April 18, 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 more than 37,000,000 Americans living with kidney diseases and the 21,000 nephrologists, scientists, and other kidney health care professionals who are members of the American Society of Nephrology (ASN), thank you for the opportunity to share our comments on the proposed **16 CFR Part 910 RIN 3084-AB74 Non-Compete Clause Rule.** ASN commends the Federal Trade Commission (FTC) for releasing a proposed rule to address the issues associated with non-competes at the federal level, with the goal of preventing unfair methods of competition.

Non-competes, also known as restrictive covenants, have been historically governed by state law. However, the proposed regulation asserts that FTC has the authority to regulate non-compete agreements between employees and employers under Section 5 of the Federal Trade Act[1]. This is not the first time FTC has addressed and acted against non-compete agreements in health care as *In the Matter of Davita Inc. and Total Renal Care, Inc*[2]*.* FTC also acted against non-competes in health care in 2018 when it filed a complaint against three of the largest dental product distributors for using non-competes agreements that the agency deemed anti-competitive[3].

Restrictive covenants, or "non-compete" clauses, are a common provision in employee contracts that restrict an employee from engaging in competition with their employer by placing restrictions on an employee's ability to work in a particular field, within a specific geographic area, or for a stated period of time following the termination of the contract. Non-compete clauses are common in the health care industry, with an estimated 45 percent of U.S. physicians being bound by them[4].

In ASN's letter, we focus our comments on two primary issues:

I. **The Unique Role of Doctors/Medical Professionals for Patients and the Community**
II. **Unresolved Questions for Non-Profits**

I. The Unique Role of Doctors/Medical Professionals for Patients and the Community

a. Patient care first and foremost

ASN appreciates FTC's attempt to address non-competes and stresses that such covenants within the health care realm present an additional level of complexity due to the unique role the medical professional serves for individuals in need of health care services and for the broader society. While ASN understands that non-competes are an attempt to balance the interest of the employer with the interest of a physician, we are sworn as medical professionals to serve the best interests of patients at all times. Patients' needs and decisions regarding care should never be compromised or influenced by any other factors than those most essential to an individual's health. That is the principle that must be supported at all times before business interests. Therefore, ASN believes that such restrictive agreements potentially disrupt the patient-physician relationship and potentially restrict a physician's ability to promote the patient's best interest and care choices.

b. Health care workplace

Modern trends in health care have led to a more consolidated health care system. Physician employment over the last several years has moved away from private practice settings to direct employment with healthcare systems, hospital systems, or large multispecialty groups. According to a study sponsored by The Physicians Advocacy Institute, the percentage of U.S. physicians employed by hospitals, health systems, or corporate entities grew from 62.2 percent in January 2019 to 73.9 percent as of January 2022[5]. As medical practices become increasingly owned by large systems, the impact imposed by restrictive covenants is also increasing. Despite their original intent to protect the interests of small, privately owned practices, the current health care environment is quite different.

Medical employers regard non-competes as essential to protect their investments in both their employees and business, which includes the cost associated with recruitment, referrals, training, and reputation. ASN acknowledges the importance of these investments, as they are necessary for the maintenance of an effective health care system. However, ASN believes that this stance may overestimate the value brought by employers while simultaneously failing to recognize the immense value physicians bring to employers through talent, patient relationships, reputation, skills, and in other ways.

c. Role of trust in health care

Ultimately, the practice of medicine is embodied by the clinical encounter between a patient and a physician. The foundation of this relationship is trust, which is the foundation of a physician's ethical responsibility to hold the patient's best interest above all else. The maintenance of strong patient-physician relationships through trust is

paramount; thus, actions must be taken to prevent enforcement of employment contracts that restrict physicians' actions to promote their patients' best interest.

Patients reserve the fundamental right to choose their health professional, which includes the maintenance of an on-going professional relationship with the physician of their choice. Through the maintenance of that relationship, continuity of care is improved and that continuity is known to improve outcomes, particularly for patients with complex chronic conditions[6]. This type of patient-physician relationship is especially crucial to the practice of nephrologists, who often see patients several times a month to properly manage their kidney failure or end-stage renal disease (ESRD). The enforcement of restrictive covenants against physicians can impair or outright deny this fundamental right all together.

d. Importance to the community

Physicians are integrally involved in the health of a community. In the event of termination of a contract that contains a non-compete clause, or if a position of employment becomes untenable, the physician-patient relationship is unreasonably ended when a physician might otherwise continue to provide care in the same community. The resulting loss of a physician, especially specialists, can have a detrimental effect on communities. Patients can be left without access to their physician and thus may be forced to travel long distances for care. The issue of access to care is especially exacerbated by the workforce shortage currently faced by the U.S. health care system.

In kidney care, dialysis in the United States is largely provided by two large for-profit dialysis companies, several medium to smaller for-profit dialysis companies, and an array of non-profit dialysis companies[7]. These dialysis companies often enter employment and contracting agreements with physicians and physician groups for medical director services. Restrictive covenants imposed by these companies can limit the ability of a nephrologist or entire group of nephrologists to provide services at competing centers. These restrictive covenants allow dialysis companies to establish and maintain monopolies in communities with already scarce and limited access to care by barring competition from entering the market and severely limiting patient choice.

II. Unresolved Questions for Non-Profits

In 2021, 58 percent of hospitals were non-profit, 18 percent were government owned, and 24 percent were for-profit[8]. As discussed previously, among dialysis providers a mix of for-profit and non-profit companies exist. A critical question about the proposed rule focuses on the extent to which the rule applies to non-profit health care organizations. It is unclear to ASN how the current proposed rule addresses this question. Interpretations to date indicate that it is likely that many health care organizations that have qualified as Section 501©(3) entities would be considered an "employer" subject to the prohibition on non-competes[9]. However, it is more complex than simply their overall tax-exempt status.

Also of importance in this consideration is how institutions/health care businesses attain tax-exempt status and whether they are meeting the necessary standards. In general, health care entities 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"[10]. 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 three years.

The current purposed rule exempts non-profits from the ban on non-competes. However, ASN believes that more realistically, the non-profit and for-profit health care entities are competing for shares of the same patients, the same market, and the same labor supply. ASN believes that the exclusion of non-profit health care entities from the proposed ban on non-competes would cause an unprecedented and unfair distortion in the labor market. Given these concerns, ASN recommends the rule be extended to include non-profit health care entities.

Conclusion

Whether to enforce non-compete clauses in physicians' employment contracts has substantial implications on public policy in health care. Nationally, there is widespread criticism of the use of restrictive covenants in physician employment due to the potential harm those covenants may cause to the public. To balance public and private interests, states and courts have taken a range of approaches to address the use of non-competes in the health care space, with trends moving toward limitations on such agreements. For example, several states, including Delaware, Massachusetts, and Rhode Island, have statutes that prohibit non-compete agreements to the extent that they restrict a physician's right to practice, but permit other provisions, such as confidentiality and non-solicitation. Other states, such as Connecticut and Tennessee, place statutory limits on the length of time and geographic restrictions in physician non-competes. ASN encourages FTC to factor in state-level policies as it moves forward in the rulemaking process.

ASN appreciates the thought and effort FTC has put into the development of this proposed rule. The society and its members stand ready to assist the agency in navigating the issue of non-competes for the nation's physicians and the patients they serve, particularly the more than 37 million Americans with kidney diseases. If you have questions or wish to discuss this letter, please contact David L. White, ASN Regulatory and Quality Officer, at dwhite@asn-online.org .

Sincerely,

Michelle A. Josephson, MD, FASN
President

[1]Federal Trade Commission Docket No. 9379." *In the Matter of Benco, Schein, Patterson Part 3*, Federal Trade Commission, 2021, https://www.ftc.gov/system/files/documents/cases/docket_no_9379_benco_schein_patterson_part_3_complaint_final_public_version_2.pdf.

[2] "Federal Trade Commission Act Section 5." *Federal Reserve* , Federalreserve.gov, https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf.

[3] "Federal Trade Commission Docket No. C-4752." *Federal Trade Commission*, FTC , 2021, https://www.ftc.gov/system/files/documents/cases/211_0056_c4752_davita_utah_health_order.pdf.

[4] Lavetti, Kurt, et al. "The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians." *Kurtlavetti,Com*, 29 June 2018, http://kurtlavetti.com/UIPNC_vf.pdf.

[5] "COVID-19's Impact On Acquisitions of Physician Practices and Physician Employment 2019-2021." *Physicians Advocacy Institute*, Prepared by Avalere Health, http://www.physiciansadvocacyinstitute.org/.

[6] Yang, Yun Jung, et al. "The Effect of Continuity of Care on the Incidence of End-Stage Renal Disease in Patients with Newly Detected Type 2 Diabetic Nephropathy: a Retrospective Cohort Study." *BMC Nephrology*, vol. 19, no. 1, ser. 127, 5AD. *127*, https://doi.org/10.1186/s12882-018-0932-3. Accessed 4 Mar. 2023.

[7] "2017 Annual Data Report - USRDS - NIDDK." *National Institute of Diabetes and Digestive and Kidney Diseases*, U.S. Department of Health and Human Services, 2017, https://www.niddk.nih.gov/about-niddk/strategic-plans-reports/usrds/prior-data-reports/2017.

[8] "Hospitals by Ownership Type." *KFF*, 17 Jan. 2023, https://www.kff.org/other/state-indicator/hospitals-by-ownership/?currentTimeframe=0&sortModel=%7B%22colId%22%3A%22Location%22%2C%22sort%22%3A%22asc%22%7D.

[9] Honart, Charles M. "FTC Proposed Non-Compete Ban: Impact on Nonprofit Hospitals and Nonprofit Affiliates." *Stevens & Lee*, 12 Jan. 2023, https://www.stevenslee.com/health-law-observer-blog/ftc-proposed-non-compete-ban-impact-on-nonprofit-hospitals-and-nonprofit-affiliates/#:~:text=FTC%20Proposed%20Non-Compete%20Ban%3A%20Impact%20on%20Nonprofit%20Hospitals,limited%20exceptions%2C%20prohibit%20employers%20from%20using%20non-compete%20clauses.

[10] "Charitable Hospitals - General Requirements for Tax-Exemption under Section 501(c)(3)." *Internal Revenue Service*, https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3.