

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’s actions may invoke the state action defense if they are not in accordance with an articulated state policy and actively supervised by the state. As alleged in the Complaint, the

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.¹ 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"²). 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.³

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."⁴ 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."⁵

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 cTc 0 Tw [(t)-2 (ha)] frligner

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