federal securities regulation is greatly diminished."[106] Thus, the *Life Partners* court was

97. *Id.* at 548.

98. *Id.* at 538.

99. *Id.* at 548 ("[I]t is the length of the insured's life that is of overwhelming importance to the value of the viatical settlements marketed by LPI.").

100. *Id.*

101. *Id.* at 545-48.

102. *Id.* (stating that "ministerial activities should receive a good deal less weight than entrepreneurial activities").

103. *Id.* at 545-46.

104. *Id.* at 545.

105. *Id.* at 548.

106. *Id.* at 547.

satisfied that because the post-investment functions of the promoters were largely ministerial, the viatical investments were not securities even though the promoter's pre-investment activities, like identifying and evaluating insurance policies, evaluating the insured, and negotiating the purchase price, were important to the investment's success and required some expertise.[107]

The *Life Partners* court's pre-/post-investment distinction has been criticized by some courts as unsupported by *Howey*.[108] In disagreeing with the reasoning in *Life Partners*, the Eleventh Circuit contended that the *Howey* test is broad and flexible, that the proper focus is on substance over form, and that there is no support for a bright-line rule about whether a promoter's key profit-producing activities occur before or after investors join the venture.[109]

There is broader agreement that if profit is anticipated predominantly because of the operation of market forces, market fluctuation, and other factors outside the promoter's control, the scheme is not an investment contract under *Howey*.[110] When profits are dependent on market fluctuations and not on the managerial efforts of the promoter, the final *Howey* factor is less likely to be satisfied.[111] A key question, therefore, in determining whether an entity is issuing securities is whether the investors are truly dependent on the efforts of the promoter or on market fluctuations outside the promoter's control.

B. Exemptions

There are several exemptions to registration under the Securities Act. While there are multiple exemptions, I will focus on two exemptions that may be most attractive to community solar projects: Regulation D and the Intrastate exemption. Exemptions are provided in situations where the onerous disclosure and reporting requirements of the Securities Act are not necessary due to the sophistication of investors, because the amount of money being raised is small, because the issuer is the government or some other heavily regulated entity, or when state

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107.*Id.*

108. *See, e.g.*, S.E.C. v. Mutual Benefits Corp., 408 F.3d 737, 743 (11th Cir. 2005) (stating, "[w]hile it may be true that the "solely on the efforts of the promoter or a third party" prong of the *Howey* test is more easily satisfied by post-purchase activities, there is no basis for excluding pre-purchase managerial activities from the analysis"); *see also* Reiswig v. Dep't of Corrections for the State of California, 50 Cal. Rptr. 3d 386, 396 (Cal. Ct. App. 2006); Wuliger v. Eberle, 414 F. Supp. 2d 814, 821-22 (N.D. Ohio 2006).

109. *Mutual Benefits Corp.*, 408 F.3d at 743.

110. *See, e.g., id.* at 744 n.5; Noa v. Key Futures, Inc., 638 F.2d 77, 79-80 (9th Cir. 1980).

111. *Noa*, 638 F.2d at 79-80 (because profits were based on fluctuations in the national silver market and not on the managerial expertise of the promoters, the investments were not securities).

securities laws are adequate to protect investors.

First, Regulation D provides exemptions for small offerings and private placements.[112] In particular, Rules 504 and 505 may be useful to community solar projects. Rule 504 provides an exemption for offerings of securities up to $1 million within one twelve-month period.[113] Rule 505 provides an exemption for offerings of securities totaling up to $5 million in a twelve-month period, as long as they are sold to no more than thirty-five unaccredited investors; an unlimited number of accredited investors is permitted.[114] Accredited investors are defined by Rule 501(a) to include institutional investors like banks, people whose net worth exceeds $1,000,000, and individuals whose income has exceeded $200,000 for the past two years.[115]

The SEC prohibits general advertising and solicitation under Rules 504 and 505.[116] In addition, securities issued under Rule 504 are "restricted" securities meaning they may not be re-sold unless they are registered.[117] Securities issued under Rule 505 are also restricted and may not be resold. There are two ways to avoid these restrictions on advertising and resale: (1) by registering the offering under a state securities law that requires public filing and distribution of disclosure documents to potential investors or (2) by limiting the offering to "accredited investors."[118]

Second, the intrastate exemption applies to securities issuances that are confined to one state: they must be promoted by in-state issuers to in-state residents.[119] The intrastate exemption is based on the premise that state securities laws are sufficient to regulate intrastate offerings; offerings under the intrastate exemption are still subject to state securities law in the state in which they are issued.[120] Further, the intrastate exemption, like all exemptions, does not remove the transaction from the anti-fraud provisions of the Exchange Act like Rule 10b-5.[121] For clarity, the SEC has adopted Rule 147 to help companies and courts interpret the intrastate exemption; Rule 147 clarifies such terms as "resident" and "doing business" for purposes of the exemption.[122]

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112. 17 C.F.R. §§ 230.501-508 (2011).

113. *Id.* at §§ 230.504(a), (b)(2).

114. Q&A: Small Business and the SEC, SEC. AND EXCH. COMM'N, http://www.sec.gov/info/smallbus/qasbsec.htm#eod6 (last visited Dec. 10, 2011).

115. 17 C.F.R. §§ 230.501(a)(5), (6).

116. *Id.* at § 230.502(c).

117. *Id.* at § 230.502(d).

118. *Id.* at §§ 230.504(b)(1)(i), (iii).

119. 15 U.S.C. § 77c(a)(11) (2011); *id.* at § 230.147.

120. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 3 SECURITIES AND FEDERAL CORPORATE LAW § 3:5 (2d ed. 2003).

121. *Id.;* 17 C.F.R. § 240.10b-5 (2011).

122. BLOOMENTHAL & WOLFF, *supra* note 120.

III. THREE STRATEGIES

In light of the above discussion, the organizers of community solar projects cannot ignore the securities laws but instead must make informed and strategic decisions about how to organize their entities. There are three possible strategies community solar projects could pursue: first, attempt to organize the community solar project in a way that shares or memberships will likely not be considered securities under state or federal law; second, attempt to fit one of the exemptions; and third, register as securities but try to reduce transaction costs. This section will first discuss the details of each strategy and then analyze each strategy in light of the policy tension between the protection of investors from unscrupulous promoters and broadening participation in the use of renewable energy sources.

The first strategy is for community solar projects to organize themselves so that they might avoid regulation under the securities laws altogether. To do this, they should try to avoid one or more prongs of the *Howey* test. As discussed above, *Howey* defined a security as an investment of money in a common enterprise with an expectation of profit based solely on the efforts of a third party. Of note, the expectation of profit can be satisfied by the anticipation of any tangible economic benefit. According to a recent letter from the Colorado Department of Regulatory Agencies, Division of Securities, to a Denver lawyer who had requested an interpretative opinion on the Colorado solar gardens legislation with regard to the securities issue,

> [T]he transaction could be structured so that the primary motive for the subscriber's participation . . . is to receive the net metering credit against the subscriber's bill. . . . [T]he Staff believes that the receipt of a net metering credit is a tangible economic benefit to the subscriber, and in a broader sense, a profit.[123]

Under the first three *Howey* factors, just like the Florida citrus groves in the seminal case, the sale of solar panels in a community solar project would qualify as an issuance of securities; consumers will have invested money in a common enterprise with the expectation of economic benefit.

The final factor under the *Howey* test, whether profit is expected based solely on the efforts of others, is where community solar projects may find some degree of play. If the subscriber does not participate in managerial decision-making, and if the community solar project promoter makes entrepreneurial and not merely ministerial efforts that result in profits, this final factor will probably be satisfied. But as

123. Community Solar Gardens, Colo. Div. of Sec., File No. A 011-001 (Sept. 22, 2010), *available at* http://www.solargardens.org/ColorSecuritiesReport.pdf (interpretive opinion).

articulated regarding LLC memberships in *Robinson v. Glynn*, if a subscriber or member is sufficiently involved in the management and decision-making of the project, the subscription or membership will probably not be considered a security requiring registration under the 1933 Act.[124] Thus, one way a community solar organization could address the securities issue would be to involve all members or subscribers in day-to-day management and decision-making.

Alternatively, if the anticipated profits are due to factors other than the efforts of the community solar project developers, such as energy prices and the efficiency of the available PV technology, the project's subscriptions may not be considered securities. Therefore, another way to avoid regulation under the securities laws might be to clearly minimize the extent to which the project's return on investment is materially affected by the project's developers. Instead, the project's developers would be limited to a "ministerial" or administrative role.

There could be significant practical problems with avoiding the securities laws by involving community solar subscribers in managerial efforts. First, while it might be feasible to involve a small number of subscribers in management decisions, if the number of subscribers grew large enough to make the project financially attractive for small subscribers and to create economies of scale, it would be practically difficult to effectively involve each one in management decisions. Second, one of the benefits of community solar projects is that they take the day-to-day hassle of maintaining solar panels *out* of the hands of the subscribers who do not wish to bother with the details.

The second solution may be more viable for community solar. Instead of structuring a community solar project as the sale of LLC memberships, it could be structured as the sale of solar panels from the community solar project directly to the consumers, with an ongoing arrangement whereby the organizers would be limited to administrative and maintenance tasks. Because the return on investment for community solar is heavily dependent on energy prices, and, to a lesser degree, on the efficiency of the solar panels used, an argument could be made using the reasoning in *Mutual Benefits Corp.* and *Noa* that community solar shares' profits are more dependent on market fluctuation and factors outside of the promoters' control than they are on the managerial expertise of the promoters. Therefore, they should not be regulated as securities. The success of this strategy would depend on courts' fact-intensive analysis of the level of managerial versus clerical or ministerial efforts and the relation of those efforts to the project's expected profits. In addition, if the court agreed with the reasoning in *Life Partners*, it

124. *Robinson*, 349 F.3d at 174.

would also look to see whether the significant managerial decision-making had primarily been conducted pre-investment.

As indicated by the foregoing discussion, 100-percent certainty that community solar subscriptions are not securities is difficult to establish. To add to the uncertainty, the Colorado Department of Regulatory Agencies, Division of Securities, letter referenced above articulated the view that shares in community solar gardens under the Colorado solar gardens legislation would most likely be securities.[125] This uncertainty is a significant problem for both investors and community solar developers. If state or federal legislators or rulemaking bodies were to take up the issue, they could provide more certainty by establishing clear rules whereby community solar projects would be assured they are not issuing securities.

Finally, there is the question of how this first strategy fares in light of the competing policies of protecting investors and encouraging wider adoption of renewable energy sources. On one hand, the option of moving forward with a community solar project without the added hassle and expense of registration with the Securities and Exchange Commission would save time; it would also lessen costs for subscribers, which would increase both the potential rate of return and the number of consumers willing to purchase subscriptions. But on the other hand, one of the primary purposes of the Securities Act is to provide disclosure of important information about investment opportunities so that potential investors would be enabled to evaluate their merits; under the 1934 Act, there are severe penalties if disclosure statements are found to have been fraudulent. If a community solar project were to avoid regulation under the securities laws, there would be less public information available to consumers about the project and fewer protections against fraudulent statements. While solar developers could voluntarily choose to make such information available to the public or to subscribers, the lack of disclosure requirements and accountability could attract unscrupulous actors.

A second strategy would be to organize community solar projects to fit one of the exemptions articulated above. Regulation D may be an attractive option because its $1 million limit on the amount raised would be plenty for many small community projects. And for residents remaining in their homes for at least two years, the restriction on resale would not be a problem; however, the two-year restriction on re-sale would preclude renters who move each year from participating. More significantly, the restriction on general advertising and solicitation would prevent a community solar project from distributing information widely

125. Community Solar Gardens, *supra* note 123.

through the mail, online, or on television; information would only be available via word of mouth, private meetings, or personal relationships. This latter restriction would be a great impediment to the success of young community solar projects with little exposure in the community.

The intrastate exemption may be attractive for community solar projects whose investors are located within one state. University Park Solar was able to take advantage of this federal exemption; thus, the entity was able to focus only on complying with Maryland securities rules. Therein lies an example of the major drawback to the intrastate exemption: even if a project qualifies for the federal intrastate exemption, it must still comply with state securities laws. State governments could potentially assist community solar projects by creating a special category under state law for community solar, enabling projects that take advantage of the federal intrastate exemption a clear, perhaps more streamlined process through which to register under state securities laws.

Ultimately, projects that qualify for one of the federal exemptions are subject to the ongoing uncertainty that if one element of the exception is breached, the protection of the exception will fail and the project will find itself subject to all of the requirements of the 1933 Act. This risk would need to be weighed according to the facts and circumstances of each project: how likely would such a breach be, and how damaging to the community solar project would it be to suddenly require compliance with the 1933 Act?

Finally, how does this second strategy fare with regard to the protection of investors and the broader use of renewable energy? Fitting into an exemption would ultimately protect community solar projects from much of the expensive and time-consuming process of registration. In addition, this option is better at protecting investors: because entities that qualify for an exemption are technically issuing securities, consumers enjoy the protections of the anti-fraud provisions of the 1934 Act. But the limits on each exemption might make it more difficult for community solar projects to achieve widespread consumer adoption. For example, without advertising under Regulation D it would be difficult for community solar projects to reach out to potential subscribers.

As a third strategy, community solar projects could choose to register their memberships as securities but attempt to recreate that process in multiple community solar projects around the state, region, or country. A project could create a workable model, including the legal and business structure but also including SEC registration documents and processes. The project could then create an economy of scale with that model by sharing it with other projects, thereby reducing transaction costs. Because much of the cost of dealing with securities laws comes from the time and expense associated with the initial registration and

disclosure, if that process could be streamlined and standardized for community solar projects around the project's state or region, the expense of each registration would fall.

It is possible to register under the 1933 Act and remain unaccountable to the ongoing disclosure requirements required by the 1934 Act. If a project meets one of two thresholds—less than 300 shareholders or less than 500 shareholders with less than $10 million in assets—that project will only be required to disclose under the 1934 Act for one year.[126] For small community solar projects, these thresholds are reasonable; recall that the University Park Solar project cost $130,000 to install on behalf of its 30 members. For smaller community solar projects, this may represent the best compromise strategy to resolve the tension between providing certainty and stability to community solar projects and protecting investors. Some commentators have written that registration with the SEC would be positive for Colorado's community solar gardens:

> In general, [the fact that shares in solar gardens are likely securities] is probably a good thing, since it provides a strong legal framework under which regulators will be able to sanction unscrupulous CSR developers who might be tempted to cold-call unsophisticated utility customers and over-promise the benefits of a small subscription in a Solar Garden.[127]

Likewise, the Colorado Deputy Securities Commissioner, Gerald Rome, wrote that while

> the development of [community solar gardens] in Colorado is in the public interest and intended to broaden participation in utility customer ownership of small solar generation . . . this laudatory purpose does not eliminate the incentive for fraudulent or deceptive practices by those who devise the countless and variable schemes through the use of the money of others on the promise of profits.[128]

The fact remains that registration with the SEC is costly and would probably diminish returns for community solar consumers. But ultimately, this last strategy could best protect consumers and investors, offer certainty to the developers of community solar projects, and increase the potential for widespread adoption of a powerful renewable energy model.

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126. Q&A: Small Business and the SEC, *supra* note 114.
127. Konrad, *supra* note 60.
128. Community Solar Gardens, *supra* note 123.

CONCLUSION

Community solar is an innovative strategy to place solar energy in the hands of larger numbers of consumers. But most community solar models run the risk of implicating federal and state securities laws, important disclosure rules that are designed to protect small investors from unscrupulous promoters. Community solar projects have been bold in refusing to back down in the face of difficult legal hurdles like this one; instead, they are right to seek innovative solutions. This Note has articulated the pros and cons of three different strategies to address this particular problem, and has demonstrated that there is no easy solution to the tension between this type of innovation and the goal of protecting investors. The optimal strategy will depend on the specific facts and circumstances, goals, and local laws for each community solar project. Regardless of the strategy chosen, this problem presents an opportunity for federal or state government to create clarity in the law for community solar projects. It also provides a chance for legal advisors to help community solar projects organize themselves to avoid the securities laws or create economies of scale with their securities registrations. Ideally, the strategies chosen will enable community solar projects to grow in number and enjoy success for years to come.