



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the Secretary

December 20, 2021

American Association of Orthodontists, *et al.*

Re: *In the Matter of Board of Dental Examiners of Alabama*  
FTC File No. 191-0153, FTC Docket No. C-4757

Dear American Association of Orthodontists:

Thank you for the comment submitted on behalf of the American Association of Orthodontists and other groups of orthodontists and dentists (collectively, “AAO”). The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission’s Rules of Practice, 16 C.F.R. §4.9(b)(6)(ii), and has given it serious consideration. As you know, in this matter, the Commission addressed conduct by the Board of Dental Examiners of Alabama (“Board”) that unreasonably impeded competition from new providers of clear aligner therapy in Alabama. Specifically, the Board amended a rule in September 2017 to prohibit non-dentist personnel from taking intraoral scans without on-site dentist supervision. Then, in September 2018, the Board sent SmileDirectClub, LLC (“SmileDirect Club”), a clear aligner platform, a letter directing SmileDirectClub to cease and desist from taking intraoral scans without on-site dentist supervision. A state board controlled by active market participants may invoke the state action defense only if the restraint was enacted pursuant to a clearly articulated state policy and actively supervised by the state. As alleged in the Complaint, the requirements for active supervision were not met here: neither the rule amendment nor the cease-and-desist letter were reviewed or approved by neutral state officials with the power to veto or modify the Board’s actions.

In its comment, the AAO expresses “serious concerns” with the proposed Order. The comment states that the proposed Order does not account for the role of state dental boards in ensuring patient safety. The comment also takes issue with a provision of the proposed Order that enjoins the Board from prohibiting, restricting, impeding, or discouraging the provision of clear aligner therapy through remote treatment. Finally, the comment suggests that the structure of the Board may change in a way that could impact the applicability of the antitrust laws to the Board.

In the Commission’s view, the proposed Order appropriately balances the need to redress the Board’s anticompetitive conduct with the Board’s ongoing mandate, in partnership with other state actors, to enforce the Alabama Dental Practice Act, and thereby ensure a standard of care for dental practice in Alabama. The comment reads the proposed Order too broadly and ignores language in the proposed Order that effectively addresses the concerns articulated in the comment.

In issuing the complaint, the Commission found reason to believe the Board's actions do not yield procompetitive benefits that justify their harmful effect on competition.<sup>1</sup> As the comment correctly points out, the focus of the complaint is regulation by the Board of intraoral scans ("the capture and creation of dental picture, photographs, or images"<sup>2</sup>). The Board required that a dentist be in the building when a non-dentist performed intraoral scanning. In so doing, the Board impeded competition from innovative clear aligner platforms, which often initiate patient treatment with a non-dentist practitioner performing an intraoral scan under the remote supervision of a dentist. The AAO's comment does not identify any risks to patient health and safety from the process of intraoral scanning itself.<sup>3</sup>

Under the proposed Order, the Board will be able to ensure an appropriate standard of care for dental practice in Alabama. The proposed Order contains two provisos that limit the scope of the proposed Order and enable the Board to continue to protect patient health and safety in Alabama. First, the proposed Order does not prohibit the Board from filing "a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act."<sup>4</sup> And, aside from the specific prohibitions contained in the injunction, the proposed Order does not "prevent [the Board] from pursuing any administrative remedies against a Dentist or Non-Dentist Provider."<sup>5</sup>

The comment's suggestion that the Board will be hamstrung in its efforts to protect Alabama patients from improper orthodontic treatment fails to account for these provisos. Under the proposed Order, the Board now cannot require that non-dentists affiliated with clear aligner platforms be supervised by an on-site dentist when performing intraoral scanning, nor can it restrict or impede clear aligner platforms (or dental professionals affiliated with clear aligner platforms) from providing clear aligner therapy through remote treatment. But, the Board otherwise remains free to enforce appropriate standards of care against Alabama-licensed dentists who perform improper orthodontic treatment. If, for instance, an Alabama-licensed dentist that is providing remote supervision of intraoral scanning somehow violates the standard of care, the Board remains free to enforce the standard of care against that dentist.

Indeed, the proposed Order contemplates that the Board will still engage in legitimate enforcement activity related to remote clear aligner providers. Paragraph V.B. requires, for instance, that the Board notify the Commission about certain enforcement activities directed at clear aligner platforms and dental professionals, and therefore envisions that the Board may engage in legitimate enforcement activity *vis-à-vis* these entities.

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<sup>1</sup> Complaint ¶ 26.

<sup>2</sup> Proposed Order ¶ Paragraph I.G.

<sup>3</sup> AAO Comment at 2.

<sup>4</sup> Proposed Order ¶ Paragraph II.

<sup>5</sup> Proposed Order ¶ Paragraph II.

Paragraph II.B. of the order therefore does not have the far-reaching effect that the comment ascribes to it. It does not “effectively prohibit the Alabama Board from regulating teledentistry at all.”<sup>6</sup> Paragraph II.B. addresses Board activity directed at the provision of “Clear Aligner Therapy through remote treatment.”<sup>7</sup> This language does not address every application of teledentistry, but instead is limited to the remote provision of clear aligners. In general, this provision prohibits the Board from applying to dental professionals that provide clear aligner therapy by remote treatment restrictions or impediments that do not apply to in-office dentistry. The proposed Order does not give dental professionals carte blanche to breach the standard of care when providing clear aligner therapy through remote treatment.

Finally, the comment’s hypothetical concerns about principles of state sovereign immunity do not require amendment to the proposed Order at this time. The proposed Order addresses the Board as currently constituted. If there are future changes to the structure of the Board that impact the applicability of the antitrust laws, the Board may seek modification of the proposed Order.<sup>8</sup> The comment also says that the Alabama Legislature may enact new legislation covering teledentistry. The proposed Order does not in any way constrain the Alabama Legislature from passing new laws. The provisos make clear the Board may, consistent with the proposed Order, enforce that the Alabama Dental Practice Act in court.

After review of the comment and careful consideration of the issues raised, the Commission has determined that the public interest is served by issuing the Decision and Order in final form. A copy of the final Decision and Order and other relevant materials are available from the Commission’s website at: <http://www.ftc.gov>. The final Decision and Order will improve competitive conditions in the treatment of malocclusion in Alabama.

It assists the Commission’s analysis to hear from a variety of sources in its work on antitrust and consumer protection issues. Thank you for your interest in this matter.

By direction of the Commission.

April J. Tabor  
Secretary

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<sup>6</sup> AAO Comment at 3.

<sup>7</sup> Proposed Order ¶ Paragraph II.B.

<sup>8</sup> See Rules of Practice and Procedure of the Federal Trade Commission, Requests to Reopen, 16 C.F.R. § 2.51.