



DAVID A. RAYMOND
PRESIDENT & CEO

March 7, 2014

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

Re: MSRB 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) 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.

As you know, Section 975 of the Dodd-Frank financial services reform law requires “municipal advisors” to register with the Securities and Exchange Commission (SEC) and the MSRB. The statute contains an exemption from registration for “engineers providing engineering advice.” The final municipal advisor registration rule approved by the SEC on September 18, 2013 includes additional exemptions, such as the general information exemption and the independent registered municipal advisor exemption, which may be utilized by engineering firms. However, the SEC’s definitions of municipal advisor and advice in the final rule may not fully shield all engineers from registration.

There is a potential conflict for engineers that register as municipal advisors and must therefore assume the fiduciary duties outlined in MSRB draft rule G-42. The draft rule states: “A municipal advisor to a municipal entity client shall, in the conduct of all municipal advisory activities for that client, be subject to a fiduciary duty that includes 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.

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. In such a circumstance, it would be detrimental to the health, safety, and welfare of the public to prioritize the engineer's fiduciary duty to his or her client. By failing to address such a conflict, MSRB draft rule G-42 does not serve the interests of the public.

Based on these concerns, we respectfully request that the MSRB address how the conflict between an engineer's duty to public health and safety and fiduciary duty to a municipal client can be managed.

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, yet 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. Once again, we ask the MSRB to address how the engineer can manage the conflict between these requirements.

In its notice, the MSRB specifically requested comment on whether the municipal advisor's fiduciary duty should be limited to a municipal advisor's municipal entity clients. This question is pertinent to engineering firms that register as municipal advisors, in terms of the professional services they provide to different municipalities. It is likely that an engineering firm that registers as a municipal advisor will have municipal clients for which it does purely technical engineering work. It would be inappropriate to impose fiduciary duty on the engineering firm in such circumstances. Requiring engineering firms that register as municipal advisors to assume a fiduciary duty toward all municipal entity clients would, as noted above, provide fertile ground for a conflict between the engineer's primary ethical duty to protect public health, safety and welfare, and the fiduciary's duty to protect the interests of his or her client.

The MSRB also requested comment on whether to require disclosure of the amount of professional liability insurance (PLI) carried by a municipal advisor. We question whether this information would provide a benefit to municipalities seeking to hire municipal advisors. The amount of PLI coverage would not appear to correlate with the experience and qualifications of the municipal advisor, or the quality of their services.

In addition, there is significant uncertainty whether PLI carried by engineers would cover fiduciary duty that goes beyond the standard of care, such as design flaws, to a duty of loyalty. If claims arising out of an alleged breach of a fiduciary duty are not covered by the engineering firm's current PLI policy, the firm would face two choices. The firm could elect to acquire additional insurance coverage, the cost of which would be passed along to all of the firm's clients through the firm's general and administrative overhead rate regardless of the nature of the firm's services on behalf of any given client. Alternatively, as the MSRB's current regulations do not require a municipal advisor to maintain professional liability insurance covering fiduciary duties, the firm could elect not to procure such additional insurance coverage so as to avoid having to increase the cost of its services to all of its clients in a very competitive environment.

Finally, the MSRB asked whether the compliance costs associated with registration as a municipal advisor would be passed on to municipal entity clients in the form of higher fees. It seems reasonable to assume that at least some portion of these costs will be reflected in higher contract prices. The filing, record-keeping, and employee training costs are too substantial for most engineering firms to absorb. We expect that the municipal entity client would pay for some part of the additional services, such as fiduciary duty and associated insurance costs, which they will be receiving from registered municipal advisors. As an example, the Federal Acquisition Regulation, which regulates the work of engineering firms and other federal contractors, generally allows the legal and regulatory costs of doing business to be charged to the client.

We respectfully request that the MSRB consider the issues we have raised. Thank you for your consideration of our comments, and we look forward to working with the MSRB as the rulemaking process moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. Raymond". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

David A. Raymond
President & CEO