

BURR ALERT

New FTC Guidance on Antitrust Immunity for State Regulatory Boards

By Graham Cotten, Gary London, April Mason, and John Mooresmith

October 2015

This week the Federal Trade Commission (FTC) issued its much-anticipated Staff Guidance on what sort of supervision states should provide to regulatory boards in order for those boards to qualify for antitrust immunity. In March, we sent out an alert describing a [new Supreme Court antitrust decision](#) that could have significant implications for state regulatory agencies throughout the country. The FTC brought suit against a state dental board, claiming that it had illegally suppressed competition by sending cease-and-desist letters to non-dentists that implied the non-dentists broke the law by providing teeth whitening services. The Court rejected the board's state immunity argument because the board was made up of a controlling number of "active market participants"—practicing dentists. When that is true, the Court held, a regulatory board will only be immune to antitrust law if the state provided "active supervision" over the challenged action. Whether active state supervision exists is context-specific, but the Court did advise that it does not mean "micromanagement."

The FTC's new Guidance defines an "active market participant" as any person licensed by the board or any person providing a service that is subject to the regulatory authority of the board. This definition, if followed by courts, broadens the spectrum of boards that need active state supervision to get antitrust immunity.

Some states have considered creating state agencies that are empowered to modify, veto, or approve regulatory board actions. The new FTC Guidance says that this is insufficient if the agency provides only "cursory review" and "perfunctorily approves" a board's actions. The Guidance recommends that board actions be subject to a rigorous inquiry by a state supervisor that includes publishing notice, a public hearing, soliciting written comments, reviewing published studies and cost analyses, conducting de novo review, and issuing a written decision that explains the rationale for approving a board action. The process recommended by the new FTC Guidance is complicated, and may involve more than what state legislatures and boards initially expected would be needed for antitrust immunity.

Antitrust cases are often the most expensive cases to defend. State regulatory boards should seek advice on how they can minimize the risk of suit. Some boards may choose to put in place mechanisms to facilitate active state supervision so that they will have immunity to antitrust suits. Others may choose to keep their current structure but retain counsel to help them avoid making decisions that implicate antitrust laws. The fact that they are state agencies no longer means that they are automatically immune, and new FTC Guidance may have increased the level of sophistication that will be required of an active state supervision regime.

If you would like more information, please contact:



[Graham Cotten](#)
Associate, Birmingham
(205) 458-5259
gcotten@burr.com



[April Mason](#)
Partner, Birmingham
(205) 458- 5459
amason@burr.com



[Gary London](#)
Partner, Birmingham
(205) 458-5203
glondon@burr.com



[John Mooresmith](#)
Counsel, Montgomery
(334) 387-2072
jmooresmith@burr.com

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.