

*The ESC's goal on the quarterly peer exchange calls is to first share the successes and challenges that states may be encountering within their state and GESPC program. As an adjunct, ESC will offer topics that may be deserving of your time during the exchanges to the degree that you might find the discussion helpful. We welcome you sharing with your respective call leader (Dale Hahs, Jim Ploger or Eddie Riddle) other topics that you would like for us to collectively address.*

## **BRIEFING PAPER**

### **Topic: Impact of the Dodd-Frank Act on Guaranteed Energy Savings Performance Contracting**

Prior to the passage of the Dodd-Frank Act, the Energy Services Company (ESCO) associates commonly provided education to prospective end users/owners regarding finance matters including their perspective on how and when to engage the financial community. Additionally they may have worked directly with the financial community on the owners behalf to solicit competitive rates for a pending project.

The ESCO industry through the National Association of Energy Service Companies (NAESCO), worked hard to get clarity on the direct impact to their members that resulted in the following statement posted on the NAESCO website.

The SEC issued the final rule on the registration of Municipal Financial Advisors in late September 2013 (<http://www.sec.gov/rules/final/2013/34-70462.pdf> ). The final rule, much like the interim final rule and the proposed rule uses an approach that focuses and limits the scope of the exclusions and exemptions contained in Section 975 of the Dodd-Frank Act, utilizing "activities-based exemptions" rather than "status-based exemptions." The SEC used many of the concepts in the NAESCO recommended safe harbor provision to define the activities that are excluded from regulation as a "municipal advisor." A footnote in the final rule states that the SEC treats energy service companies as engineering companies for purposes of the engineering exclusion in the rule.

In the final rule, the first consideration for being classified as a municipal advisor is "whether a person provides advice to or on behalf of a municipal entity or obligated person." While the SEC says they believe this determination must rely on all the relevant "facts and circumstances," they have provided some additional guidance on the "advice" standard. The final rule provides "that advice excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues)." This follows the NAESCO recommendation that providing general educational information on financing energy service company projects would be an allowable activity of energy service companies that are not required to register.

The safe harbor for energy service companies which NAESCO had proposed included a list of energy services activities that would allow the company to qualify for our exemption from registering as a municipal advisor. Most of these activities are similar to many of the examples of types of activities that the SEC, in the final rule, concludes are permissible for an engineering firm to provide and not be required to register.

Resolving that the ESCO community may continue to provide education regarding how financing is generally managed for GESPC projects but precluding ESCO participation in determining the means of financing selected for a project or the solicitation of providers.

The resulting question is then, "Who within your state or GESPC program administration will be directing the end user/owners to the party(ies) that will be filling this void?"

Asked another way, "How does an end user/owner determine what means of financing a project is best for their application and how will they determine which financier will be providing funds and at what rate?"