

AMERICAN ASSOCIATION OF  
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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

**Subject: Non-compete Clause Rulemaking, Matter No. P201200**

Dear Chair Khan,

On behalf of the American Association of Neurological Surgeons (AANS) and the Congress of Neurological Surgeons (CNS), representing more than 4,500 practicing neurosurgeons in the United States, we appreciate the opportunity to comment on the Federal Trade Commission's (FTC) proposed rule regarding non-compete clauses.

In general, the AANS and the CNS concur with the FTC that non-compete clauses — particularly as used by large employers — can be anti-competitive and unduly restrict the ability of individuals to change jobs. This is true in the health care system, where non-compete agreements limit physicians' ability to choose their employer or practice setting, stifling competition and impeding patient access to the physician of their choice. Such restrictions are particularly concerning given the projected shortages<sup>1</sup> or maldistribution of physicians. Furthermore, the current patchwork of state laws governing non-competes — many with strict bans and others allowing them in some form but judging enforceability on various factors — further complicates the landscape. Given the ongoing consolidation in the health care marketplace, a uniform national solution may be appropriate.

Nevertheless, a blanket prohibition that fails to recognize reasonable contracts to protect certain business owners' — notably smaller independent neurosurgical practices — legitimate competitive interests may go too far. Therefore, we encourage you to modify the proposed rule to strike the appropriate balance between these competing interests.

***Ethical Considerations***

At the outset, we believe it important to examine non-compete clauses in the context of medical ethical considerations. According to the American Medical Association's (AMA) Code of Medical Ethics, "[c]ovenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit access to care."<sup>2</sup> The AMA code goes on to state:

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<sup>1</sup> According to the Association of American Medical Colleges, the country faces a projected shortage of 37,800 to 124,000 physicians by 2034, including a shortfall of 15,800 to 30,200 surgeons. The complexities of physician supply and demand: projections from 2019 to 2034. June 2021. <https://www.aamc.org/media/54681/download> (Accessed on April 17, 2023).

<sup>2</sup> AMA Code of Medical Ethics. Opinion 11.2.3.1. <https://code-medical-ethics.ama-assn.org/ethics-opinions/restrictive-covenants> (Accessed on April 17, 2023).

Physicians should not enter into covenants 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.

Physicians in training should not be asked to sign covenants not to compete as a condition of entry into any residency or fellowship program.

The AANS and the CNS agree wholeheartedly with these ethical considerations and believe the FTC's final rule should reflect these principles.

### **Views from the Trenches**

Neurosurgeons from across the country have expressed a keen interest in this proposal. Most support the ban, while others are concerned that it is overly broad and should be modified to recognize valid exceptions to any prohibition on non-compete clauses.

Consider the following comments in support of the ban:

*Non-compete clauses only benefit the organization and are often excessive. As an example, my non-compete was five years and 100 miles or \$500,000, and I had no choice but to sign if I wanted this academic position.*

*Our work is very specialized, and the neurosurgery workforce is already in short supply in many parts of the country. Maintaining rigid non-compete clauses would further this workforce shortage and thereby hurt the ability of neurosurgeons to provide patient care. Access to neurosurgery is already sometimes difficult and non-compete clauses further hamper access.*

*Hospitals often use non-compete clauses as a negotiating tactic with prospective physician employees to drive down contracted salaries. The physician is left with a Hobson's choice: accept the non-compete clause or a lower salary — neither of which is a good option for the physician.*

*Non-compete clauses tend to be used as golden handcuffs by health systems, ultimately hurting providers and patients.*

Others expressed support for a modified ban. For example:

*While generally supportive of this ban, there is some concern for practices and institutions that spend time and capital to train a certain individual who then jumps to a competitor — in a sense, one entity trains staff for a competitor who pays more and poaches them. As long as there is a mechanism for institutions that spend time and capital training certain staff to protect themselves from employees jumping to competitors, then it makes sense to ban non-competes.*

*Companies need restrictive covenants that are fair to protect our interests. Yet I understand that overreaching covenants should not be enforced, especially in a contract of adhesion.*

*If we did not have a non-compete in our practice contracts, what would prevent our six complex spine neurosurgeons from pulling out of an all-subspecialty practice and forming their own group? If those spine surgeons left, we would have difficulty paying the rent.*

*I continue to believe that non-competes are primarily for the benefit of the employer, which for most neurosurgeons, are hospital systems or academic medical centers. Some large groups will benefit from non-competes, allowing them to protect the group's intellectual property and maintain the value generated through years of service to the community.*

*This proposed ban would negate all non-competes for independent physician groups but would not affect most hospital contracts since the hospitals are non-profits and not subject to the FTC's ban. The non-compete is a critical part of most independent physician group contracts but is much less critical for hospitals. Whether one supports or opposes the ban on non-competes, there shouldn't be a regulation that severely and disproportionately disadvantages doctors in independent medical practice.*

### **Striking the Right Balance**

As noted above, our associations generally support the goals of this proposed rule. Nevertheless, we have several concerns with the proposal as currently written.

- 1. The final rule should also apply to non-profit organizations.** As we understand the proposal, it fails to apply to non-profit health care entities — including more than one-half of the nation's hospitals.<sup>3</sup> At the same time, the proposed non-compete clause ban would apply to for-profit hospitals and independent medical practices. Exempting non-profit entities from the ban would cause disproportionate harm to those physicians employed by non-profit hospitals. Approximately 70 to 75% of neurosurgeons are employed or practicing at an academic medical center (many of which are non-profit hospitals or hospital systems). Therefore, it is unfair that those employed by non-profit hospitals would fail to benefit from the protections afforded by this proposal.

Furthermore, if the rule exempts large non-profit hospital systems while at the same time banning smaller independent medical practices from using non-compete clauses, it could have the perverse effect of further reducing competition in the health care system and jeopardizing continuity of care for patients. Physicians are abandoning independent private practice in droves due to reductions in reimbursement, regulatory burdens and burnout and choosing hospital employment instead. As a result, this consolidation in the health care marketplace is driving up overall health care costs and disrupting continuity of patient care. Therefore, the FTC should not take any action that would worsen competition in the health care marketplace. **Instead, the FTC should modify the proposal to apply any ban on non-competes to both for-profit and non-profit entities to level the playing field and help ensure that the prohibition improves competition in the health care marketplace.**

- 2. The final rule should broaden the exceptions to the non-compete ban.** Again, many employed physicians with non-competes support the proposed ban because they have little bargaining power and are forced to accept unreasonable non-competes. If enforced, these physicians could find themselves in situations where they have to uproot their families and relocate to an area not subject to the non-compete, which is tremendously disruptive to these physicians, their families, patients and the community.

Nevertheless, the AANS and the CNS believe the near-total ban on non-compete clauses is overly broad. As noted in the above comments from our members, those with an ownership interest in an independent private neurosurgical practice have legitimate business interests in using *reasonable* non-competes as part of their hiring and retention practices. These physicians have made considerable financial investments in their practices, including investments in new physician recruits

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<sup>3</sup> According to the American Hospital Association, in 2022, 58% (2,960) of the 5,139 community hospitals in America were non-profits. <https://www.aha.org/statistics/fast-facts-us-hospitals> (Accessed on April 17, 2023).

(e.g., student loan debt payments, relocation expenses, expanded office space, etc.). Without non-competes, these practices — especially when they are located in a region dominated by hospitals — are vulnerable to having physicians hired away by a competing hospital with deeper pockets, which is unfair.

Therefore, the FTC should modify the proposed rule in several ways:

- **Modify the substantial owner/member/partner definition to exempt individuals with less than a 25% ownership interest in the practice from the ban.** Independent private neurosurgical practices have various ownership models, and depending on the size of the group, the partners may have less than a 25% ownership stake in the practice, but they are nevertheless significantly invested in its success — including being financially liable for contracts, expenses and any losses.
- **Permit *reasonable* non-compete clauses — particularly for independent physician practice owners — if they are not overly restrictive, based on geographic area, duration, the scope of services and other related considerations.** We are not offering specific recommendations because each market is different, but we believe the FTC can provide a framework for making these determinations.

### **Conclusion**

The AANS and the CNS thank the FTC for tackling this issue. Again, we generally agree with the goals of the proposed ban on non-competes, as they can be anti-competitive, exploitive and coercive. Nevertheless, a blanket prohibition goes too far, and we urge the FTC to modify its proposal to allow for non-competes in certain *limited* circumstances, as discussed above.

If you have any questions or need additional information, please contact us.

Sincerely,



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American Association of Neurological Surgeons



Elad I. Levy, MD, President  
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