

April 19, 2023

Lina M. Khan
Chair
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

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

Dear Chairwoman Khan:

On behalf of the undersigned 46 organizations representing more than 178,000 osteopathic physicians (DOs) and osteopathic medical students, we thank you for this opportunity to comment on the Non-Compete Clause Proposed Rule. We appreciate the work that the Federal Trade Commission (FTC) has undertaken to ensure that businesses may no longer abuse non-compete clauses to unfairly discourage or limit competition.

Background

The healthcare industry, and particularly the medical profession, is disproportionately impacted by the abuse of non-compete clauses in employment contracts. As noted in the proposed rule, nearly 45% of physicians are bound by non-compete clauses in their contracts.¹ These clauses are often used by employers with the intent of limiting competition by preventing physicians from practicing within a certain geographic region.

In addition to limiting physicians' mobility and employment opportunities, the use of non-competes also has a negative impact on patient care and healthcare costs. Larger enterprises based in major metropolitan areas will often acquire physician practices across a broad geographic region, including in communities where the number of providers is limited, and utilize non-competes to restrict competition across the communities in which they operate. In these communities, enterprises are able to leverage their market share in a manner that results in decreased access to care and higher costs for consumers. Evidence highlighted in the proposed rule confirms this practice, with one study specific to the healthcare industry finding that as enforceability of non-compete clauses across states increased, concentration at the firm level and price of final goods also increased.² Our healthcare system is currently grappling with the challenge of greater consolidation, including the vertical integration of physician practices with larger health systems. Between 2010 and 2016, the proportion of primary care practices owned by hospitals nationwide grew from 28% to 44%. Additionally, 39% of healthcare markets, defined by metropolitan statistical areas, are considered "highly concentrated," meaning that they are

¹ Kurt Lavetti, Carol Simon, & William D. White, "The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians", 55 J. Hum. Res. 1025, 1042 (2020)

² Naomi Hausman & Kurt Lavetti, "Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes", 13 Am. Econ. J. Applied Econ. 258, 284 (2021)

dominated by a limited number of providers.³ Non-compete clauses are just one tool that vertically integrated systems utilize to limit competition and grow their market share, with the negative outcome of higher costs and reduced access for patients.

Osteopathic physicians play a critical role in our healthcare system, often serving in rural and underserved communities. As physicians practicing in these settings, we have a deep understanding of the factors that influence patients' access to care, the critical need to maintain continuity of such care, and the impact that delays in access have on adherence to treatment plans and ultimately health outcomes. Nearly 99 million Americans reside in a primary care health professional shortage area⁴, and abuses of non-compete clauses can further exacerbate workforce challenges in many communities. With this perspective, we offer the following feedback in response to the FTC's request for comments on the proposed rule's provisions.

Scope of Proposed Rule

The rule, if finalized, would broadly prevent employers from including non-compete clauses in contracts that prevent a worker from seeking or accepting employment or operating a business after the worker is no longer employed by the employer. To achieve this, the rule would create a new subchapter under the Federal Trade Commission Act's regulations to designate non-compete clauses as an unfair method of competition.

The rule broadly defines the term "worker" to be inclusive of employees, independent contractors, sole proprietors, volunteers, interns, and any other individuals who work for an employer. The rule would also apply to employees at all skill and compensation levels. We appreciate the approach that the FTC has taken, which considers the broad range of employment and contracting practices that employers adopt in the healthcare space, particularly in regard to physicians.

In defining non-compete clauses, the FTC has constructed the rule to apply to clauses based on how they function in employment contracts, rather than based on how they are referenced. To do this, the FTC defines a non-compete clause as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer". The definition also includes de facto non-compete clauses that have the effect of prohibiting a "worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."⁵ This approach, which defines contractual terms based on how they function, will help to broadly prevent the use of restrictive and inappropriate non-competes while not being overly inclusive of all restrictive covenants.

³ Brent D. Fulton. "Health Care Market Concentration Trends In The United States: Evidence And Policy Responses." *Health Affairs* 36, no. 9 (September 1, 2017): 1530–38.

⁴ [Health Resource & Services Administration](#), 2022.

⁵ Federal Trade Commission. "Non-Compete Clause Rule". *Federal Register*. January 19, 2023.

While the AOA opposes the use of non-competes by large enterprises that may control an outsized share of a particular market, there may be limited instances where a non-compete can serve a legitimate business purpose for smaller practices struggling to compete in markets predominantly controlled by a limited number of hospital or health systems. While we appreciate the FTC's efforts to broadly limit abuses through the implementation of a categorical ban, we believe a narrowly tailored exception could be developed that balances the need to prevent abusive non-competes with the need to permit those that have a legitimate function to support a healthy market.

Applicability to Non-Profit Organizations

The undersigned groups have concerns that the rule's impact in the healthcare market may be limited, as certain employers, such as those not subject to the FTC Act, would be exempt. As noted in the proposed rule, exempt employers would include "an entity that is not 'organized to carry on business for its own profit or that of its members.'"⁶ We strongly urge the FTC to identify a pathway, including through potential collaboration with other federal agencies, to ensure that non-profit entities are also prohibited from misusing non-compete clauses. Many hospitals and large health systems are registered as non-profit organizations but operate similar to for-profit businesses through many of their practices. In many cases, these not-for-profit entities can be the dominant healthcare provider within a market, and their use of non-compete clauses can significantly restrict physicians' employment opportunities and patient choice. We urge the FTC to identify a pathway to prevent non-profits from behaving like for-profit entities in ways that seek to limit market competition.

Alternative Proposals Considered by the FTC

Rebuttable Presumption

Instead of a categorical ban, the FTC also considered adopting a "rebuttable presumption" of invalidity, whereby use of non-compete clauses would be presumptively unlawful but could be permitted if the employer met a certain evidentiary burden demonstrating that the clause was appropriate and did not unfairly limit competition. For example, in certain metropolitan areas where there is a maldistribution of providers and a limited presence of independent practices relative to physicians affiliated with larger health systems, the use of non-compete clauses by smaller organizations could be appropriate and not unfairly limit competition. However, this would need to be determined on a case-by-case basis, with the non-compete clause meeting a certain test to demonstrate that it protects a legitimate business interest. For example, the size of the business in terms of annual revenue and share of a market could be considered. The test would also need to be carefully constructed to ensure that any rebuttable presumption only allows exceptions in a limited set of circumstances and prevents large enterprises with substantial legal resources from continuing to abuse non-compete contract clauses. Such a narrow construction will help ensure that the rule serves its intended goal of preventing abuses that limit competition. Our organizations welcome the opportunity to work with the FTC to develop the implementing rules and legal test that would be applied under this approach.

⁶ Federal Trade Commission. "Non-Compete Clause Rule". *Federal Register*. January 19, 2023.

Differentiation

The FTC notes that it considered constructing the rule in a manner that would apply differently to different categories of workers. For example, the rule could apply differently based on income level or employment type. Our organizations would urge caution with this approach, as it may not adequately address the misuse of non-competes within certain industries, such as healthcare. For example, if a state determines the enforceability of non-competes based on an income threshold, such clauses could continue to be used among physicians. If the FTC does choose to move forward with this approach, we urge the commission to consider how rules can be constructed to ensure that it has the intended effect across all affected industries.

Disclosure or Reporting Rules

As alternatives to the current proposal, the FTC considered establishing disclosure and reporting rules whereby employers would be required to 1) disclose non-compete clauses within contracts prior to the worker's acceptance of an offer to ensure greater transparency, and 2) report certain information relating to their use of non-compete clauses to the FTC to enable the Commission to monitor the use of such clauses. We do not support this approach and we agree with the FTC's assessment that it would be insufficient to achieve the goal of limiting the misuse of non-compete clauses in employment contracts.

Once again, our organizations thank you for the opportunity to comment on this proposed rule. We commend the FTC for working to address unfairly restrictive non-compete clauses which can limit patient access to care and drive-up healthcare costs. We look forward to continuing to work with the FTC as it develops final regulations. Should you have any questions regarding our comments or recommendations, please contact John-Michael Villarama, MA, AOA Vice President of Public Policy, at (202) 349-8748 or [jvillarama@osteopathic.org](mailto:mvillarama@osteopathic.org) at any time.

Sincerely,

American Osteopathic Association
Alaska Osteopathic Medical Association
American Academy of Osteopathy
American College of Osteopathic Emergency Physicians
American College of Osteopathic Family Physicians
American College of Osteopathic Internists
American College of Osteopathic Obstetricians and Gynecologists
American College of Osteopathic Pediatricians
American College of Osteopathic Surgeons
American Osteopathic Academy of Addiction Medicine
American Osteopathic Academy of Orthopedics
American Osteopathic Academy of Sports Medicine
American Osteopathic College of Anesthesiologists
American Osteopathic College of Occupational and Preventive Medicine
American Osteopathic College of Physical Medicine & Rehabilitation
American Osteopathic College of Radiology

American Osteopathic Colleges of Ophthalmology & Otolaryngology-Head and Neck Surgery
Arizona Osteopathic Medical Association
Connecticut Osteopathic Medical Society
Delaware State Osteopathic Medical Society
Florida Osteopathic Medical Association
Georgia Osteopathic Medical Association
Idaho Osteopathic Physicians Association
Indiana Osteopathic Association
Iowa Osteopathic Medical Association
Louisiana Osteopathic Medical Association
Maine Osteopathic Association
Maryland, Maryland Association of Osteopathic Physicians
Massachusetts Osteopathic Society
Michigan Osteopathic Association
Michigan Osteopathic Association
Michigan Osteopathic Association
Minnesota Osteopathic Medical Society
New Jersey Association of Osteopathic Physicians and Surgeons
New York State Osteopathic Medical Society
North Carolina Osteopathic Medical Association
Ohio Osteopathic Association
Oklahoma Osteopathic Association
Osteopathic Physician & Surgeons of California
Pennsylvania Osteopathic Medical Association
Rhode Island Society of Osteopathic Physicians and Surgeons
Tennessee Osteopathic Medical Association
Texas Osteopathic Medical Association
Utah Osteopathic Medical Society
Virginia Osteopathic Medical Association
Wisconsin Association of Osteopathic Physicians & Surgeons