AXINN

RICHARD B. DAGEN
202-721-5418
RDAGEN@AXINN.COM

March 13, 2018

Douglas Rathbun
Competition Policy and Advocacy Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 3413
Washington, DC 20530

Re: Public Comment for First Roundtable: The Appropriate Role of The State Action Doctrine

Dear Mr. Rathbun:

I write on behalf of the Association of Dental Support Organizations ("ADSO").[1] The ADSO is a national and international trade association representing Dental Support Organizations ("DSOs"). ADSO membership includes 47 DSOs that support dental practices in 48 states. The ADSO would like to thank the Department of Justice Antitrust Division Competition and Advocacy Section for the opportunity to provide comments on the important issue of the state action doctrine.

DSOs provide non-clinical support functions for dental practices (e.g., accounting, procurement, and scheduling). ADSO members help lower overhead costs for dentists. These efficiencies are in turn passed onto consumers in the form of greater access to dental care, more choices, and lower prices. DSOs allow dentists to focus on their patients, not on business administrative functions.

[1] I served as the Assistant Director of the Anticompetitive Practices Division of the Federal Trade Commission ("FTC"). I was lead counsel in the North Carolina State Board of Dental Examiners matter where the Supreme Court adopted the FTC's interpretation of the state action doctrine in connection with the active supervision prong. My division also handled numerous other state action cases. *See, e.g.*, *Kentucky Household Goods Carrier Ass'n v. FTC*, 139 F.T.C. 404 (2005), *aff'd*, 199 Fed. Appx. 410 (6th Cir. 2006); *In the Matter of Indiana Household Movers & Warehousemen, Inc.*, F.T.C. Docket No. C-4077 (Apr. 25, 2003). I was a significant contributor to the FTC State Action Task Force's 2003 Report, which was the foundation for *NC Dental* as well as *FTC v. Phoebe Putney*, 568 U.S. 216 (2013). In 2016, I participated in a panel before the Democratic Attorney General Association on the Implications of the FTC's State Action Guidance for AGs & State Regulatory Boards.

The Federal Trade Commission has recognized that DSOs provide services that benefit consumers and dentists alike.[2]

Across the country, the ADSO has opposed efforts by dental licensing boards and state legislatures to make it more difficult for licensed dentists to utilize the non-clinical services provided by DSOs. Over the past few years, the ADSO, often with the assistance of the FTC's Office of Policy Planning, has fought against these restrictions in states such as Georgia, Maryland, North Carolina, Texas, Virginia, and Washington.

In their most benign form, state laws related to dentistry ensure the health and safety of patients.[3] However, licensing boards, typically comprised of active market participants with potential competitive biases, often move beyond regulating the clinical aspects of dentistry. These proposals purport to be justified by clinical concerns.[4] For instance, relying on statutes that define the practice of dentistry to encompass those who "own, operate or manage" a dental practice, many boards lobby their state legislatures or propose their own regulations to make it difficult for DSOs to operate. As discussed below, sometimes the boards (or the legislatures) effectively delegate their regulatory authority to the dental industry's main trade association, the American Dental Association ("ADA"), by adopting the ADA's code of professional responsibility.[5] Provisions in the ADA Code sometimes serve the dentists' interests, not those of the consumer/patient.

The recent spate of legislative and regulatory actions targeted at DSOs and DSO-supported practices is unwarranted and unnecessary: the dental boards (and the states' Attorneys General) have the wherewithal to attack unsafe practices without restricting the efficient non-clinical services provided by DSOs. In letters to state boards and legislators, the FTC has distinguished restrictions on clinical functions from non-clinical functions, the latter of which "are unlikely to affect the quality of professional dental care."[6]

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[2] *See* Letter from FTC Staff to Simone Salloum, Texas State Board of Dental Examiners (Oct. 6, 2014), https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/10/ftc-staff-comment-texas-state-board-dental-examiner-0; Letter from FTC Staff to The Honorable Stephen LaRoque, Representative, North Carolina House of Representatives (May 25, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-nc-representative-stephen-laroque-concerning-nc-house-bill-698-and-regulation/1205ncdental.pdf.

[3] *See, e.g.*, Virginia Code § 54.1-2706 (listing reasons the Virginia Dental Board may refuse to grant a license or suspend or revoke an existing license).

[4] *See North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (Feb. 25, 2015); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1985); Order Denying Motion to Dismiss on State Action Grounds, *In the Matter of South Carolina Board of Dentistry*, FTC Docket No. 9311 (July 28, 2004).

[5] *See, e.g.*, Petition, *Adoption of the ADA Code of Ethics*, Virginia Regulatory Town Hall (June 11, 2015), https://www.townhall.virginia.gov/L/ViewPetition.cfm?petitionid=226; Board Regulation Number 1, *Code of Ethics*, Mississippi State Board of Dental Examiners, https://www.dentalboard.ms.gov/msbde/msbde.nsf/webpageedit/Laws_RegsAdopted_reg1/$FILE/regulation1.pdf?OpenElement.

[6] Letter from FTC Staff to Simone Salloum, Texas State Board of Dental Examiners, 1 (Oct. 6, 2014). *See also* Letter from FTC Staff to The Honorable Stephen LaRoque, Representative, North Carolina House of Representatives, 6 (May 25, 2012) (noting that a bill that would regulate DSOs "does not appear [to] enhance the Board [of Dental Examiners'] ability to ensure patient safety.").

Unwarranted restrictions on DSOs can be extremely harmful to patients in underserved areas. The Kaiser Family Foundation ("KFF") estimates that 49 million Americans live in "dental health professional shortage areas."[7] The KFF reports that "there is a geographic maldistribution of dentists and a shortage of office-based dentists available to treat low-income and special needs populations."[8] The Centers for Disease Control and Prevention ("CDC") estimate that "children from lower-income families are almost twice as likely to have cavities as those from higher-income families, but they are much less likely to have dental sealants[,]" which are safe and effective tools for preventing cavities.[9] The CDC also noted that the prevalence of untreated cavities varies among racial and ethnic groups.[10] As the FTC has recognized, DSOs help lower barriers to entry and expand access to these underserved populations.

While some dentists may be most comfortable performing their administrative functions on their own, those dentists should not have the ability to use state licensure requirements to "deny consumers of dental services the benefits of competition spurred by the efficiencies that DSOs can offer, including the potential for lower prices, improved access to care, and greater choice."[11]

In addition to FTC advocacy, the state action doctrine has served to limit harm to consumers. This comment addresses some particular aspects of the doctrine of relevance to the ADSO.

The State Action Doctrine

Through control of state boards by financially-controlled market participants, incumbents in an industry sometimes resist new competition and new business models to the potential detriment of consumers. In 2015, the Supreme Court's opinion in *North Carolina State Board of Dental Examiners v. FTC* ("*N.C. Dental*") made clear that anticompetitive conduct by such financially-interested boards is not necessarily immune from antitrust liability.[12] The *N.C. Dental* Court identified two requirements for a licensing board's action to receive state action immunity: "first that the challenge restraint . . . be one clearly articulated and affirmatively expressed as state policy, and second that the policy . . . be actively supervised by the State."[13]

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[7] Elizabeth Hinton and Julia Paradise, *Access to Dental Care in Medicaid: Spotlight on Nonelderly Adults*, The Henry J. Kaiser Family Foundation (Mar. 17, 2016), https://www.kff.org/medicaid/issue-brief/access-to-dental-care-in-medicaid-spotlight-on-nonelderly-adults/.

[8] *Id.*

[9] *At a Glance 2016 Oral Health: Working to Improve Oral Health for All Americans*, Centers for Disease Control and Prevention, 2 https://www.cdc.gov/chronicdisease/pdf/aag-oral-health.pdf.

[10] *Id.*

[11] Letter from FTC Staff to The Honorable Stephen LaRoque, Representative, North Carolina House of Representatives, 1 (May 25, 2012).

[12] 135 S. Ct. 1101 (Feb. 25, 2015). There have been a number of antitrust challenges to state board regulations since the *N.C. Dental* decision. *See, e.g., Teledoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Texas May 29, 2015) (order denying state action immunity); Administrative Complaint, *In the Matter of Louisiana Real Estate Appraisers Board*, F.T.C. Docket No. 9374 (May 13, 2017); *Wallen v. St. Louis Metropolitan Taxicab Comm.*, 2016 WL 5846825 (E.D. Mo. Oct. 6, 2016).

[13] *Id.* at 1110 (internal quotations and citations omitted).

In that case, the FTC found that the North Carolina Board had taken anticompetitive action to prevent entry of new lower cost service providers. The North Carolina Board argued that its actions were immune, but the FTC, the 4th Circuit, and the Supreme Court all rejected that argument because the Board was not actively supervised. Just two years earlier, the Supreme Court in *FTC v. Phoebe Putney Health System, Inc. ("Phoebe Putney")*,[14] had focused its attention on the clear articulation prong.

The ADSO wishes to bring two common scenarios to the attention of the DOJ, one that implicates the Clear Articulation prong and the other the Active Supervision prong.

Clearly Articulated State Policy

The first prong of the state action doctrine is the requirement that the relevant entity (e.g., a licensing board) act pursuant to a clearly articulated state policy. In *Phoebe Putney,* the FTC challenged the acquisition of a hospital by a hospital authority that would have resulted in the authority having an 86% market share in a six-county area. The hospital authority raised a state action immunity defense. At issue was a Georgia statute granting hospital authorities general corporate power, including the power to acquire hospitals. The Supreme Court rejected the use of the state action defense.

The Court recognized that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication."[15] State action immunity will only attach where, as a preliminary step, an entity is acting pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition."[16] In applying the clear articulation test, the Court takes a practical approach, focusing on the foreseeable results of the State's policy:

> [T]he State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the "state itself." Thus, we have concluded that a state policy to displace federal antitrust law was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.[17]

Notwithstanding the hospital authority's power to acquire hospitals, the Court held that there was "no evidence the State affirmatively contemplated that hospital authorities would displace

[14] 568 U.S. 216 (2013).
[15] *Phoebe Putney*, 568 U.S. at 225.
[16] *Id.* at 226.
[17] *Id.* at 229 (internal citations omitted).

competition by consolidating hospital ownership."[18] Numerous cases have rejected claims for state action immunity because there was no clearly articulated policy.[19]

The ADSO has encountered several situations where a Board contemplated anticompetitive conduct absent a clearly articulated policy to displace competition. One recurring theme involves a Board or state legislature incorporating the American Dental Association's Principles of Ethics and Code of Professional Conduct (the "ADA Code") into statute or regulation. Neither situation would appear to satisfy the state action defense.

In Maryland, where the State Board of Dental Examiners considered incorporating the ADA Code, the Board might argue that a statutory provision, Md. Health Occupations Code Ann. Article § 4-315(16), contains a clearly articulated state policy shielding potential anticompetitive conduct.[20] That section provides:

> Subject to the hearing provisions of § 4–318 of this subtitle, the Board may deny a general license to practice dentistry, a limited license to practice dentistry, or a teacher's license to practice dentistry to any applicant, reprimand any licensed dentist, place any licensed dentist on probation, or suspend or revoke the license of any licensed dentist, if the applicant or licensee:
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> * * *
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> (16) Behaves dishonorably or unprofessionally, or *violates a professional code of ethics* pertaining to the dentistry profession, ... [emphasis added]

The Maryland statute would not appear to shield anticompetitive conduct under the state action doctrine. The clear articulation prong cannot be satisfied if the statute requires compliance with every possible code of ethics whenever adopted and regardless of the provisions. This is particularly important here because the ADA Code is a "living document," subject to change by the professional trade association consisting of dentists. For example, the Board could not enforce an ADA Code provision, adopted through a vote of competitors, to explicitly require price fixing. The Supreme Court in *Goldfarb v. Virginia* ruled a fee-setting provision unlawful when adopted by the lawyers' trade association.[21]

Given the discretion vested in the trade association to change its Code, there is no reasonable argument that Board enforcement activity would be "merely ministerial," or even that there is something approaching a clearly articulated policy. As the Supreme Court made clear in the seminal state action case, *Parker v. Brown*, a state cannot simply immunize private anticompetitive conduct.[22] The state policy must be clearly articulated, not left to be developed by private,

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[18] *Id.* at 227.

[19] *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶225 (3d and 4th eds., 2017 Cum. Supp. 2010-2016).

[20] In 2015, the Executive Director of the Virginia Dental Association petitioned the Virginia Board of Dentistry to adopt the ADA Code. Other states have already incorporated the ADA Code into their statutes.

[21] 421 U.S. 773 (1975).

[22] 317 U.S. 341 (1943).

financially interested entities. Board enforcement pursuant to the ADA Code would run afoul of this prong of the state action doctrine. Indeed, in the *Goldfarb* case, the Supreme Court recognized that, even absent enforcement, the adoption of restrictive ethical rules could chill procompetitive conduct and violate the antitrust laws.

Active Supervision

Even when a licensing board acts pursuant to a clearly articulated state policy, the board's actions may still result in antitrust liability if the board is not "actively supervised" by a non-interested state actor. For state regulatory boards controlled by market participants, "active supervision" is required because licensing boards present the "structural risk of market participants' confusing their own interests with the State's policy goals."[23] The Court in *N.C. Dental* further explained:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.[24]

The Supreme Court established certain criteria for active supervision: (1) the supervisor must review the substance of the anticompetitive decision, (2) the supervisor must have the power to veto or modify decisions, and (3) there must be more than the "mere potential for state supervision."[25] The FTC further clarified that cases require that "active supervision must precede implementation of the allegedly anticompetitive restraint."[26] The possibility of judicial or other review of board decisions will not suffice.[27]

States have responded to the *N.C. Dental* decision in varying ways, not all of which will necessarily satisfy the active supervision requirement; the key in many cases will be in the implementation of the new statute. In 2017, the Georgia Board of Dentistry proposed revising its fee splitting rule in a way that not only would harm ADSO members and other dental support organizations ("DSOs"), but, more generally, competition for dental services, and therefore would negatively impact Georgia consumers. The current fee splitting rule is a straightforward prohibition on fee splitting for referrals. This reflects a legitimate concern (recognized in many states) that splitting fees with referral sources may undermine the integrity of a dentist's professional relationships with patients,

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[23] *N.C. Dental*, 135 S. Ct. at 1114, 1106.
[24] *Id.* at 1111.
[25] *Id.* at 1116-17.
[26] FED. TRADE COMM'N., FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS ("FTC GUIDANCE"), 10 (Oct. 14, 2015), *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.
[27] *See Patrick v. Burget*, 486 U.S. 94, 103-04 (1988).

other professionals, and payors.[28] The proposed Rule provided that dentists shall not give rebates to referral sources or split fees and then defines "fee splitting" to include the sharing of fees for professional services between a licensed dentist and any unlicensed party. This amendment creates confusion in the marketplace and seems to extend the fee splitting prohibition well beyond referrals.[29]

Of particular relevance here to the active supervision prong, Georgia enacted the Georgia Professional Regulation Reform Act. The law provides in pertinent part:

> The Governor shall have the authority and duty to actively supervise the professional licensing boards of this state to ensure that their actions are consistent with clearly articulated state policy and shall therefore have the authority and duty to: . . . Review and, in writing, approve or veto any rule before it is filed in the office of the Secretary of State if such rule is required to be filed in the office of the Secretary of State by Chapter 13 of Title 50, the 'Georgia Administrative Procedure Act,' or before such rule becomes effective, if filing is not required[.][30]

The Board might argue that the law provides for active supervision as articulated by the Supreme Court in relation to licensing board *rules*. However, the mere possibility of a "pointed reexamination" by the supervisor does not establish active supervision if the supervisor does not actually engage in a substantive review of relevant information prior to implementation of a rule.[31] The supervisor must do far more than simply gather paperwork.[32] Finally, merely certifying that a proposed rule complied with procedures is not sufficient to establish active supervision.[33]

Moreover, even if *rulemaking* is actively supervised, it is nonetheless possible that *implementation* of the rules by the financially-interested board may occur without any "pointed reexamination."[34] Any actions a licensing board takes that are not ministerial (non-discretionary) implementations of clearly articulated state policies could still expose the board to antitrust liability if the actions are not actively supervised.[35] *See N.C. Dental*, 135 S. Ct. at 1112 ("The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be

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[28] *Cf.* 42 U.S.C. § 1395nn.

[29] Indeed, on its face, the proposed Rule could be read to prohibit a dentist paying his/her accountant because that payment would come from the dentist's "fees."

[30] O.C.G.A. § 43-1C-3(a)(1).

[31] *See* FTC GUIDANCE at 10; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (finding no active supervision where the State "at most [checked] the rate filings . . . for mathematical accuracy"), *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

[32] *See Ky. Household Goods Carrier Ass'n*, 139 F.T.C. 404 (2005), *aff'd*, 199 Fed. Appx. 410 (6th Cir. 2006).

[33] *See Teledoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-343, 2015 WL 8773509, at *8 (W.D. Tex. Dec. 14, 2015) (finding no active supervision where a rule is "'voidable' if it fails to comply with the procedural requirements of the [Administrative Procedures Act], including failure to include a 'reasoned justification for the rule as adopted'").

[34] The law only provides for review of licensing board enforcement actions after implementation if they are challenged via an appeal or submitted for review by a licensing board. *See* O.C.G.A. § 43-1C-3(a)(3).

[35] *See* FTC GUIDANCE at 6 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987)).

defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.").

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This Comment provides a few examples of the potential harm to consumers that might occur absent continued vigilance by the DOJ, the FTC, and the Courts with respect to confining the reach of the state action doctrine to its proper limits.

The ADSO greatly appreciates the opportunity to provide the DOJ with information on important issues surrounding the impact of the state action doctrine on occupational licensing. The ADSO urges the DOJ to continue efforts to limit the use of the state action defense to so as to reduce unnecessary licensing obligations that harm consumers. Please do not hesitate to contact me or Dennis LaGanza, Senior Vice President, Government Affairs, at 703-940-3861 or dlaganza@theadso.org with any questions.

Sincerely,

Richard B. Dagen

cc: Dennis LaGanza