

Complaint

IN THE MATTER OF

BOARD OF DENTAL EXAMINERS OF ALABAMACONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT.*Docket No. C-4757; File No. 191 0153**Complaint, September 28, 2021 – Decision, December 20, 2021*

This consent order addresses the Board of Dental Examiners of Alabama's violation of the FTC Act through the exclusion of new competition in the relevant market. The complaint alleges that the Board of Dental Examiners of Alabama prohibited dental assistants and other non-dentist practitioners from performing scans inside a patient's mouth without on-site dentist supervision thereby limiting new and innovative teledentistry platforms and the dentists who partner with these platforms. Under the order the Respondent must no longer impede clear aligner platforms or dental professionals affiliated with them from providing clear aligner therapy through remote treatment.

Participants

For the *Commission*: Philip Kehl, Elizabeth Gillen, and Melissa Westman-Cherry.

For the *Respondent*: Ashby Pate, Jackson Sharman, and Logan Matthews [*Lightfoot Law*].

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent, Board of Dental Examiners of Alabama, has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This case challenges actions of the Board of Dental Examiners of Alabama ("Dental Board") that unreasonably exclude emerging competition from certain new and innovative teledentistry platforms, and the dentists who partner with these platforms. The Dental Board is comprised of seven members, six of whom are practicing dentists.

2. In recent years, dentists working with several new firms have started to offer teeth alignment treatment that differs from the traditional treatments offered through dental offices, such as braces or clear aligners prescribed following an in-office appointment with a dentist. In this new treatment model, patients are fitted for clear aligners following a visit to a storefront location, where a digital scan is performed by a dental assistant. The scan is then reviewed by a dentist working remotely. Patient interactions with dental professionals also take place on a remote basis. This mode of treatment often is substantially less expensive than traditional treatments.

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3. In 2017 and 2018, the Dental Board took actions to stop the expansion in Alabama of firms providing clear aligners in Alabama through a teledentistry model. First, the Board amended Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentists from performing digital scans without on-site dentist supervision. Thereafter, the Dental Board directed the leading provider of clear aligners through a teledentistry model to cease performing digital scans without on-site dentist supervision.

4. The actions of the Dental Board have deprived consumers in Alabama of low-price, convenient options for teeth alignment treatment without any legitimate justification or defense. The actions of the Dental Board have unreasonably restrained competition and violate Section 5 of the Federal Trade Commission Act.

RESPONDENT

5. Respondent Dental Board is the regulatory body responsible for the licensure and monitoring of the practice of dentistry in the State of Alabama. The Dental Board is organized, exists, and transacts business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama.

6. The State of Alabama created the Dental Board pursuant to the Alabama Dental Practice Act, Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*) ("Act") to carry out the purposes and enforce the provisions of the Act. It is unlawful for an individual to practice dentistry or to provide dental hygiene services in Alabama without holding a current license to practice issued by the Dental Board.

7. The Dental Board is responsible for the licensure of all dentists practicing in Alabama, including orthodontists.

8. The Dental Board is comprised of seven members: six dentists and one dental hygienist. To be eligible for Dental Board membership, the dentist members must be actively engaged in the practice of dentistry in Alabama for at least five years prior to their selection to the Dental Board. Members of the dental profession select the Dental Board members. Licensed dentists residing and practicing in Alabama vote to elect five of the six dentist members. The Alabama Dental Society selects the sixth. Licensed dental hygienists residing and practicing in the state elect the dental hygienist member.

9. Collectively, the six dentist members can and do control the operation of the Dental Board. While serving on the Dental Board, dentist members continue to engage in the for-profit business of providing dental services.

10. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, dentists in Alabama compete with each other and with dentist members of the Dental Board in the provision of dental services. Through their dental practices, dentist board members are distinct economic actors.

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JURISDICTION

11. The Dental Board is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

12. The acts and practices of the Dental Board, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, dentists and non-dentist providers of dental services in Alabama purchase and receive products and equipment that are shipped across state lines by manufacturers and suppliers located out of state, and transfer money across state lines in payment for these products and equipment.

BACKGROUND

13. “Malocclusion” is a clinical term for the misalignment of or incorrect relation between teeth. Many dentists and orthodontists offer patients treatment for malocclusion. This treatment may include prescribing braces or clear aligners.

14. Braces are the traditional form of treatment for malocclusion. Braces typically employ visible components, including wires or brackets and rubber bands. Braces are installed and adjusted during in-person visits to a dentist’s or orthodontist’s office, and patients, or their insurance providers, pay dentists or orthodontists directly for these services.

15. Clear aligners are custom-made, removable plastic mouthpieces that are molded to fit the patient’s teeth for the treatment of malocclusion. Clear aligners are less conspicuous than braces.

16. Clear aligner therapy consists of supplying the dental patient with a series of mouthpieces sequenced to correct incrementally the malocclusion over a prescribed period. Wearing clear aligners places gentle pressure on the patient’s teeth to reposition them gradually.

17. Clear aligner therapy often begins with an intraoral scan of the patient’s teeth using a scanning device placed inside the patient’s mouth. The intraoral scanning device, also known as an “optical impression device,” is a wand-like tool inserted into the patient’s mouth to create a three-dimensional digital model of the patient’s teeth, bite, gums, and palate. The scanning device enables clinical evaluations without a conventional plaster-cast impression. After the scan is completed, a dentist or orthodontist determines whether the patient is a candidate for clear aligner therapy.

18. Many patients are prescribed clear aligners through a visit to a dentist’s or orthodontist’s office. A patient will schedule an in-person visit with a dentist or orthodontist for assessment of and possible treatment for malocclusion and may receive a prescription for clear aligners from the dentist or orthodontist. As with braces, patients or their insurance providers typically pay dentists or orthodontists directly for these services.

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19. In recent years, several new firms, referred to herein as clear aligner platforms, have launched a new business model utilizing teledentistry. Under this model, the clear aligner platform may send an “impression kit” to the prospective patient’s home, which the patient uses to take impressions of her teeth and then sends to the provider. Alternatively, the prospective patient may visit a storefront location, where a dental hygienist, dental assistant, or other non-dentist professional performs an intraoral scan of the patient’s teeth. For reasons of ease and convenience, many patients prefer to initiate treatment with clear aligner platforms by visiting a physical storefront.

20. The typical patient treatment process employed by clear aligner platforms is as follows. After an impression or digital scan of the prospective patient’s teeth is taken, the clear aligner platform provides the results to a dentist working remotely. The dentist reviews the results and determines whether the patient is a candidate for clear aligner therapy. If so, the dentist may prescribe a set of clear aligners for the patient. A set of custom-made clear aligners is manufactured and sent to the patient’s home. Dental professionals are available for consultations on a remote basis.

21. Several firms employ this teledentistry model to provide clear aligner therapy to patients, including SmileDirectClub, Candid, and Smilelove. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting.

22. Many patients prefer clear aligner therapy supplied through a teledentistry model to treatment through a traditional dentist’s or orthodontist’s office. These patients find this model to be less expensive and more convenient than clear aligners or braces fitted through in-person office visits to a dentist or orthodontist.

THE CHALLENGED CONDUCT

23. Following the rollout and initial success of the first clear aligner platforms, the Dental Board adopted a regulation impeding their operations. Specifically, in September 2017, members of the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board’s interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist dental personnel, such as dental hygienists and assistants, from taking digital intraoral scans of a patient’s teeth without supervision by a dentist who is physically present in the dental facility. The business model employed by emerging clear aligner platforms is not compatible with the Board’s interpretation of the amended rule, as dental hygienists or assistants who perform digital scans for the platforms are supervised by dentists working remotely.

24. In September 2018, pursuant to a Dental Board vote, the Dental Board sent a cease-and-desist letter to SmileDirectClub. In the letter, the Dental Board instructed SmileDirectClub that the firm and its affiliated personnel were engaged in the unauthorized practice of dentistry.

25. The actions of the Dental Board described above constitute concerted action for purposes of the antitrust laws.

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26. As a result of the Dental Board's actions, SmileDirectClub halted a planned expansion of facilities in Alabama. In addition, the Dental Board's actions were widely publicized, including as a result of related litigation between the Dental Board and SmileDirectClub. Other clear aligner platforms are therefore aware of the Board's conduct.

27. The Dental Board's actions have unreasonably restrained competition for the treatment of malocclusion in Alabama. Consumers in Alabama have been deprived of full competition across all channels through which consumers could access treatment for malocclusion.

28. The Dental Board's actions do not yield procompetitive benefits sufficient to justify their harmful effect on competition.

29. The Dental Board's actions have not been reviewed or approved by any neutral state officials with the power to veto or modify the Board's actions.

VIOLATION ALLEGED

30. The acts and practices described above unreasonably restrain competition and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such acts and practices or the effects thereof are continuing and will likely continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December 2021, issues its Complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of certain acts and practices of the Board of Dental Examiners of Alabama ("Board" or "Respondent"). The Commission's Bureau of Competition prepared and furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondent and the Bureau of Competition executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by Respondent of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for

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settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent Board of Dental Examiners of Alabama is the regulatory board responsible for the licensure, monitoring and safe practice of dentistry in the State of Alabama with its executive offices and principal place of business located at 2229 Rocky Ridge Road, Birmingham, Alabama 35216.
2. The Commission has jurisdiction of the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER**I. Definitions**

IT IS HEREBY ORDERED that, as used in this Order, the following definitions, shall apply:

- A. "Board" or "Respondent" means the Board of Dental Examiners of Alabama, and its committees, groups, members, employees, agents, representatives, and assigns.
- B. "Commission" means the Federal Trade Commission.
- C. "Alabama Dental Practice Act" means the Code of Alabama, Title 34, Chapter 9 (Dentists and Dental Hygienists) (Ala. Code § 34-9-1, *et. seq.*).
- D. "Clear Aligner Platform" means any Person that provides, or facilitates the provision of, remote treatment for malocclusion through the provision of Clear Aligner Therapy, using remote supervision by a Dentist.
- E. "Clear Aligner Therapy" means the use of Intraoral Scanning and fabricated, removable aligners for the treatment of malocclusion.

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- F. “Dentist” means any individual holding a license, issued by the Board, to practice dentistry in Alabama.
- G. “Intraoral Scan” or “Intraoral Scanning” means the capture and creation of dental pictures, photographs, or images using a device, such as an *iTero* brand device or similar device, to scan inside of a patient’s mouth. The terms Intraoral Scan and Intraoral Scanning do not include radiographic or x-ray imaging techniques.
- H. “Non-Dentist Provider” means any Person other than a Dentist that provides Clear Aligner Therapy.
- I. “Person” means both natural and artificial persons, including but not limited to, corporations and unincorporated entities.

II. Injunction

IT IS FURTHER ORDERED that Respondent, in connection with its activities in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from, directly or indirectly:

- A. Requiring any Non-Dentist Provider affiliated with any Clear Aligner Platform to have on-site supervision by a Dentist when performing Intraoral Scanning; and
- B. Prohibiting, restricting, impeding, or discouraging any (i) Clear Aligner Platform or (ii) Dentist or Non-Dentist Provider affiliated with any Clear Aligner Platform from providing or facilitating the provision of Clear Aligner Therapy through remote treatment;

Provided, however, nothing in this Order shall prohibit Respondent from filing, or causing to be filed, a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act;

For the avoidance of doubt, and other than as set out above in Paragraphs II.A. and II.B., this Order shall not be construed as preventing Respondent from pursuing any administrative remedies against a Dentist or Non-Dentist Provider pursuant to and in accordance with the Alabama Dental Practice Act and Chapter 270 of the Alabama Administrative Code.

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III. Notice to Board Members

IT IS FURTHER ORDERED that Respondent shall:

- A. No later than 30 days from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to:
 - 1. Each Board member;
 - 2. Each officer, director, manager, representative, agent, attorney, and employee of the Board;
 - 3. Each Dentist or Non-Dentist Provider to whom the Board sent any correspondence related to Intraoral Scanning; and
 - 4. Each Clear Aligner Platform identified in Appendix A.
- B. For a period of 5 years from the date this Order is issued, distribute by electronic mail with return receipt requested, a copy of this Order and the Complaint to each new Board member, officer, director, manager, attorney, representative, agent or employee, and who did not previously receive a copy of this Order and the Complaint from Respondent, no later than 30 days from the date that such Person assumes his or her position.

IV. Notice to the Commission

IT IS FURTHER ORDERED that, from the date this Order is issued, Respondent shall notify the Commission no later than 60 days after any publication of advance notice of any proposed change to Chapter 270 of the Alabama Administrative Code that relates to Intraoral Scanning or Clear Aligner Platforms, including modifications to the existing rules or proposals for new rules.

V. Compliance Reports

IT IS FURTHER ORDERED that Respondent shall file verified written reports (“compliance reports”) in accordance with the following:

- A. Respondent shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondent has fully complied with Paragraph III.A.; annual compliance reports one year after the date this Order is issued, and annually for the next 5 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.

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- B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its report, among other information or documentation that may be necessary to demonstrate compliance:
1. A full description of the measures Respondent has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;
 2. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Clear Aligner Platform. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable;
 3. A full description of any enforcement action and the circumstances leading to such enforcement action, including the sending of any cease and desist letter, against any Dentist or Non-Dentist Provider related to Intraoral Scanning. Each description should include copies of any cease and desist letter or compliant filed by the Board, as applicable; and
 4. Copies of notices sent pursuant to Paragraph III of the Order.
- Provided, however,* that the Board need not provide any information under Paragraphs V.B.2 or V.B.3 the disclosure of which would violate Ala. Admin. Code r. 270-x-1.08(3).
- C. Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.
- D. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the President or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2,41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

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VI. Change in Respondent

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least 20 days prior to:

- A. Any change in the Board of Dental Examiners of Alabama's principal place of business address; or
- B. Any other change in Respondent if such change may affect compliance obligations arising out of this Order.

VII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent, made to its principal place of business as identified in this Order, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative of the Commission and at the expense of Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition in the provision of Clear Aligner Therapy as the Commission alleged in its Complaint.

IX. Term

IT IS FURTHER ORDERED that this Order shall terminate on December 20, 2031.

By the Commission.

Analysis to Aid Public Comment

Appendix A

1. SmileDirectClub, LLC
2. Candid Care Co.
3. Smilelove LLC

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. Introduction**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with the Board of Dental Examiners of Alabama (the “Board”). The Board is an Alabama state agency comprised of six licensed dentists and one licensed dental hygienist. The Board is charged with administering dental licensing in Alabama and carrying out the provisions of the Alabama Dental Practice Act.

The consent agreement contains a proposed order addressing allegations in the proposed complaint that the Board has unreasonably excluded competition from providers of teledentistry-based teeth alignment products and services without adequate supervision from neutral state officials, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the consent agreement and the comments received and will decide whether it should withdraw from the consent agreement and take appropriate action or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, or to modify their terms in any way. The consent agreement is for settlement purposes only and does not constitute an admission by the Board that the law has been violated as alleged in the complaint or that the facts alleged in the complaint, other than jurisdictional facts, are true.

II. Challenged Conduct

This matter involves allegations that the Board unreasonably impeded competition from new providers of clear aligner therapy in Alabama. The Board is a state regulatory agency controlled by practicing, Alabama-licensed dentists.

Analysis to Aid Public Comment

Braces and clear aligners (removable, fabricated molds) are treatment options for misalignment or incorrect relation between teeth (called malocclusion). Many patients are prescribed braces or clear aligners following a visit to a dentist's or orthodontist's office.

In recent years, several new firms have launched platforms that facilitate treatment for malocclusion using teledentistry. These firms typically offer clear aligner therapy at prices substantially below the prices associated with treatment using braces or clear aligners supplied by a dentist or orthodontist in a traditional office setting. To initiate treatment with a clear aligner platform, a prospective patient may visit a storefront location, where a non-dentist professional will perform a digital scan of the patient's teeth and gums to create a 3D image of the patient's mouth. The results of this intraoral scan are provided to a dentist working remotely, who determines whether the patient is a candidate for clear aligner therapy.

For reasons of price and convenience, many consumers prefer clear aligner therapy supplied through a teledentistry model.

After the entry and expansion of clear aligner platforms in Alabama, in September 2017, the Board voted to amend Alabama Administrative Code § 270-X-3.10(o)(2). The Board's interpretation of that amendment, in conjunction with other existing Board regulations, operates to prohibit non-dentist personnel from taking intraoral scans without on-site supervision by a dentist. Following a Board vote, in September 2018, the Board sent SmileDirectClub, LLC ("SmileDirectClub"), a clear aligner platform, a letter directing SmileDirectClub to cease and desist from taking intraoral scans without on-site dentist supervision.

Because of the Board's conduct, consumers in Alabama have been deprived of full competition for the treatment of malocclusion. For example, because of the Board's conduct, SmileDirectClub has halted a planned expansion of storefronts in Alabama.

III. Legal Analysis

Section 5 of the FTC Act prohibits unfair methods of competition, including concerted action prohibited by Section 1 of the Sherman Act.¹ To establish a violation of Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.²

State regulatory boards comprised of active market participants can violate Section 1 by promulgating and enforcing rules that harm competition in the industry in which board members participate.³ The Board's rule amendment and cease-and-desist letter harmed competition by impeding consumer access to a low-cost and convenient option for the treatment of malocclusion.

The state action defense is not applicable here. Active market participants control the Board. Therefore, for the Board's conduct to constitute state action, neutral state officials must

¹ 15 U.S.C. § 45; *see, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948).

² 15 U.S.C. § 1; *see, e.g., National Collegiate Athletic Ass'n v. Alston*, 141 S.Ct. 2141, 2151 (2021); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–43 (1982).

³ *See N.C. Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 510–12 (2015).

Analysis to Aid Public Comment

actively supervise the Board's conduct. The State's supervision mechanisms must provide "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."⁴

Although the Board's rule amendment was reviewed by Alabama's Legislative Services Agency ("LSA"), that review did not satisfy the "constant requirements" of active supervision articulated by the Supreme Court.⁵ The LSA did not review the substance of the rule amendment, specifically whether the rule comports with clearly articulated state policy to displace competition.⁶ Additionally, the LSA lacked the authority to veto or modify the Board's decisions.⁷ Furthermore, the Board's cease-and-desist letter to SmileDirectClub did not receive any review by the LSA or any other state officials.

IV. Proposed Order

The proposed order seeks to remedy the Board's anticompetitive conduct by requiring the Board to cease and desist from requiring on-site supervision by dentists when non-dentists perform intraoral scans on prospective patients.

Section II of the proposed order addresses the core of the Board's anticompetitive conduct. Paragraph II.A. orders the Board to cease and desist from requiring non-dentists affiliated with clear aligner platforms to maintain on-site dentist supervision. Paragraph II.B. prohibits the Board from impeding clear aligner platforms, or dental professionals affiliated with clear aligner platforms, from providing clear aligner therapy through remote treatment.

Section III requires the Board to provide notice of the proposed order to Board members and employees, and to certain dentists and clear aligner platforms.

Section IV requires the Board to notify the Commission of any changes to its rules related to intraoral scanning or clear aligner platforms.

Section IX provides that the Order will terminate 10 years from the date it is issued.

⁴ *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

⁵ *See N.C. Bd. of Dental Exam'rs*, 574 U.S. at 515 ("The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant.") (internal citations and quotations omitted).

⁶ Instead, the LSA determined, without explanation, that the rule amendment "does not affect competition at all." *See* Exhibit A to Brief in Support of Motion to Dismiss (Memo to File from Paula M. Greene, Feb. 12, 2018) at 13, 15, *Leeds v. Board of Dental Examiners of Alabama*, No. 2:18-cv-01679, (N.D. Ala. Nov. 21, 2018), ECF No. 33. Because the LSA made this determination, it did not review whether the rule was made pursuant to a clearly articulated state policy. *See* Ala. Code § 41-22-22.1.

⁷ Alabama statutes provide a procedure by which certain Board action may be reviewed by the Alabama Legislature's Joint Committee on Administrative Regulation Review. *See* Ala. Code § 41-22-22.1. The Joint Committee did not review the actions at issue in this case.

Complaint

IN THE MATTER OF

ASCENSION DATA & ANALYTICS, LLC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF THE GRAMM-LEACH-BLILEY
ACT.

Docket No. C-4758; File No. 191 0153
Complaint, December 22, 2021 – Decision, December 22, 2021

This consent order addresses Ascension Data & Analytics' violation of the GLB Act's Safeguards Rule through the failure to maintain a comprehensive information security program to protect customer information in their control. The complaint alleges that Ascension Data & Analytics' stored sensitive personal information from mortgage documents in plain text on a cloud-based server without any protections to block unauthorized access. Under the order Respondent must establish and implement comprehensive data security protections and oversight of third-party providers to ensure compliance with those safeguards.

Participants

For the *Commission*: Jarad Brown and Miles Plant.

For the *Respondent*: Claudia McCarron and Kathleen Laubenstein [Mullen Coughlin LLC].

COMPLAINT

The Federal Trade Commission, having reason to believe that Ascension Data & Analytics, LLC, a limited liability company, has violated the provisions of the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title I of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 *et seq.*; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Ascension Data & Analytics, LLC ("Ascension" or "Respondent") is a Delaware limited liability company with its principal place of business at 701 Highlander Boulevard, Suite 510, Arlington, Texas 76015.
2. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

RESPONDENT'S BUSINESS ACTIVITIES

3. Respondent is an analytics company that provides data, analytics, and system-based technology services and products to other companies in its corporate family in connection with mortgages. Respondent's many services include systems development, such as the creation of document management systems, automation of data-driven decision-making, and case management task scheduling; creating valuation models and comparative market analyses; and