SCAI
Society for Cardiovascular Angiography & Interventions

The Society for Cardiovascular Angiography & Interventions Statement for the Federal Trade Commissions Work Shop on Making Competition Work

The Society for Cardiovascular Angiography & Interventions (SCAI) wants to thank the FTC for holding this Workshop on Making Competition Work: Promoting Competition in Labor Markets. We appreciate the opportunity to provide our comments for the record regarding this important matter. SCAI supports President Biden's wide-ranging Executive Order issued on July 15, 2021, Promoting Competition in the American Economy. As you know, the Executive Order includes, among many other competition-focused objectives, encouraging the Federal Trade Commission (FTC) to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

SCAI is a non-profit professional association with over 4,500 members representing the majority of practicing interventional cardiologists and cardiac catheterization teams in the United States, including those providing percutaneous coronary interventions (PCI) to adults and children. SCAI promotes excellence in invasive and interventional cardiovascular medicine through education, representation, and the advancement of quality standards to enhance patient care and access.

SCAI is specifically concerned about the "unfair use" of hospitals, health systems and others requiring interventional cardiologists to sign restrictive covenants not-to compete in physician contracts. These provisions are contained in what amounts, in many cases, to contracts of adhesion because a physicians' only choice is to accept the terms of the contract without revision or reject employment. In addition, these take it or leave it contracts also contain terms that require that the interventional cardiologist live within 20 minutes of the hospital in which they work to ensure their ability to perform timely, life-saving, procedures related to patient heart attack. Durational stipulations also mandate that the interventional cardiologist not practice in an area for a period of time (6 months to 2 years) upon leaving their employment with the health care system thus ensuring a substantial period of lost income. As a result, geographic and durational limitations contained in typical non-compete clauses, governed by state law, all but require the interventional cardiologist to either stay with their current hospital or leave the area in order to change employers. Given that physicians are licensed on a state-by-state basis, and the rapid conglomeration of health care systems, the non-compete clauses can effectively restrict the physician from finding gainful employment in the same state as their licensure. In addition, the control of credentialing to hospital-based physicians, such as interventional cardiologists, by these large hospital systems subjects interventional cardiologists to further restriction to trade.

There is ample evidence that the markets related to the US hospital sector are broken. Over the last 30 years, a wave of hospital mergers in the U.S. have substantially increased market concentration. In fact, some calculations indicate that, at present, more than 80% of hospital markets in the U.S. are "highly concentrated," based on criteria set out in the Department of Justice/FTC horizontal merger guidelines (DOJ and FTC 2010). Hospitals are also increasingly buying physician practices—a concerning trend with the potential to further shield hospitals from competition and harm competition among physician practices. According to a recent report by Avalere, nearly 70% of U.S. physicians are now employed by a hospital or a corporate entity. There is growing concern that hospital credentialing policies are being used to promote economic interests and to stifle competition instead of promoting professional standards as originally intended. Many SCAI members have been at the receiving end of these trends. For example, in 2010 approximately 80-85 percent of our members practiced medicine in an office-based or group practice. Now, more than a decade later, approximately 85 percent of SCAI members are employed by hospitals and health systems. Clearly, the circumstances that justified non-compete clauses no longer exist. Contrary to their intent, these restrictions on physicians to practice, already limited by their state licensure, hospital credentialing policies, and subject to take it or leave it covenants not to compete with ever growing hospital systems has made it very difficult for Interventional Cardiologists to provide care to their patients.

The same studies have shown that the conglomeration of health systems has resulted in reduced access to care for patients, particularly in rural, underserved, and lower socio-economic status areas. In addition, the restrictions on interventional cardiologists have also resulted in inequitable outcomes to diverse and underserved patient populations across the United States.

We note that the FTC conducted an examination of non-compete clauses in January 2020, bringing the number of Administrations that have examined health care competition to three, so far, including the Biden Administration. In March 2016, the U.S. Treasury Department issued a report entitled, "Non-Compete Contracts: Economic Effects and Policy Implications," based mostly on non-public studies, asserting pervasive misuse of non-competition agreements. In October 2016, President Barack Obama issued a "State Call to Action on Non-Compete Agreements" to "address wage collusion, unnecessary non-compete agreements, and other anticompetitive practices."

In Congress, bills aiming to ban non-competes have also been introduced. As referenced above, the FTC hosted a workshop in January 2020 "to examine whether there is a sufficient legal basis and empirical economic support" to restrict non-competes. The FTC has examined not only "why" it should consider regulating non-competes, but also "how" the FTC could potentially act. While some have questioned whether the FTC could regulate this area of law through rulemaking, others suggested that FTC rulemaking authority is manifest. Other sources of FTC's potential legal authority related to non-compete clauses include litigation and sub-regulatory guidance such as publishing a general statement of policy or issuing guidelines. However, the President's Executive Order specifically encourages the FTC to "exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act" to regulate restrictive covenants. This process may require several steps, including publishing a detailed and specific notice of any proposed rulemaking, the draft text of the rule, and the reason for the proposed rule. Rulemaking potentially could be a years-long process. We urge you to begin this process as soon as possible.

The Executive Order encourages regulating "the *unfair* use" of non-compete clauses and other restrictive covenants. We also ask you to read the phrase "unfair use" as the President asking the FTC to act against the abuses of restrictive covenants -- and not their reasonable use -- and not just imposing such restrictions for low-wage workers as a number of states have done. There are already a number of restrictions on settings of care for licensed and credentialed physicians who perform inpatient procedures. Non-compete clauses, with ever growing health systems, result in barriers for the interventional cardiology community to provide care, and importantly, restrict patients' access to care. We stand prepared to provide the FTC with our enthusiastic assistance as it pursues this critical matter. Please contact Curtis Rooney, Vice President, Government Relations at crooney@scai.org, should you have questions.