

# **Analysis of Agreement Containing Consent Order to Aid Public Comment**

## ***In the Matter of Board of Dental Examiners of Alabama, File No. 191-0153***

---

### **I. Introduction**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with the Board of Dental Examiners of Alabama (the “Board”). The Board is an Alabama state agency comprised of six licensed dentists and one licensed dental hygienist. The Board is charged with administering dental licensing in Alabama and carrying out the provisions of the Alabama Dental Practice Act.

The consent agreement contains a proposed order addressing allegations in the proposed complaint that the Board has unreasonably excluded competition from providers of teledentistry-based teeth alignment products and services without adequate supervision from neutral state officials, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the consent agreement and the comments received and will decide whether it should withdraw from the consent agreement and take appropriate action or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way. The consent agreement is for settlement purposes only and does not constitute an admission by the Board that the law has been violated as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts, are true.

### **II. Challenged Conduct**

This matter involves allegations that the Board unreasonably impeded competition from new providers of clear aligner therapy in Alabama. The Board is a state regulatory agency controlled by practicing, Alabama-licensed dentists.

Braces and clear aligners (removable, fabricated molds) are treatment options for misalignment or incorrect relation between teeth (called malocclusion). Many patients are prescribed braces or clear aligners following a visit to a dentist’s or orthodontist’s office.

In recent years, several new firms have launched platforms that facilitate treatment for malocclusion using teledentistry. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied

by a dentist or orthodontist in a traditional office setting. To initiate treatment with a clear aligner platform, a prospective patient may visit a storefront location, where a non-dentist professional will perform a digital scan of the patient's teeth and gums to create a 3D image of the patient's mouth. The results of this intraoral scan are provided to a dentist working remotely, who determines whether the patient is a candidate for clear aligner therapy.

For reasons of price and convenience, many consumers prefer clear aligner therapy supplied through a teledentistry model.

After the entry and expansion of clear aligner platforms in Alabama, in September 2017, the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist personnel from taking intraoral scans without on-site supervision by a dentist. Following a Board vote, in September 2018, the Board sent SmileDirectClub, LLC ("SmileDirectClub"), a clear aligner platform, a letter directing SmileDirectClub to cease and desist from taking intraoral scans without on-site dentist supervision.

Because of the Board's conduct, consumers in Alabama have been deprived of full competition for the treatment of malocclusion. For example, because of the Board's conduct, SmileDirectClub has halted a planned expansion of storefronts in Alabama.

### **III. Legal Analysis**

Section 5 of the FTC Act prohibits unfair methods of competition, including concerted action prohibited by Section 1 of the Sherman Act.<sup>1</sup> To establish a violation of Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.<sup>2</sup>

State regulatory boards comprised of active market participants can violate Section 1 by promulgating and enforcing rules that harm competition in the industry in which board members participate.<sup>3</sup> The Board's rule amendment and cease-and-desist letter harmed competition by impeding consumer access to a low-cost and convenient option for the treatment of malocclusion.

The state action defense is not applicable here. Active market participants control the Board. Therefore, for the Board's conduct to constitute state action, neutral state officials must actively supervise the Board's conduct. The State's supervision mechanisms must provide "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."<sup>4</sup>

---

<sup>1</sup> 15 U.S.C. § 45; *see, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948).

<sup>2</sup> 15 U.S.C. § 1; *see, e.g., National Collegiate Athletic Ass'n v. Alston*, 141 S.Ct. 2141, 2151 (2021); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–43 (1982).

<sup>3</sup> *See N.C. Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 510-12 (2015).

<sup>4</sup> *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

Although the Board’s rule amendment was reviewed by Alabama’s Legislative Services Agency (“LSA”), that review did not satisfy the “constant requirements” of active supervision articulated by the Supreme Court.<sup>5</sup> The LSA did not review the substance of the rule amendment, specifically whether the rule comports with clearly articulated state policy to displace competition.<sup>6</sup> Additionally, the LSA lacked the authority to veto or modify the Board’s decisions.<sup>7</sup> Furthermore, the Board’s cease-and-desist letter to SmileDirectClub did not receive any review by the LSA or any other state officials.

#### **IV. Proposed Order**

The proposed order seeks to remedy the Board’s anticompetitive conduct by requiring the Board to cease and desist from requiring on-site supervision by dentists when non-dentists perform intraoral scans on prospective patients.

Section II of the proposed order addresses the core of the Board’s anticompetitive conduct. Paragraph II.A. orders the Board to cease and desist from requiring non-dentists affiliated with clear aligner platforms to maintain on-site dentist supervision when performing intraoral scanning. Paragraph II.B. prohibits the Board from impeding clear aligner platforms, or dental professionals affiliated with clear aligner platforms, from providing clear aligner therapy through remote treatment.

Section III requires the Board to provide notice of the proposed order to Board members and employees, and to certain dentists and clear aligner platforms.

Section IV requires the Board to notify the Commission of any changes to its rules related to intraoral scanning or clear aligner platforms.

Section IX provides that the Order will terminate 10 years from the date it is issued.

---

<sup>5</sup> See *N.C. Bd. of Dental Exam’rs*, 574 U.S. at 515 (“The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant.”) (internal citations and quotations omitted).

<sup>6</sup> Instead, the LSA determined, without explanation, that the rule amendment “does not affect competition at all.” See Exhibit A to Brief in Support of Motion to Dismiss (Memo to File from Paula M. Greene, Feb. 12, 2018) at 13, 15, *Leeds v. Board of Dental Examiners of Alabama*, No. 2:18-cv-01679, (N.D. Ala. Nov. 21, 2018), ECF No. 33. Because the LSA made this determination, it did not review whether the rule was made pursuant to a clearly articulated state policy. See Ala. Code § 41-22-22.1.

<sup>7</sup> Alabama statutes provide a procedure by which certain Board action may be reviewed by the Alabama Legislature’s Joint Committee on Administrative Regulation Review. See Ala. Code § 41-22-22.1. The Joint Committee did not review the actions at issue in this case.