ACEC
American Council of Engineering Companies
100 Years of Excellence

David A. Raymond
President & CEO

August 25, 2014

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Alexandria, VA 22314

Re: MSRB Revised Draft Rule G-42

Dear Mr. Smith:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America's engineering industry – I appreciate the opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB's) Revised Draft Rule G-42 regarding the duties of non-solicitor municipal advisors.

ACEC members – numbering more than 5,000 firms representing hundreds of thousands of engineers and other specialists throughout the country – are engaged in a wide range of engineering works that propel the nation's economy, and enhance and safeguard America's quality of life. Many of our member firms work with municipal clients and could potentially be affected by the municipal advisor registration rule and related regulations.

We would like to begin by expressing our appreciation that the MSRB addressed several issues we raised in our comment letter of March 7, 2014, on the initial version of Draft Rule G-42. In particular, we agree with the MSRB's decision to limit the application of fiduciary duty to a municipal advisor's municipal entity clients. In addition, we believe removing the requirement that municipal advisors disclose details pertaining to professional liability insurance was the correct decision. Finally, we appreciate the MSRB's acknowledgement that at least some portion of compliance costs will be passed on to municipal entity clients.

We are, however, disappointed that the MSRB did not address the primary concern we raised. As we previously highlighted, the fiduciary duty of a municipal advisor to act in the interest of a client required by Revised Draft Rule G-42 could come into direct conflict with the engineer's professional and ethical responsibilities to the public at large.

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Engineering is a profession that is heavily regulated by state boards of engineering, and is founded on professional credentials and personal integrity as a condition of licensure. The regulations of the various state licensing boards for professional engineers delineate the ethical duty of the engineer to uphold the safety, health, and welfare of the public. For example, the Commonwealth of Virginia's Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects' current regulations, which have the force and effect of law, provide as follows:

> *The primary obligation of the professional is to the public. The professional shall recognize that the health, safety, and welfare of the public are dependent upon professional judgments, decisions, and practices. If the professional judgment of the professional is overruled under circumstances when the health, safety, and welfare, or any combination thereof, of the public are endangered, the professional shall inform the employer and client of the possible consequences and notify appropriate authorities.*

The same obligation is reflected in the codes of ethics of private professional associations such as ACEC and the National Society of Professional Engineers (NSPE), as well as related professional associations such as the American Institute of Architects (AIA).

In the course of providing professional engineering services to a client, circumstances could arise in which the engineer would find himself or herself facing a conflict between breaching the fiduciary obligations of a municipal advisor and violating the ethical obligations imposed upon the engineer under applicable state licensing board regulations and/or one or more professional associations. This is a conflict that must be resolved, with priority given to the engineer's role in protecting health and safety.

For the purposes of illustrating our concern, consider the following hypothetical set of facts and circumstances, which are loosely based on a story related to ACEC staff by a representative of one of ACEC's member firms. A municipal entity client engages an engineer "to prepare revenue projections to support the structure of an issuance of municipal securities," which services are "outside the scope of the engineering exclusion" and constitute "municipal advisory activity." (See page 229 of the SEC's final rule.) In the course of performing its services, the engineer undertakes a ridership study of the municipal entity's public transportation system. In the course of performing field work in support of this study, the engineer suspects the presence of noxious fumes emanating from the ground beneath one of the transportation system's stations. While for the most part the station is not enclosed, the station does have a large roof structure providing protection for system users. The engineer is concerned about the possibility of these suspected noxious fumes being trapped beneath the roof structure and, over time, accumulating to a level that could potentially be harmful to people. The engineer voices his concerns to his municipal entity client. Concerned over the possible negative consequences such information might have on ridership at this station, the municipal entity client instructs the engineer not speak to anyone else regarding this matter. In such a circumstance, the engineer faces a conflict between his ethical duties as an engineer to

advise his client to address his concerns or the appropriate authorities will be notified, and his fiduciary duty to his client.

Our understanding of Revised Draft Rule G-42 is that the fiduciary duties imposed upon one who provides municipal advisory services will apply only to those services. However, we are concerned that there might not be a bright line between municipal advisory services and non-municipal advisory services in all circumstances. In its final rule, the SEC wrote, in pertinent part, as follows: "While the Commission believes that the determination of whether a person provides advice to or on behalf of a municipal entity or obligated person depends on all the relevant facts and circumstances, the Commission also believes that additional guidance on the advice standard for purposes of the municipal advisor definition will provide greater clarity regarding the applicability of the municipal advisor registration requirement."

We had hoped for greater clarity from the MSRB with respect to the issue of potential conflicts of interest for engineers in performance of serving their municipal clients. Respectfully, we urge the MSRB to address this conflict before finalizing Revised Draft Rule G-42.

Thank you for your consideration of our comments, and we look forward to working with the MSRB as the rulemaking process moves forward.

Sincerely,



David A. Raymond
President & CEO