



April 19, 2023

The Honorable Lina Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

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

Dear Chair Khan,

Thank you for the opportunity to provide input into the Federal Trade Commission's (FTC) proposed rule that would ban employers from imposing noncompete agreements on their workers. The FTC's work to address anti-competitive business practices across our nation's workforce, including in the health care industry, is vital to the health of our economy.

The Partnership to Empower Physician-Led Care (PEPC) is a membership organization dedicated to supporting value-based care among independent physicians and practices to reduce costs, improve quality, empower patients and physicians, and increase access to care. Our members include Aledade, American Academy of Family Physicians (AAFP), California Medical Association, and Medical Group Management Association (MGMA). We also have individual and small medical group supporters across the country, many of whom are independent physicians or practices and wish to remain so.

We believe that physicians – especially independent physician practices – are the lynchpin of our nation's health care system. Independent physicians have repeatedly demonstrated their superior ability to generate positive results in value-based care arrangements, both in improved health outcomes and reduced costs. In our vision of the future, this important piece of the health care system not only survives, but thrives as a result of policies that place independent physicians on a level playing field with other providers and opportunities to test new models with components that reflect their unique circumstances.

However, consolidation in the health care sector has put the future of independent practice at risk and in turn jeopardizes equitable access to care in patients' own communities. Increasing consolidation in the hospital and provider markets creates greater urgency to ensure the survival of independent practices. In recent years, there has been a historic pendulum swing between employed physicians and private practice. In 2021, for the first time, the American Medical Association found that less than 50 percent of physicians in the U.S. are in independent practice. Between July 2020 and January 2021, the rate at which hospitals employ physicians increased by three percent. The situation has only worsened since then, as private equity firms and other players have redefined what consolidation looks like in health care.

There is widespread recognition that provider consolidation leads to higher costs without measurable improvements in quality. Recent studies highlighted in a March 2020 Medicare Payment Advisory Commission (MedPAC) [report](#) found that provider consolidation with hospital/health systems led to an increase in commercial prices from three percent to 14 percent, without corresponding increases in

efficiencies or quality. The report found that patients were more likely to choose a high-cost, low-quality hospital when their provider was employed by the hospital; physicians whose practices were acquired by hospitals were more likely to bill for more services in the hospital setting and fewer in the office setting; and hospital acquisitions of a physician practice had little effect on improved outcomes on a range of issues, such as mortality, acute circulatory conditions, and diabetes complications.

Given this climate, we support action to increase competition among providers to achieve key health care goals such as improved quality, reduced cost, and increased access to care. There are many steps that the Administration, Congress, and states must take to fully achieve this goal; limiting unreasonable non-compete clauses that cause harm to physicians and their patients is one such step. We recognize, however, that not all uses of non-compete clauses are unreasonable and that there may be some circumstances where reasonable non-compete terms should be allowed as a key employee retention tool to help sustain independent practices. As such, we believe that the FTC could limit abuse of these contractual clauses while retaining the option for the use of non-compete clauses in limited health care use cases.

Below are comments on how the FTC can strike an appropriate balance across competing interests to achieve its ultimate goals of promoting competition and protecting consumers, in addition to other steps the Administration can take to increase competition in the health care sector.

### **Considerations for Non-Compete Clauses in the Health Care Industry**

An April 2022 [survey](#) found that ninety percent of doctors are currently or were previously bound by noncompete clauses. Typically, noncompete agreements are used to bar a physician from practicing medicine for a certain period of time within a defined geographic area to prevent physicians from moving to a competing practice after an employer has invested in those physicians.

We support the FTC's decision to ban the use of non-compete clauses in most instances. There may be some circumstances where the anti-competitive risk is lower than in other circumstances, or where the benefit of a reasonable non-compete clause outweighs any risks or harm. We suggest that the FTC develop a framework for evaluating these cases.

As noted in the proposed rule, noncompete agreements can be particularly restricting and harmful in health care given the rapid consolidation in the market. MedPAC has [reported](#) that in most markets by 2017, a single hospital system accounted for over 50 percent of inpatient admissions. A January 2023 [analysis](#) from the Commonwealth Fund suggests this trend is only worsening; in 10 states plus D.C., two hospital systems account for the majority of Medicare inpatient hospital spending in the entire state. In these instances, a physician bound by a non-compete could have to make the exceptionally difficult decision between staying in a job they wish to leave, or uprooting their lives and moving to a different state. This is particularly concerning given the unprecedented rates of [burnout](#) the nation's physician workforce is currently experiencing. Noncompete agreements can also negatively impact patients by impeding access to care, disrupting care continuity, and deterring advocacy for patient safety.

However, in some instances, reasonable noncompete clauses also serve as a retention tool for small and independent practices competing against hospitals and health systems, particularly in rural areas that

already face physician shortages. We believe that the Commission should robustly engage with independent practices, particularly in these rural and underserved areas, to fully understand the implications of this proposed rule. These practices, who suffer the most from health care consolidation, should be at the forefront of policy decision-making.

We also note that non-compete clauses are used by non-profit health care entities as well as for-profit health care entities. In the health care industry, many of the large private sector providers that use non-compete clause are non-profit hospitals and health systems. Nearly [60 percent](#) of hospitals were non-profit in 2021, a figure that has held relatively constant for decades.

As a result, a significant percentage of the overall health care workforce may not be impacted by this proposed rule and would thus be permitted to continue using non-compete clauses. We encourage the FTC to consider the implications of this regulatory disparity, and to work with other federal agencies such as the Internal Revenue Services (IRS) to ensure consistent regulatory structures across both non-profit and for-profit entities. If FTC were to finalize a non-compete ban that applies only to for-profit entities, small and independent practices who continue to operate as for-profit entities on very low margins and at a competitive disadvantage compared to other practice settings that receive higher payments for the same services, would be significantly disadvantaged.

**We urge the FTC to work with stakeholders to ensure that this policy will not have a disproportionately negative impact on small and independent practices, and truly addresses our shared goals of addressing anti-competitive practices in health care.**

#### **Other Steps the Administration Can Take to Promote Competition in Health Care**

Increasing consolidation in the provider market creates greater urgency to ensure that value-based care is a path to sustainability for practices and physicians who are independent and wish to remain so. We believe that the primary care physician-patient relationship is most powerful when there is patient choice and provider competition within local markets. **We support legislative and regulatory action that creates parity across practice settings; aligns incentives to enable a range of providers to move toward value-based care; and prohibits anti-competitive behavior such as information blocking.**

#### *Antitrust Enforcement*

We were pleased to see the Department of Justice's (DOJ) Antitrust Division and the HHS Office of the Inspector General (OIG) sign a memorandum of understanding ([MOU](#)) in December 2022, strengthening the [partnership](#) between the two agencies to promote competitive health care markets. As the Administration continues to pursue oversight and antitrust enforcement, we urge it to keep small and independent practices in mind.

As outlined by the [Brookings Institution](#), antitrust authorities are currently constrained in a number of ways, including limited available data and resources, as well as a high threshold of pre-merger notification. In 2023, pre-merger notification to federal antitrust authorities was required for transactions over \$111.4 million, meaning that many acquisitions, particularly of physician practice, go unnoticed until the merger has been finalized. Greater transparency and strengthened antitrust statutes could help reduce the amount of anticompetitive consolidation in health care. **We encourage the FTC to continue to work with**



**Congress to ensure it has the resources needed to be effective in researching and pursuing new and develop issues related to health care consolidation and competition.**

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Thank you in advance for your consideration of these comments. Please do not hesitate to reach out to me if you have questions or the Partnership to Empower Physician-Led Care (PEPC) can be a resource to you. I can be reached at [kristen@physiciansforvalue.org](mailto:kristen@physiciansforvalue.org) or 202-640-5942.

Sincerely,

Kristen McGovern  
Executive Director