MICHIGAN ACADEMY OF FAMILY PHYSICIANS

April 18, 2023

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

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC 5610 (Annex C)
Washington, DC 20580

Re: RIN 3084-AB74; Non-Compete Clause Rulemaking: Matter No. P201200

Dear Chair Khan and Secretary Tabor:

I write on behalf of the Michigan Academy of Family Physicians (MAFP) which represents 4,300 physicians and medical students nationally in response to the Federal Trade Commission's (FTC) notice of proposed rulemaking (NPRM) to ban noncompete clauses. MAFP represents family physicians who are employed in a wide variety of practice types and settings – urban and rural, large and small, multi-specialty and primary care only, as well as in hospitals and large health systems. Our members' diverse experiences inform our policy and recommendations on physician employment practices. MAFP strongly supports the NPRM, which is consistent with the AAFP's policy opposing restrictive covenants. We urge the Commission to ensure that organizations employing physicians and other health care workers are included in the final rule to protect patient access and continuity of care with their family physician, and to support our nation's health care workforce.

A significant shift from physicians as owners of independent practice has been occurring over many years across all medical specialties. The most recent AMA Physician Practice Benchmark Survey (2020) reported that for the first time, less than half of physicians (49.1%) delivered care in independent practice (meaning organizations wholly owned by physicians) and the proportion of physicians who have an ownership stake in their practice is shrinking as well. Just 24% of AAFP members report that they are sole or partial owners in their practice setting. The proportion of family physicians who are employed continues to grow each year with 73% of all AAFP members and 91% of new physicians (1-7 years post-residency) working as employees in a wide range of organizations from small independent practices to Fortune 100 employers. This shift is dramatic when considering just 59% of AAFP members reported being employed in 2011.

As the landscape of employment for physicians' shifts toward employment, noncompete agreements in health care threaten to disrupt patient access to physicians, deter advocacy for

patient safety, limit physicians' ability to choose their employer, stifle competition, and contribute to an increasingly concentrated healthcare market. Despite projected physician shortages, health care employers enforce noncompete agreements that intentionally restrict physician mobility and workforce participation. As noted in the NPRM, there is evidence that noncompete clauses increase consumer prices and concentration in the health care sector. There is 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. Evidence indicates that consolidation increases health care prices, does not improve quality, and can worsen access to care. MAFP firmly believes that everyone should have affordable, equitable access to comprehensive, person-centered primary care and we are therefore concerned that non-compete clauses may be undermining progress toward improving individual and population health.

These concerns are exacerbated for family care physicians who provide continuous, comprehensive care for patients over their lifespan. Continuity of care is known to improve outcomes, particularly for patients with complex chronic conditions. This significance of this issue is underscored 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. According to physician search firm, Merritt Hawkins, more than 90% of physician agreements they review include noncompete agreements. More recently, noncompetes have been documented to prevent physicians from practicing medicine in their chosen communities when they want to change jobs, thus potentially limiting patients' access to their regular source of care.

The FTC NPRM seeks to protect employees from stifled professional flexibility and movement caused by noncompete clauses in employment and independent contractor agreements. MAFP wholeheartedly supports this intent and urges the FTC to explore mechanisms to include enforcement of the rule banning noncompete clauses with non-profit employers. In 2022, fifty-eight percent of hospitals in America were non-profits. Non-profit hospitals and healthcare systems represent one of the largest segments of physician employers. While the proposed rule supports the critical principle that physicians retain independence to dictate and protect the quality of patient care and the practice of medicine free from the influence of corporate employers, excluding non-profit entitles significantly limits its otherwise positive impact. Excluding these employers from the ban on noncompete clauses would undercut the proposed rule's otherwise positive effect on many physicians.

Physician Organizations Oppose Unreasonably Restrictive Noncompete Clauses that Limit Patient Choice and Disrupt Patient-Physician Relationships

The AAFP's policy opposing restrictive covenants states: "The AAFP believes restrictive covenants in physician employment contracts disrupt the patient-physician relationship. No physician employment contract should include restrictions which interfere with the continuity of the patient-physician relationship or patient access to care. Noncompete contract clauses including geographic regions, post-employment time periods, and scope of practice constraints limit continuity of care, patient access to care, and patient choice when the physician leaves employment in a practice." Similarly, the American Medical Association's (AMA) policy discourages the use of noncompete clauses that "unreasonably restrict a physicians' ability to practice medicine within a specified geography or time frame" and "do not make reasonable accommodations for patients' choice of physician" because they, "...can disrupt continuity of care, and may limit access to care." AMA Policy E-11.2.3.1. In its policy paper titled "Ethical and Professional Implications of Physician Employment and Health Care Business Practices", the American College of Physicians (ACP) states their view that "maintenance of a strong

physician-patient relationship is paramount" in stating their recommendation that "employment contracts should not restrict physicians' actions to promote patients' best interests and that contract provisions affecting practice should align with the ethical commitments of physicians and be subject to negotiation that recognizes that alignment." The ACP further notes that "what constitutes an unreasonable restriction requires case-by-case analysis."

Small physician-owned practices play an important role in meeting the care needs of many Americans in rural and otherwise underserved areas. The NPRM notes that the FTC "does not expect there are classes of businesses that would face disproportionate impacts from the proposed rule." As the FTC considers the impact of this proposed rule on small businesses through the Initial Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, MAFP urges the consideration of small physician-owned practices, the majority of which employ less than 50 physicians. In the face of increasing health care consolidation, preservation of independent practices and their ability to invest in hiring and training new physicians is essential to ensuring patient access and patient choice in light of the important role many of these small practices play in meeting the needs of underserved Americans.

Strengthening the Functional Test for Whether a Contractual Term is a Non-Compete Clause

MAFP supports FTC's use of functional tests to determine whether a contractual term is a "de facto" noncompete clause because it has the effect of prohibiting 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. MAFP appreciates that the repayment of training costs in (2) ii as an example of a de facto noncompete clause "where the required payment is not reasonably related to the costs the employer incurred for training the worker." MAFP urges the FTC to ensure that other types of payment, frequently offered as recruitment incentives by large health systems, such as sign-on bonuses, moving expenses, housing fees, stipends, and student loan repayments, also qualify as "de facto noncompete clauses" when "the required payment is not reasonably related to costs incurred by the employer."

These payments are regularly offered as recruitment incentives by large hospitals, health systems, and other medical organizations. The amount of these payments can vary dramatically based on physician specialty, geography, and the needs of the employer. Often, they are subject to accelerated recoupment if the employed physician leaves their employment (whether to a competing employer or not) within a specified time period. Requiring physicians, already faced with significant medical school debt in the $200,000-$300,000 range, to repay these recruitment incentives effectively operates as a de facto noncompete agreement.

Accordingly, we respectfully encourage you to expand the definition of a "de facto" noncompete clause beyond training costs to include any contractual term that requires an employee to repay an employer or a third-party entity upon termination of the employment for:

1. Sign-on bonuses
2. Student loan reimbursement
3. Moving expenses
4. Housing fees
5. Stipends
6. Any other item in an amount equal to ten percent (10%) or more of an employee's annualized salary.

By limiting the flexibility and mobility of health care workers, noncompete clauses can harm individual workers, patients, and the broader health care system. Noncompete clauses in physician employment contracts lead to suboptimal working conditions, worsen clinician burnout and health care worker shortages, jeopardize patient safety, impede timely access to care, and accelerate consolidation in the health care industry.

Given the widespread impact the NPRM would have on family physicians, we thank you for addressing the harm of noncompete clauses in physician employment contracts. This proposed rule is poised to help thousands of physicians across the nation as we have seen state laws help physicians in states where noncompete clauses are banned. We look forward to its implementation and your consideration of our comments.

Should you have any questions, please contact Karlene Ketola, Chief Executive Officer at kketola@mafp.com or (517) 347-0098.

Sincerely,

Glenn V. Dregansky, DO, FAAFP
President

[i] Gaynor, M. What to Do about Health-Care Markets? Policies to Make Health-Care Markets Work, Policy Proposal No. 2020–10, The Hamilton Project.

[ii] Nancy D. Beaulieu, PhD[1]; Michael E. Chernew, PhD[1,2]; J. Michael McWilliams, MD, PhD[1,3]; et al. Organization and Performance of US Health Systems. *JAMA.* 2023;329(4):325-335. https://jamanetwork.com/journals/jama/fullarticle/2800656

[iii] Ho, V., Metcalfe, L., Vu, L. *et al.* Annual Spending per Patient and Quality in Hospital-Owned Versus Physician-Owned Organizations: an Observational Study. *J GEN INTERN MED* **35**, 649–655 (2020). https://doi.org/10.1007/s11606-019-05312-z

[iv] What We Know About Provider Consolidation. Kaiser Family Foundation. Available at: September 2, 2020. https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/

[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]. https://www.merritthawkins.com/news-and-insights/blog/executive-order-impacts-physician-non-compete-clauses

[viii] JAMA Health Forum. 2021;2(12):e214018. Doi:10.1001/jamahealthforum.2021.4018.