

File Suppl. Resp. (“FTC Guidance”).¹ As a threshold matter, the FTC explains that a state “may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust laws.” *Id.* at 2-3. To the extent that a state wants to shield a board from antitrust scrutiny, however, the Guidance explains when active supervision is required and what constitutes active supervision. *See id.* at 4, 7-10.

This new statement from our country’s expert antitrust agency directly contradicts Defendants’ arguments in several important respects.

First, and perhaps most important, the FTC explains that, under established Supreme Court precedent, “active supervision must precede implementation of the allegedly anticompetitive restraint.” FTC Guidance 10 (emphasis added). This basic principle refutes Defendants’ claim that post-hoc judicial or sunset review provide active supervision here. *See* Am. Mot. to Dismiss 11-16, 20, ECF No. 64 (“MTD”); Reply in Support of Am. Mot. to Dismiss 12, 23, ECF No. 74. And, because Defendants identify no supervision of either New Rule 174 or 190.8 that preceded the rule taking effect, they cannot establish active supervision.

Second, the FTC notes that, to establish active supervision, an independent state supervisor should review the evidence supporting an action by a regulatory board and issue “a written decision approving, modifying, or disapproving the recommended action” to demonstrate that the supervisor undertook “the required meaningful review of the merits of the state board’s action” and “accepts political accountability for the restraint being authorized.” FTC Guidance 10. Again, nothing Defendants proffer here comes close to meeting this requirement.

¹ *See also* Bureau of Competition, *The When and What of Active Supervision* (FTC Oct. 14, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/10/when-what-active-supervision>.

Third, the FTC dismisses certain other passing assertions by Defendants. For example, the FTC notes that “[i]t is no defense to antitrust scrutiny . . . that the board members themselves are not directly or personally affected by the challenged restraint.” FTC Guidance 7; *contra* MTD 24 (“None of the physician members of the TMB, who are all specialists, are in direct competition with the Teladoc physicians . . .”). And the FTC rejects the suggestion that the method by which a board member is selected affects the state action defense. FTC Guidance 7; *contra* MTD 23 (“[I]n contrast to the North Carolina dental board, members of the TMB are all appointed by the Governor and confirmed by the Senate.”).

II. The Texas Medical Board’s Brief to the Texas Supreme Court

In separate litigation with Teladoc, the TMB recently filed a brief in the Texas Supreme Court that undermines the arguments Defendants have made here. *See* Ex. 2 to Mot. to File Suppl. Resp. (“TMB Merits Brief”) at 8-12, 18. For example, whereas Defendants argue to this Court that the Texas Administrative Procedure Act gives state courts the “authority to realistically assure that . . . professional licensing boards are promoting state policy,” MTD 13, the TMB Merits Brief argues that state courts have *no* authority to review policy issues:

- (1) “the judiciary declines to resolve policy issues committed by law to another governmental branch” (TMB Merits Brief 11-12);
- (2) “the APA allows agencies . . . to engage in policymaking without undue intrusion from the courts” (*Id.* at 18);
- (3) “the proper, limited role of courts . . . should not so interfere with the executive policymaking function” (*Id.* at 8);
- (4) the Texas Constitution “prohibit[s] courts from supervising and directing the manner and method of a statute’s enforcement” (*Id.* at 11);
- (5) “the judiciary is the most limited of the three government departments” (*Id.*).

The limited judicial role detailed by the TMB in its Merits Brief flatly contradicts the claims made by Defendants here about state courts having authority to review the TMB's actions to determine whether those actions promote state policy. *See also* Ex. A attached hereto comparing the inconsistent statements made by TMB and Defendants.

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Plaintiffs respectfully submit that these two new developments further demonstrate that Defendants' Amended Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of October, 2015, a true and correct copy of the foregoing document was filed via CM/ECF and served on the parties listed below by operation of the Court's electronic filing system:

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