



Office of the Secretary

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

September 6, 2007

Tamra S. Kempf
Chief Legal Counsel
American Dental Association
211 East Chicago Avenue
Chicago, IL 60611

Re: *In the Matter of South Carolina State Board of Dentistry, Docket No. 9311*

Dear Ms. Kempf:

Thank you for your comments on behalf of the American Dental Association (ADA) regarding the proposed consent order in the above-captioned matter. The Commission has reviewed the ADA's comment in connection with its decision whether to give final approval to the proposed consent order and has placed the comment on the public record.

The ADA asserts that final acceptance of the consent order would be an abuse of discretion. It contends that there is no need for an order because "there is essentially no likelihood of re-adoption of the challenged regulation in the absence of the decree." (ADA Letter at 3). It also argues that federalism concerns make issuance of an order against a state governmental body under these circumstances especially inappropriate.

The ADA appears to have overlooked the fact that the consent order does not prohibit the Board from reimposing the challenged regulation. As the Analysis to Aid Public Comment expressly states, the Commission determined that it is not necessary to include such a provision. It thus appears that the FTC and the ADA agree on this point.

We note that the ADA has offered no comments about the provisions that actually are in the order. As the Analysis to Aid Public Comment explains, the Commission concluded that an order is warranted to eradicate lingering effects of the Board's challenged conduct that may discourage dentists and dental hygienists from participating in public health dental programs.¹ The order is designed to address such effects by requiring the Board to disseminate an announcement to market participants. That announcement essentially affirms the Board's support for the state legislative policy that no dentist examination is required as a condition of

¹ Cf. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (finding of mootness requires not only a showing that it is clear that there is no reasonable expectation that the alleged violation might recur, but also that interim events "have completely and irrevocably eradicated the effects of the alleged violation").

dental hygienists providing preventive dental care in public health settings. Addressing the chilling effects of the Board's past conduct on market participants who might otherwise be interested in participating in public health preventive dental care programs involving dental hygienists is warranted under the circumstances here. The ADA has not suggested that there are no lingering effects from the Board's conduct or that relief to eliminate such effects would be improper. Moreover, there is ample precedent for this type of affirmative disclosure remedy, including in orders against state agencies.²

The ADA also suggests that the consent order "injects the Commission into an area, *i.e.*, balancing access and quality considerations in dentistry, that is far better handled by the state legislature than by a federal antitrust agency." (ADA Letter at 1). The enforcement action and the resulting consent order, however, were designed to remedy the Board's imposition of restraints on public health preventive dental care that conflicted with the policies articulated by the South Carolina legislature. The ADA has not explained how anything in the consent order would threaten the state legislature's policy judgments. Moreover, it is difficult to see how requiring the Board to distribute an announcement affirming its support for what it acknowledges to be the state legislative policy concerning public health practice by dental hygienists (or any other aspect of the order) would put the Commission in the position of second-guessing the legislature's judgments regarding quality and access to preventive dental care services.

Accordingly, after considering the ADA's comment, the Commission has determined that the public interest would be served best by issuing the Decision and Order in final form without modification.

We appreciate your interest in this matter. A copy of the final Decision and Order is enclosed for your information.

By direction of the Commission.

Donald S. Clark
Secretary of the Commission

Enclosure

² As the Commission observed in affirming a requirement that the state agency respondent distribute a prescribed announcement to optometrists in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 619 (1988):

The Commission's authority to issue remedial orders requiring respondents to make affirmative disclosures, including sending notices to affected parties, is well-established. *See, e.g., Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986); *Warner Lambert v. FTC*, 562 F.2d 749, 756-62 (D.C. Cir 1977), *cert. denied*, 435 U.S. 950 (1978).

Other state board orders with such requirements include *Missouri Board of Embalmers and Funeral Directors*, FTC File No. 061-0026 (published for comment March 2007); *Louisiana State Board of Dentistry*, 106 F.T.C. 65 (1985).