April 10, 2023

Ms. Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Chair Khan:

The American Council of Engineering Companies (ACEC) – the national voice of America's engineering industry – would like to share our concerns about the Federal Trade Commission's (FTC) proposed rule that would ban non-compete agreements in most cases.

Founded in 1906, ACEC is a national federation of 51 state and regional organizations representing more than 5,500 engineering firms and nearly 600,000 engineers, surveyors, architects, and other specialists nationwide. ACEC member firms drive the design of America's infrastructure and built environment.

ACEC understands the FTC's mission to promote competition. The thousands of firms that make up the engineering industry compete with each other and with engineering firms from abroad every day. Strong wages and generous employee benefits are the norm in the industry, which is vital as our industry competes with many others for engineering talent. Data from the Bureau of Labor Statistics shows that the engineering workforce is at full employment and the National Science Foundation reports that the number of bachelor's degrees awarded in engineering is not growing quickly enough to keep up with workforce needs.

The FTC's proposed rule would ban the use of noncompete agreements in most cases and require that existing noncompete agreements be rescinded. ACEC member firms have varying practices when it comes to the use of noncompete agreements. However, there is consensus that the FTC's proposal is too broad and that engineering firms should have access to certain legal tools that protect the firm's client relationships, intellectual property and trade secrets. ACEC recommends that the proposed rule be improved in the following ways to balance the rights of employees to seek different employment with the engineering firm's need to protect proprietary information and other assets of the firm.

Noncompete agreements for firm owners

The proposed rule would ban noncompete agreements except in the limited case of an individual who owns at least 25 percent of a business that is being sold or acquired. Employee ownership – whether through a formal employee stock ownership plan (ESOP) or by a group of senior leaders – is the norm in the engineering industry.

Ownership of an engineering firm is a transparent transaction. Employees who choose to become owners of their firms are not surprised if the firm includes certain restrictions in ownership agreements. For example, some firms do not seek to prevent owners from leaving for another firm or starting their own firm but may prevent them from taking clients, other employees, or proprietary information with them. Other ownership agreements may include language on a payment schedule for the buyback of their shares in the firm if the owner goes to work for a competitor.

The narrow exception to the noncompete agreement ban in the proposed rule for individuals who own at least 25 percent of a business that is being sold or acquired will rarely be met in an industry with broad-based employee ownership. ACEC recommends that the proposed rule be modified to allow noncompete agreements for any owners of an engineering firm with the understanding that the requirement for a noncompete agreement must be disclosed at the beginning of an ownership process.

Clarity on acceptable alternatives to noncompete agreements

The FTC's proposed rule does not explicitly ban other types of restrictive covenants, including agreements on customer non-solicitation, employee non-recruit, and non-disclosure of intellectual property or other confidential information. However, the FTC has stated that it will use a "functionality test" to determine whether these restrictive covenants are broad enough that they function as a *de facto* noncompete agreement that would be banned under the proposed rule.

Employers need clarity regarding when the FTC would consider these other restrictive covenants to be a noncompete agreement. A final rule should provide certainty for employers and allow them to use restrictive covenants to protect the firm's clients, employees, and intellectual property.

Rescission of existing noncompete agreements

The FTC's proposed rule would require employers to rescind existing noncompete agreements and actively inform their employees that they are no longer in effect. Many engineering firms provide substantial financial consideration – sometimes as much as an employee's salary for the period of noncompetition – in exchange for signing the noncompete agreement.

The proposed rule does not speak to whether employers can require employees to return financial consideration provided in connection to an existing noncompete agreement that

was rescinded. This would result in a windfall for employees and impose a financial penalty on employers that used a tool that was legally available at the time of signing.

ACEC recommends that the proposed ban on noncompete agreements be prospective, not retroactive. If the FTC pursues a retroactive ban, then the rule should clarify that the employer has the right to require the employee to return any financial consideration provided as part of the rescinded noncompete agreement.

ACEC urges the FTC to revise its proposed rule to better reflect the need for engineering firms and other employers to protect the assets of the firm. Thank you for your consideration and please let me know how we can assist in this matter.

Sincerely,

Linda Bauer Darr
President & CEO