



Office of the Secretary

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

September 6, 2007

Richard D. Stevens
Executive Director
West Virginia Dental Association
2016½ Kanawha Boulevard, East
Charleston, WV 25311

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

Dear Mr. Stevens:

Thank you for your comments on behalf of the West Virginia Dental Association regarding the proposed consent order in the above-captioned matter. The Commission has reviewed the Association 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 Association's letter expresses support for the comments submitted by the American Dental Association (ADA), which opposes the consent decree and contends that there is no need for an order because "there is essentially no likelihood of readoption of the challenged regulation in the absence of the decree" (ADA Letter at 3) and that federalism concerns make issuance of an order against a state governmental body under these circumstances especially inappropriate. 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).

A copy of the Commission's letter responding to the ADA comments is enclosed for your information. As that letter explains, the ADA appears to have overlooked the fact that the consent order does not prohibit the Board from reimposing the challenged regulation. The Analysis to Aid Public Comment expressly states that 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.

ADA did not offer comments on the provisions that actually are in the order, which are designed to eradicate lingering effects of the Board's challenged conduct that may discourage dentists and dental hygienists from participating in public health dental programs. The order requires the Board to disseminate an announcement to market participants that affirms the Board's support for the state legislative policy concerning the conditions under which dental

hygienists may provide preventive dental care in public health settings. There is ample precedent for this type of affirmative disclosure remedy, including in orders against state agencies.¹

Although the ADA contends that the consent order would be an invasion of the sovereign prerogatives of the South Carolina legislature, ADA did not explain how a requirement that the Board 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 requirement in 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.

In addition to endorsing the comments of the ADA, the Association offers some additional views of its own. In particular, the Association asserts that the order would permit independent dental hygienist practice, and that it would put the safety of patients in jeopardy. The Association, however, appears to misunderstand the nature of the consent order and the context in which it arises. South Carolina, like several other states, has chosen to place fewer conditions on dental hygienist practice in school settings in order to address unmet needs for dental care among school-age children. While the Association may disagree with this policy choice, its disagreement stems from the legislative enactments of the South Carolina General Assembly rather than from anything in the consent order.

Accordingly, after considering the Association'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

Enclosures

¹ 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).