ACEC
American Council of Engineering Companies
100 Years of Excellence

David A. Raymond
President & CEO

April 11, 2011

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

Re: Draft Rule G-36

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 provide our comments on the Municipal Securities Rulemaking Board's (MSRB) proposed rule concerning the fiduciary duty 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 requires "municipal advisors" to register with the Securities and Exchange Commission (SEC) and the MSRB. The statute also includes an exemption from registration for "engineers providing engineering advice."

The SEC has issued a proposed rule providing interpretation of what constitutes engineering advice. 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. In our comments to the SEC, we highlighted our concerns about the specific exclusion of cash-flow modeling from the engineering exemption, and the reference to feasibility studies. We have asked the SEC for the opportunity to work with them to refine the agency's 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.

Depending on the interpretation of the engineering exemption in the SEC's final rule, certain engineers and engineering firms may need to register as municipal advisors. There is a potential conflict for engineers that register as municipal advisors and must

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therefore assume the fiduciary duties outlined in MSRB draft rule G-36. The draft rule states: "In the conduct of its municipal activities on behalf of municipal entities, a municipal advisor shall be subject to a fiduciary duty, which shall include a duty of loyalty and a duty of care." A duty of loyalty requires a municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best interests without regard to financial or other interests of the municipal advisor. While this duty may not, in the normal course of events, cause any conflicts for the engineer, there are circumstances when such duties could come into direct conflict with the engineer's professional and ethical responsibilities.

The ethical duty of engineers to hold paramount the safety, health, and welfare of the public is delineated in the regulations of the various state licensing boards for professional engineers. For example, the Commonwealth of Virginia's Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects' current regulations 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, it is conceivable that circumstances could arise in which a professional 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 professional engineer under applicable state licensing board regulations. By failing to address such a conflict, MSRB draft rule G-36 does not serve the interests of the public, which looks to professional engineers to solve many of society's problems.

In addition to conflicts related to engineering codes of ethics, the same fiduciary and duty of loyalty provisions can be in conflict with normal expectations when engineering firms are involved in demand and revenue forecasting. An example would be traffic and revenue forecasts for a toll facility. In that role, the engineer is expected to operate independently of the client as he or she prepares estimates of revenue. These forecasts may be at odds with client expectations, and this "arm's length" relationship is essential to the credibility of the study product. In this role, engineers are not actually serving as 'advisors' to the client but rather as independent forecasters providing a critical component to the design process.

We respectfully request that the MSRB consider these issues and advise ACEC and the engineering industry how such conflicts can and should be managed. Thank you for your

consideration of our comments. We look forward to working with the MSRB on these issues as the rulemaking process moves forward.

Sincerely,



David A. Raymond
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