

Reproduced with permission from Antitrust & Trade Regulation Report, 109 ATRR 475, 10/16/15. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Compliance

FTC Offers Roadmap To State Action Immunity

State officials and others seeking guidance have a new resource to help them figure out what constitutes “active supervision” of state boards that regulate occupations requiring licenses.

The Federal Trade Commission released an FTC Staff guidance on Oct. 14 in the wake of the U.S. Supreme Court’s decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 2015 BL 48206 (2015).

In that case, the Supreme Court held that the North Carolina State Board of Dental Examiners violated federal antitrust law by not allowing non-dentists to provide teeth whitening services. It rejected the board’s attempt at invoking state action immunity, holding that there wasn’t sufficient supervision of the board’s activity by the state.

The guidance “appears to address head-on the questions raised by Justice [Samuel] Alito in his dissent in the *N.C. Dental* case,” said Robert M. Langer, a partner in the Hartford, Conn. office of Wiggin and Dana LLP and who served as the Assistant Attorney General in charge of the Antitrust and Consumer Protection Department in the Office of the Connecticut Attorney General.

Namely, Alito focused on what would constitute a “controlling number” of market participants, how an “active” market participant should be defined and what the scope of the market might be in which a given member may not participate. The majority’s decision, Alito argued—and Langer agrees—doesn’t provide clear guidance on such issues.

The guidance is therefore important in that “it lays down a marker,” Langer said. “Regulatory boards that would be inclined to argue that active supervision by a

non-market participant is required only when the subject competitive conduct is one engaged in by a majority of board members, e.g., tooth whitening, rather than licensed dentistry, itself, are now on notice that they run the risk that the FTC may very well challenge that interpretation.”

For example, the guidance explains that a member of a state regulatory board will be considered an active market participant if that person “(i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.” The manner in which a person is selected to serve on a board doesn’t impact a determination of whether that person is an active market participant, the staff said.

It further advised that a “numerical majority” of active market participants isn’t what triggers the need for active supervision, but rather that a decision was “controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market.” If it was, active supervision will be required before state action immunity will confer.

Supervision will be determined by looking at whether the state exercised “sufficient independent judgment and control” over the regulatory scheme and will accept political accountability.

Additionally, the agency will look at whether the supervising entity gathered sufficient information to properly evaluate the recommended action and has issued a written decision in response.

By CECELIA M. ASSAM

To contact the reporter on this story: Cecelia M. Assam in Washington at cassam@bna.com

To contact the editor responsible for this story: Tiffany Friesen Milone at tmilone@bna.com

The FTC Staff guidance is available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.