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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150,
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CHAIRMAN'S
CORRESPONDENCE UNIT

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

We write to express our concern about the Securities and Exchange Commission's ("Commission") recent proposal to apply the municipal advisor registration requirements in section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to energy service companies ("ESCOs") that are providing "engineering advice".¹

In section 975, Congress recognized that engineering services inherently involve the provision of such project-related economic information and for that reason specifically exempted "engineers providing engineering advice" from registering as municipal advisors. However, the Commission's proposal undermines that explicit exemption by suggesting that any ESCO that so much as provides a cash flow analysis or feasibility study to a municipality would not be providing "engineering advice" and would therefore be subject to registration as a "municipal advisor".² This interpretation of section 975 would cause the municipal advisor registration requirement to ensnare a universe of companies and individuals that Congress never intended to be covered by section 975.

By subjecting ESCOs to registration and regulation as "municipal advisors", the Commission's proposal threatens a vibrant industry that helps municipalities reduce their utility bills, conserve energy and create local jobs in construction and contracting.

ESCOs contract for an average of \$3 billion in retrofits to existing public buildings each year, creating thousands of jobs for local small businesses and construction workers while helping taxpayers save money through reduced operating costs at public facilities. Public entities, including the Federal government, have long looked to ESCOs to reduce the energy costs of their buildings. In fact, the last four Administrations have maintained an aggressive mandate to reduce energy consumption at

¹ Registration of Municipal Advisors, 76 Fed. Reg. 824 (Jan. 6, 2011).

² *Id.* at 834.

Federal buildings. ESCOs have been the preeminent vehicles for achieving these energy efficiency savings.

ESCOs provide at least four specific kinds of “engineering advice” to state and local entities considering building retrofits: (1) preparation of energy audits, engineering diagrams, equipment or building specifications, and related technical reports; (2) cash flow analysis of projected savings from the proposed retrofits and feasibility studies; (3) general information on available financing options where a public entity does not have access to allocated funding through a traditional budgeting process and the range of methods of financing that might be utilized to support the required initial capital investment; and (4) uncompensated introductions to financing entities.

A cash flow analysis and feasibility study is indispensable to both the client and the ESCO to determine whether a proposed project makes economic sense. Indeed, the fact that ESCOs guarantee the savings results of the retrofits tends to ensure a conservative projection of cost savings. Moreover, many municipal procurement requirements explicitly mandate the submission of a cash flow analysis and feasibility study as part of the RFP evaluation process.

ESCOs offer technical and managerial capabilities to the public building owner. As part of the process by which ESCOs educate public customers about their options in developing and implementing an energy efficiency retrofit, ESCOs do discuss the financing options that public entities can consider to fund the project. ESCOs also talk about the many government programs as well as utility, federal, and state incentives that may be available to the public customer. If the public customer wishes, ESCOs may provide introductions to potential financial providers; the universe of such financial providers is broad and changes over time.

However, if the public customer chooses to pursue a financing alternative that involves a securities offering, the public customer typically would rely on a separate municipal advisor, not the ESCO, for individualized financing advice about that offering. The customer’s own municipal advisor, counsel, and procurement group or finance team would be called upon to provide the customer with direct advice about prospective financing choices and structures and determine the ultimate choice of financial provider. ESCOs limit their direct involvement in the funding process to serving as a third party guarantor of energy savings. It should also be noted that there are a whole range of available financing structures that do not involve issuance of municipal securities or purchase of a municipal financial product.

The Commission’s proposed rule would exact real costs on the ESCO industry and the municipalities it serves. This would include the cost of creating an overall corporate compliance structure as well as significant cost to hire new personnel to monitor compliance with the rule and with related regulations, such as rules promulgated by the Municipal Securities Rulemaking Board. ESCOs would also assume new and ill-defined legal risk as fiduciaries—a risk for which they would have to be either directly or indirectly compensated most likely in the form of a reduction in the amount of dollar savings realized by municipalities through the energy cost savings. In addition to these

direct costs of compliance, which ultimately would be borne by the customer municipalities, there would be lost energy savings due to the slowdown in the project development and implementation cycle.

The costs incurred to comply with the proposed rule could well make serving municipalities uneconomic for ESCOs—unnecessarily restricting access by municipalities to the vital services and economic benefits that ESCOs have provided over more than a quarter of a century.

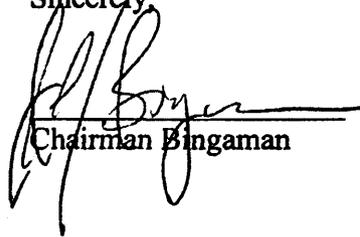
For these reasons, we respectfully request that the Commission make clear in its final rule implementing section 975 - perhaps through a specific “safe harbor” exemption - that ESCOs will not be subject to registration as municipal advisors so long as their “engineering advice” is restricted to the four types of advice enumerated above. If you have any questions about this issue or would like to have one or more Commission staff work with our staff on resolving our concerns, please have them contact Deborah Estes, Senior Counsel to the Senate Committee on Energy and Natural Resources, at 202-224-5360 at your earliest convenience.

Thank you for your attention to this important issue. We know you share our interest in assuring that the Commission’s implementation of this important legislation avoids any negative effect on a leading element of the Administration’s energy policy.

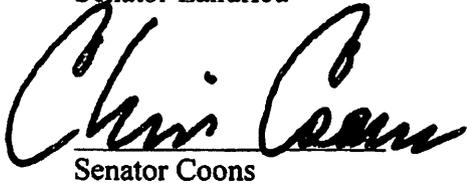
Sincerely,



Senator Landrieu



Chairman Bingaman



Senator Coons

cc:

Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner