April 19, 2023

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

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

The Ambulatory Surgery Center Association (ASCA) submits these comments on behalf of the ASC community, which includes more than 6,000 Medicare-certified facilities nationwide. ASCA shares the administration's desire to encourage competition between high-quality healthcare providers[1] and to provide Americans access to quality, affordable health care.[2] Surgery centers exemplify how competition can improve healthcare, allowing physicians more autonomy over their surgical practice and providing patients access to a lower-cost, high-quality site of service for surgical care.

While we agree with some of the concerns raised in this rulemaking, we must oppose this proposed rule as it would exacerbate a power imbalance in the US healthcare marketplace. The FTC derives much of its authority to regulate "unfair methods of competition" from Section 5 of the FTC Act, and nonprofit entities, which includes the majority of community hospitals,[3] fall outside the reach of the Commission. This proposed rule's sweeping application to some healthcare facilities and its inapplicability to others would have the unintended consequence of obstructing competition in healthcare. We respectfully request that the Commission reevaluate the impact of this rulemaking on the healthcare community as a whole before moving forward.

Most surgery centers operate as small businesses and, as such, must run efficiently to remain viable and continue to provide savings to the patients they treat. As of June 2022, there were 6,088 Medicare-certified ASCs,[4] 3,289 (54 percent) of which have only one or two operating rooms. These facilities must purchase the same equipment, devices and implants as nonprofit hospitals to perform surgery. In fact, smaller ASCs often pay more for supplies since they do not have the same purchasing power as a hospital or large health system. Most importantly, they must compete with hospitals in their community for the surgeons, nurses and other staff they need to operate.

The ASC model relies on running efficiently and our facilities are reimbursed by one of our largest payors—Medicare—only 50 percent of what hospital outpatient departments (HOPDs) receive on average for the same procedures being provided in a similar site of service. This rate disparity already jeopardizes the ability of our facilities to provide care to Medicare beneficiaries and comes at a high price to the Medicare program and the taxpayers who fund it. Now is not the time to exacerbate this problem by implementing policies that will further stifle competition and increase costs.

1 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy (accessed April 18, 2023).
2 https://www.whitehouse.gov/priorities (accessed April 18, 2023).
3 https://www.aha.org/statistics/fast-facts-us-hospitals (accessed April 18, 2023).
4 ASCA analysis of Provider of Services Current Files, available at: https://data.cms.gov/provider-characteristics/hospitals-and-other-facilities/provider-of-services-file-hospital-non-hospital-facilities (accessed April 19, 2023).

Under this proposal, surgery centers and other tax-paying healthcare providers would be subject to restrictions that tax-exempt systems would not. Hospitals are more likely to employ physicians currently, and this rule would allow nonprofit providers to more aggressively engage in noncompetitive behavior that would impede a physician's ability to eventually move to an ASC or other healthcare provider.

ASCA strongly supports competition between high-quality healthcare providers, and we welcome the opportunity to collaborate with the Biden administration on policies to encourage competition. This rule, however, does not meet its intended goal—at least for the healthcare community—and should be rescinded.

Sincerely,

William Prentice
Chief Executive Officer