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RE: Proposed SB 1520 Rules

The Green Energy Institute at Lewis & Clark Law School respectfully submits the following comment on the rules proposed by the Director of the Department of Consumer and Business Services ("DCBS") implementing Senate Bill 1520. The Green Energy Institute is a policy organization located at Lewis & Clark Law School that works to develop new strategies to promote renewable energy. With that mission in mind, the Green Energy Institute submits these comments in order to gain clarification on how DCBS's proposed rules achieve the balance that the legislature intended between adequate consumer protection and eliminating hurdles to renewable energy cooperative formation.

I. Introduction

The Oregon legislature enacted SB 1520 exempting small-scale renewable cooperatives from registering membership shares or capital stock as securities in order to "encourage the funding of small-scale renewable energy projects." (*See Public Hearing on SB 1520 Before the House Committee of Business and Labor* (statement of Sen. Starr) (Feb. 21, 2014, at 09:09) available at http://oregon.granicus.com/MediaPlayer.php?clip_id=739.) In the interest of consumer projection, however, the legislature conditioned this exemption on any additional requirements imposed by DCBS. Though fully cognizant of DCBS' role in protecting consumers, the Green Energy Institute requests clarification and explanation of some aspects of the proposed rules to ensure that the rules honor the legislative intent of promoting renewable energy cooperatives while also adequately protecting investors.

II. The proposed rules fail to carry out SB 1520's primary goal of promoting renewable energy cooperatives.

SB 1520 aims to promote renewable energy cooperatives by exempting them from state securities registration requirements, thus making their development easier and less costly. However, there are a number of areas in which the Green Energy Institute requests that DCBS substantiate with additional, and numerical, information, how these proposed rules will make it easier for cooperatives to form.

Question 1: Has DCBS calculated how the cost of the non-exempt securities registration process would compare to the cost of complying with the proposed rule's disclosure requirements? If DCBS does not have this data, can it substantiate the claim that the "impact on individuals and cooperative corporations under the proposed rules will be lower than those associated with registration"? (*See* Statement of Need and Fiscal

Impact, 1. Statement of Cost Compliance (filed Jul. 15, 2014) available at http://www.cbs.state.or.us/dfcs/rules_statutes/new_legislation/441-025-0120.pdf.)

Question 2: Has DCBS considered exemptions in other states for guidance? Specifically, has DCBS looked at the new Vermont Solar/ Utility No-Action ("SUN") Exemption, available at http://www.dfr.vermont.gov/sites/default/files/S.U.N.%20Securities%20Exemption%2014-023-S.pdf, which provides self-executing, tailored exemptions for community solar projects that meet certain requirements?

The SUN Exemption, issued on July 21st, 2014, is an order of the State of Vermont Department of Financial Regulation. Like SB 1520, the order created tailored exemptions to the state securities laws. However, unlike DCBS, the Vermont state agency responsible for consumer protection reasoned that "[a] one-size-fits-all exemption would not advance the dual policy objectives of protecting [the state's] investment community while promoting the development and consumption of renewable energy." (S.U.N. Order, at 1.) Accordingly, the SUN Exemption creates four separate securities exemptions, namely "consumer," "financing," "commercial," and "de minimis" exemptions. DCBS should consider a similar approach that recognizes important potential differences in the structure and financing of different renewable energy cooperatives. Specifically, Vermont's consumer exemption applies to projects that require no upfront payments, instead allowing investors to make payments in small installments over time and allowing them a termination right. Because this structure puts "little to no risk on the Investor," very little disclosure is required. (SUN Order, at 4.)

Similarly, Vermont's commercial exemption also features minimal disclosure 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." (SUN Order, at 4.)

Vermont's financing exemption applies to community solar projects that allow investors to participate in the financing of a project through deposits, upfront payments, or long-term commitments without a low-cost termination right. Recognizing that this situation merits investor protection and thus the strictest protections, the Vermont Department of Regulation Securities Division in its order outlined specific protective measures, mandated specific contract verbiage, and required comprehensive disclosure requirements.

Vermont's de minimis exemption exempts from securities registration requirements a group of ten or fewer investors who have a pre-existing, substantive relationship with one another, but also prohibits general advertising or solicitation. So long as a group of investors meets these requirements, the exemption is self-executing, meaning no filing or other disclosure is required.

In sum, Vermont's SUN Exemption strikes a balance between promoting renewable energy and protecting consumers by tailoring the rules to specific situations. It accommodates consumer protection concerns in the most risky situations by requiring expansive disclosures, but it promotes solar development in the small community context by lifting administrative burdens while maintaining advertising limitations.

Has DCBS considered, rather than a blanket, one-size-fits-all exemption for solar cooperatives, one that is situational like the Vermont SUN Exemption? If so, why has DCBS chosen not to go down that path? If not, why does DCBS think that a situational rule would not be appropriate for Oregon, where cooperative structures may be similarly diverse in terms of the types of membership payment structures available or pre-existing relationship among potential cooperative members?

Question 3: How does DCBS envision that its proposed rule's restrictions on advertising will achieve the goal of facilitating renewable energy cooperatives? The proposed rules seem to prevent a cooperative from disclosing essential information about a proposed cooperative, including the size and placement of a renewable energy facility or the existence of a power purchasing agreement with a utility. (Proposed OAR 441-025-0122 (10)(a).) This restriction would seem to prevent a proposed cooperative from demonstrating its legitimacy in an advertisement. The inability to demonstrate a proposed cooperative's legitimacy could stifle the interest of potential investors or make it difficult for potential investors to distinguish between a legitimate cooperative and a scam. Has DCBS considered that the existing advertising restriction places investors at greater risk because it does not allow a cooperative seeking membership to divulge specific information necessary for an investor to determine the cooperative's legitimacy? How do the rules protect potential members from fraud by placing such strict limitations on what details of the project may be revealed?

Question 4: Why does DCBS include both a cap on overall unaccredited investor contribution (Proposed OAR 441-025-0122(3) and a cap for investment from unaccredited investors at 10% of their liquid net worth (Proposed OAR 441-025-0122(5))? The investment limit of 10% of liquid net worth seems adequate to protect unaccredited investors against the failure of a renewable energy cooperative. Why is an overall cap on financing from unaccredited investors necessary, given that the overall contribution cap could be an obstacle for community wind or geothermal, particularly in rural areas where small-scale renewable energy could play a crucial role in the near future?

Question 5: What evidence does DCBS have that renewable energy cooperatives are different in kind from the other cooperatives that enjoy unconditional statutory security exemptions? Can it substantiate the underlying assumption that consumer protection is of greater concern in the renewable energy context than it is in the context of grocery, agricultural, or fisheries cooperatives, or other consumer-cooperative examples? What evidence can DCBS provide that the conditions imposed under this rule will make compliance costs "substantially similar to costs associated with pursuing other available exemptions" if similar exemptions are unconditional? (*See* Statement of Need and Fiscal Impact, 1. Statement of Cost Compliance (filed Jul. 15, 2014) available at http://www.cbs.state.or.us/dfcs/rules_statutes/new_legislation/441-025-0120.pdf.)

III. Conclusion

SB 1520 could play an important role in getting Oregon to its stated goal that at least eight percent of its retail electric load come from small-scale renewable energy projects by 2025. (*See* ORS 469A.210.) However, it is unclear whether at this point the rules imposed by DCBS will cause renewable energy cooperative development to remain prohibitively expensive. DCBS can help clear this uncertainty by substantiating these rules with concrete data showing their cost-effectiveness and making sure they are as dynamic and flexible as possible. Doing so will help DCBS and the public make sure that the interests of consumer protection do not defeat the legislative intent of promoting small-scale renewable energy cooperatives.

Sincerely,

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