ACEC
American Council of Engineering Companies
100 Years of Excellence

David A. Raymond
President & CEO

February 18, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File Number S7-45-10

Dear Ms. Murphy:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America's engineering industry – I appreciate the opportunity to provide our comments on the Securities and Exchange Commission's proposed rule on the registration of municipal advisors pursuant to Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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 proposed rule.

As you know, Section 975 of the Act requiring "municipal advisors" to register with the Securities and Exchange Commission (SEC) and the Municipal Securities Rulemaking Board (MSRB) includes an exemption for "engineers providing engineering advice."

The proposed rule expands on this exemption by stating:

> *As discussed above and below, the exclusions from the definition of "municipal advisor" included by Congress in Section 15B(e)(4) of the Exchange Act were limited. With respect to engineers, the exclusion applies to engineers providing "engineering advice." For example, costing out engineering alternatives would not subject an engineer to registration as a municipal advisor because such activity would be considered engineering advice. The exclusion does not include circumstances in which the engineer is engaging in municipal advisory activities, including cash-flow modeling or the provision of information and education relating to municipal financial products or the issuance of municipal securities, even if those activities are incidental to the provision of engineering advice. In addition, the exclusion does not include circumstances in which the engineer is preparing feasibility studies concerning municipal financial products or the issuance of municipal securities that include analysis beyond the engineering aspects*

T 202-347-7474 F 202-898-0068 draymond@acec.org
1015 15th Street, NW, 8th Floor Washington, DC 20005-2605 www.acec.org

of the project and, therefore, an engineer preparing such studies would be subject to registration as a municipal advisor.

ACEC believes that this understanding of the engineering exemption is too narrow and does not reflect congressional intent in specifying the need for an engineering exemption from the definition of municipal advisor. We are particularly concerned about the specific exclusion of cash-flow modeling from the engineering exemption, and the reference to feasibility studies.

Cash-flow modeling is a fundamental engineering activity and generally manifests as either a cost-loaded schedule provided to a client or a record-keeping cash-flow analysis typically occurring during project implementation. Engineers develop "Consulting Engineer's Reports" and "Consulting Engineer's Certificates" as part of official statements required by bond covenants and ordinances. These reports and certificates address such issues as estimated costs of proposed projects. There is a significant difference between this kind of basic financial analysis and guidance that provides recommendations on the issuance of particular types of financial products, such as municipal securities.

This is a critical distinction because in many cases an analysis of funding requirements is inextricable from the design of an engineering project. Examples include water projects that are financed by rate-payers, transit projects that are financed by fares, and toll roads financed by their users. In each of these cases, design of the project cannot proceed without analyzing its costs and cash flow. In addition, engineers provide guidance to clients on alternative phasing of projects to match available revenues or to maximize the infrastructure given limited resources.

For instance, engineering firms, serving in a consultation capacity to transportation agencies or municipalities, are regularly asked to provide analysis that will help the agency or municipality to assess the need for increased fares or tolls on their transportation network. This analysis generally includes cash flow, and is often paired with analysis of information provided by the client for new or improved capacity on their network. Much of this information is also required by federal agencies in order to receive approval for federal funding of these capital projects.

Another case in which engineers are required by federal agencies or other governmental entities to prepare financial analysis is the preparation of facilities plans for wastewater projects. The U.S. Environmental Protection Agency requires a fiscal impact study to show what the financial impact of the project would be on a typical household or business. This is traditional engineering advice that is only performed by engineers – not brokers, dealers, or investment advisors – and differs from advising a municipal client on the means that could be used to fund such projects. We suggest that this type of traditional engineering advice does not meet the definition of municipal advisor as envisioned by Congress because these services do not concern the structuring of municipal financing. We recommend that the SEC clarify the proposed rule so that the kinds of professional engineering activities outlined here are covered by the engineering exemption from the municipal advisor registration regime.

We also recommend that the SEC clarify the application of the engineering exemption to the preparation of feasibility studies. In addition to the points made above about the interwoven nature of financing with design of many engineering projects, we note that Congress specifically included the preparation of studies in its definition of engineering and architectural services. The Brooks Act (40 USC Sec. 1102), which was enacted in 1972, delineates what constitutes engineering services. This definition is used throughout federal programs. The statute states:

> *Sec. 1102. Definitions*
>
> *(2) Architectural and engineering services. – The term "architectural and engineering services" means –*
>
> *(A) Professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;*
> *(B) Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and*
> (C) *Other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.*

The Brooks Act definition of engineering services suggests that the preparation of feasibility studies would appear to be covered by the engineering exemption included by Congress in the Dodd-Frank Act. There are different types of feasibility studies prepared by engineers. One category is technical feasibility studies that solely examine the technical aspects of a potential project. For example, this type of study might analyze whether a water pipe could deliver certain quantities of water over a specified period of time without breaking. In addition, engineers often prepare alternatives analysis feasibility studies, which incorporate a cost analysis of each alternative but do not discuss funding options. Engineering firms sometimes assist municipalities in their development of feasibility studies, which can include analyzing historical financial performance, working with a coherent set of assumptions regarding future conditions, and evaluating project alternatives. While such studies are used in the client's own analysis to support spending and funding decisions, they do not provide advice on the issuance of particular financial products in order to fund a project. We recommend that the SEC clarify that the engineering exemption should apply to the types of feasibility studies outlined above.

We would appreciate the opportunity to work with the SEC to refine its interpretation of the engineering exemption to the municipal advisor registration regime so that it more clearly reflects congressional intent and the nature of professional engineering work. Thank you for your consideration.

Sincerely,



David A. Raymond
President & CEO