March 1, 2023

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

Re: Non-Compete Clause Rule (RIN 3084-AB74)

Dear Chair Khan,

On behalf of the American College of Physicians (ACP), I am pleased to share our comments on the proposed 16 CFR Part 910 RIN 3084-AB74 Non-Compete Clause Rule. The College is the largest medical specialty organization and the second-largest physician group in the United States. ACP members include 160,000 internal medicine physicians, related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

The College commends the Federal Trade Commission (FTC) for releasing a proposed rule to address issues with non-competes at the federal level to prevent unfair methods of competition. While non-compete clauses, also known as restrictive covenants, are typically governed by state law, this proposed regulation asserts that the FTC has authority to regulate non-compete agreements between employers and employees under Section 5 of the Federal Trade Act. The FTC has acted against non-compete agreements in health care in some cases where it believes that such agreements harm competition and ultimately harm consumers. For example, in 2018, the FTC settled with a group of dental companies for using non-compete agreements that the agency deemed to be anticompetitive.[i]

The College recognizes that non-compete clauses are an attempt to balance the interests of employers and the public with the interests of the employee; however, many do not strike the right balance. Therefore, addressing non-competes that potentially create opportunities for employers to exploit their bargaining power and hinder innovation or prevent new businesses from starting is important. As the FTC recognizes in the proposed rule, non-competes can be problematic in several ways. In industries where employees have access to sensitive information or trade secrets, such as technology, health diagnostic and therapeutic R&D, or finance, a non-compete can protect an employer's potentially valid business interests, such as the misappropriation of confidential information or trade secrets. However, they can also be too broad or altogether unnecessary necessary to protect a company's legitimate business interests, when a less restrictive approach, such as non-disclosure or non-solicitation agreements, may be sufficient for protecting the employer's rights. In these cases, non-competes unfairly limit an employee's ability to find a new job and force them to relocate to a different region or state.

From a physician perspective, although higher compensation or other benefits may accompany non-compete clauses, the resulting restrictions on their ability to practice for a specific period of time within

a particular geographic area after departing an organization may disrupt the patient-physician relationship. As stated in "Ethical and Professionalism Implications of Physician Employment and Health Care Business Practices" an ACP policy paper published in *Annals of Internal Medicine,* **the College views the patient-physician relationship as paramount—employment contracts should not restrict physicians' actions to promote patients' best interests.**[ii] Therefore, we strongly advise that physicians should not sign contracts that, "(a) unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and (b) do not make reasonable accommodation for patients' choice of physician." **Overall, all "contract provisions affecting practice should align with the ethical commitments of physicians and be subject to negotiation that recognizes that alignment."**

A survey in 2007 found that 45% of primary care physicians sign non-compete agreements.[iii] More recently, non-competes have been documented to prevent physicians from practicing medicine in their communities when they want to change jobs, thus potentially limiting patients' access to their regular source of care.[iv] Continuity of care is known to improve outcomes, particularly for patients with complex chronic conditions.[v] This issue may be compounded by the recent "Health of U.S. Primary Care" scorecard that found that the primary care physician workforce is shrinking and gaps in access to care appear to be growing.[vi] According to the Association of American Medical Colleges (AAMC), it is estimated that there will be a shortage of between 17,800 and 48,000 primary care and 21,000 and 77,100 non-primary care physicians by 2034.[vii]

There is also an ongoing trend of consolidation and mergers of health care employers, with at least 1,600 known hospital mergers in the United States between 1998-2017.[viii] The impact of physician non-competes on patients, especially when accounting for employer consolidation and physician workforce shortages, is potentially fewer physicians caring for patients in areas with limited employment options and therefore further reduced patient access to care.

A critical question that has been raised about the proposed rule in terms of its overall impact on the health care industry is the extent to which it applies to nonprofit health care organizations. In 2021, 58% of hospitals were nonprofit, 18% were government-owned, and 24% were for-profit.[ix] This question was not specifically addressed in the proposed rule, but interpretations to date indicate it is likely that many health care organizations that have qualified as Section 501(c)(3) entities would not be considered an "employer" subject to the prohibition on non-competes.[x] However, it is more complex than simply their overall tax-exempt status, depending on several factors, including the receipt of unrelated business income by an organization. **Therefore, given the significant market presence of nonprofit organizations in the health care industry, the College calls on the FTC to clarify if and/or how this rule will impact nonprofit health care organizations.**

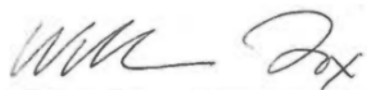
Also of importance in this consideration is how hospitals attain tax-exempt status and whether they are meeting the necessary standards. In general, hospitals qualify for tax-exempt status by meeting a community benefit standard to determine whether they are "organized and operated for the charitable purpose of promoting health" and "serve(s) a public rather than a private interest"[xi] The Patient Protection and Affordable Care Act added additional requirements, including but not limited to an obligation to conduct a community health needs assessment every 3 years. Hospitals have flexibility in how they define community benefit and the level of community benefit they provide; however, critics argue that some nonprofits are not meeting their obligation to act in the community's benefit.[xii]

Given these concerns, the College recommends that "nonprofit hospitals be required to provide measurable benefits to the community in exchange for their nonprofit status, with accountability, transparency, and strict enforcement of regulatory standards for nonprofit status."[xiii] Further, nonprofit hospitals that fail to meet requirements for providing measurable benefits to their communities should have their nonprofit status revoked.

The College commends the FTC for addressing the issue of noncompete clauses. We call on the agency to ensure that contract provisions affecting health care entities align with the ethical commitments of physicians, not restrict physicians' actions to promote their patients' best interests, protect patient access to care, and ensure that the patient-physician relationship is paramount. Simply put, the practice of medicine must be defined by the ethics of medicine. Intrinsic motivations of service, professionalism, and clinical integrity must guide physicians and be respected by institutions and health systems. Trust in systems, individual clinicians, and the patient–physician relationship demands no less.

ACP greatly appreciates the opportunity to share our perspective and provide requested information on the 16 CFR Part 910 RIN 3084-AB74 Non-Compete Clause Proposed Rule. We look forward to continuing to work with the FTC to implement policies that support and improve the practice of internal medicine. Please contact Brian Outland, Ph.D., Director, Regulatory Affairs for the American College of Physicians, at boutland@acponline.org or (202) 261-4544 with comments or questions about the content of this to inform future rulemaking and legislation.

Sincerely,



William Fox, MD, FACP
Chair, Medical Practice and Quality Committee
American College of Physicians

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[i] https://www.ftc.gov/news-events/news/press-releases/2018/02/ftc-sues-dental-products-distributors-alleged-conspiracy-not-provide-discounts-customer-segment
[ii] https://www.acpjournals.org/doi/epdf/10.7326/M20-7093
[iii] JAMA Health Forum. 2021;2(12):e214018. doi:10.1001/jamahealthforum.2021.4018.
[iv] JAMA Health Forum. 2021;2(12):e214018. Doi:10.1001/jamahealthforum.2021.4018.
[v] https://bmcprimcare.biomedcentral.com/articles/10.1186/s12875-021-01493-x
[vi] https://www.milbank.org/publications/health-of-us-primary-care-a-baseline-scorecard/#.Y_YZnbwZMHw.twitter
[vii] HS Markit Ltd. The Complexities of Physician Supply and Demand: Projections From 2019 to 2034. Washington, DC: AAMC; 2021.
[viii] Gaynor, M. What to Do about Health-Care Markets? Policies to Make Health-Care Markets Work, Policy Proposal No. 2020–10, The Hamilton Project.
[ix] https://www.kff.org/other/state-indicator/hospitals-by-ownership/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D
[x] https://www.stevenslee.com/health-law-observer-blog/ftc-proposed-non-compete-ban-impact-on-nonprofit-hospitals-and-nonprofit-affiliates/
[xi] https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3
[xii] https://www.everycrsreport.com/reports/RL34605.html
[xiii] https://www.acpjournals.org/doi/10.7326/m21-1178