

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

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Comments submitted electronically via <https://www.regulations.gov>

Dear Secretary Tabor:

On behalf of over 39,000 orthopaedic surgeons and residents represented by the American Association of Orthopaedic Surgeons (AAOS) and the orthopaedic specialty and state societies that agreed to sign on, we are pleased to provide comments on the Non-Compete Clause rulemaking, Matter No. 0201200 published in the Federal Register on January 19, 2023.

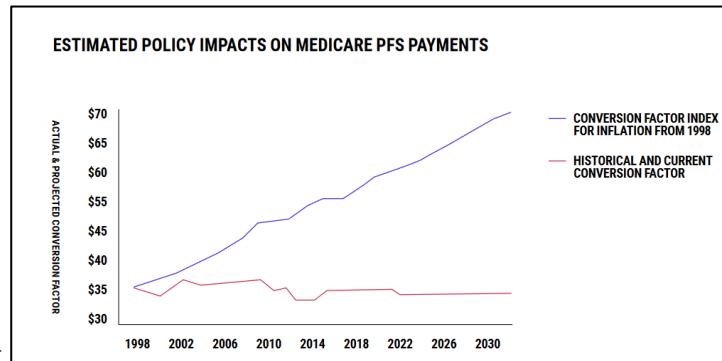
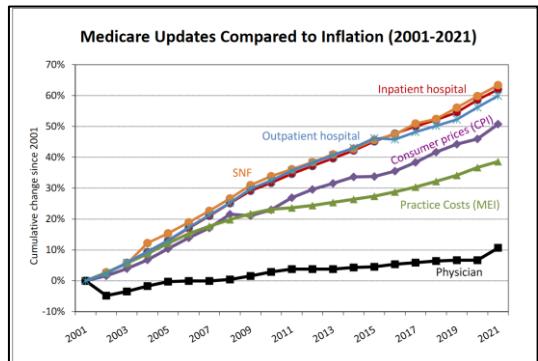
AAOS applauds the Federal Trade Commission's (FTC) consideration of the impacts that non-compete clauses and other broad restrictive covenants have on competition, innovation, and employee opportunities for growth. Given the diversity of practice settings and roles that our members have in the healthcare system, we recognize both the benefits and consequences of non-compete clauses on physicians. Despite the positive intentions of this rule, we question whether a blanket ban on such clauses will lead to market conditions that do not account for the unique training investments and relationships that physicians have in their practices. Moreso, we are concerned by the manner in which this rule has come to fruition. In light of the breadth of the proposal and extensive lookback period, along with the limited data which the ban is based on, we believe that it will be subject to numerous legal challenges.

The "Major Questions" doctrine is used by courts to determine when a federal agency has overreached their authority. Recently, the application of this doctrine was used to rescind a proposed rule from the Environmental Protection Agency (EPA) because the Supreme Court determined that the rule would have had impacts across multiple types of industries which are under the purview of various federal agencies. Certainly, the proposal to ban non-compete clauses across all industries and rescind existing covenants would generate some of the same questions for the court. With this in mind, AAOS recommends that the FTC consider the potential benefits of a narrower rule that would limit the negative consequences of such contracts without outright banning them and thus disregarding the purposes of their existence.

Furthermore, we are concerned that the agency is basing much of the impact of non-compete clauses for physician practices on a study which finds that "a judicial decision decreasing non-compete agreements (NCA) enforceability by 10% of the observed policy spectrum (about 0.39 standard

deviations) causes physician prices to fall on average by 4.3%.” The paper goes on to suggest that based on this data, implementing a ban on non-compete clauses “at the national level would reduce aggregate medical spending by over \$25 billion annually.”<sup>1</sup> It is agreed that the ratio of spending on healthcare in the United States compared to other countries is disproportional, and with limited benefit.<sup>2</sup> However, solutions to this should be thoughtful and appropriately targeted. Including physicians, who play a critical and unique role in our healthcare system, in a blanket ban that targets the full spectrum of industries which are subject to more predictable fluctuations in supply and demand, is an overly simplistic panacea for a complex problem. Particularly at a time when the federal government, through the Centers for Medicare and Medicaid Services (CMS), continues to decrease physician reimbursement to levels which make keeping practices afloat a challenge, this rationale for applying a ban on non-compete clauses to physicians appears crass.

Below are two graphs that highlight the disparity between Medicare reimbursement and inflation over time. According to data from the Medicare Trustees Report<sup>3</sup>, Medicare physician pay has increased just 11 percent over the last two decades, or 0.5 percent per year on average. Approximately one-third of that increase is from the Congressionally designated temporary 3.75 percent update for 2021 that expired in 2022. In contrast, the cost of operating a medical practice has increased 39 percent between 2001 and 2021, or 1.6 percent per year. Economy-wide inflation, as measured by the Consumer Price Index, increased 51 percent over this period, or 2.1 percent per year. Thus, once adjusted for inflation in practice costs, Medicare physician pay declined 20 percent from 2001 to 2021, or by 1.1 percent per year on average.



Instead of regulating industry through a blanket ban, it makes more sense for the FTC to use their law enforcement authority to pursue action against specific bad actors that have misused non-compete

<sup>1</sup> Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 a.m. Econ. J. Applied Econ. 258, 284 (2021).

<sup>2</sup> Munira Z. Gunja, Evan D. Gumas, and Reginald D. Williams II, *U.S. Health Care from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes* (Commonwealth Fund, Jan. 2023). <https://doi.org/10.26099/8ejy-yc74>

<sup>3</sup> <https://www.cms.gov/files/document/2022-medicare-trustees-report.pdf>

<sup>4</sup> Federal Register, Medicare Trustees' Reports and U.S. Bureau of Labor Statistics

<sup>5</sup> Surgical Care Coalition

clauses at the expense of employee opportunity and to the detriment of innovation. **AAOS suggests that if the FTC is looking for solutions to decrease health spending and increase competition, they consider engaging with their partners at the Department of Health and Humans Services (HHS) to explore all regulatory avenues for lifting the arbitrary ban on new and expanding physician-owned hospitals (POHs).** Considering the ongoing issues brought to the forefront as a result of the COVID-19 pandemic, the value of POHs has never been as evident. They contribute to local economies, meet a growing demand for health care services, and can shift focus and address frontline issues without the administrative red tape that cripples larger hospital systems.

A comprehensive peer-reviewed study published in the British Medical Journal found that, overall, physician-owned hospitals have similar proportions of Medicaid patients and racial minorities as other hospitals and perform comparably to other hospitals on benchmarks for quality of care.<sup>6</sup> The Secretary has broad authority in creating a new demonstration project for POHs through the Center for Medicare and Medicaid Innovation, which would include a waiver or exemption to allow POHs to expand if they are accepted into the program. Moreover, based on legal analysis of the relevant statutes, regulations, and guidance regarding Section 1115 waivers, the HHS Secretary has broad authority to lift the POH moratorium. **AAOS asks that all the regulatory options are thoroughly explored to allow POH expansion as the healthcare ecosystem continues to diversify to meet the needs of our nation's most vulnerable beneficiaries.**

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Thank you for your time and attention to the concerns of the American Association of Orthopaedic Surgeons (AAOS) on the significant proposals made in the Non-Compete Clause proposed rule. The AAOS looks forward to working with the FTC and all federal stakeholders eager to improve the access to and quality of musculoskeletal care in the United States. Should you have questions on any of the above comments, please do not hesitate to contact Shreyasi Deb, PhD, MBA, AAOS Office of Government Relations at [deb@aaos.org](mailto:deb@aaos.org).

Sincerely,



Felix H. Savoie, III, MD, FAAOS  
AAOS President

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<sup>6</sup> Blumenthal, D. M., Orav, E. J., Jena, A. B., Dudzinski, D. M., Le, S. T., & Jha, A. K. (2015). Access, quality, and costs of care at physician owned hospitals in the United States: observational study. *BMJ*, 351.

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