

107-3-01**Definitions.**

(A) As used in this section, "board or commission" means the same as defined in section 107.56 of the Revised Code.

(B) As used in this section, an "action" means a board's or commission's order, proposed orders, or other action or proposed action which is subject to review and referred to the Common Sense Initiative Office as described in section 107.56 of the Revised Code.

(C) As used in this section, the "Office" means the Common Sense Initiative Office as described in section 107.61 of the Revised Code.

(D) As used in this section, a "person affected by or likely to be affected by the action or proposed action" of a board or commission means a person that is or will be directly or indirectly affected in the person's business, profession or occupation, or that otherwise is or will be directly or indirectly injured in the person's business or property, because of one or more of the effects described in division (E) of this section.

(E) As used in this section, actions subject to review include actions that have the effect of fixing prices or limiting price competition; dividing, allocating, or assigning customers or potential customers or geographic markets in this state among members of the occupation regulated by the boards; excluding present or potential competitors from the occupation regulated by the board; limiting output or supply in this state of any good or service provided by the members of the regulated occupation; or any other activity that could be subject to state or federal antitrust law if undertaken by private persons. Pursuant to section 107.56 (B)(2) of the Revised Code, the following actions or proposed actions do not constitute actions subject to review by the Office:

(1) Denying an application to obtain a license because the applicant has violated or has not complied with the Ohio Revised Code or the Ohio Administrative Code;

(2) Taking disciplinary action against an individual or corporation that is licensed by a board or commission for violations of the Ohio Revised Code or the Ohio Administrative Code.

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107-3-02**Scope and purpose of rules.**

Section 107.56 of the Revised Code requires the Office to analyze actions or proposed actions of state boards or commissions which could potentially contravene federal antitrust law. The law also requires the Office to adopt rules necessary for the implementation and administration of this review. Accordingly, the rules in this section amplify the analysis and review required by that section, and in light of the U.S. Supreme Court case, styled N. Carolina State Bd. of Dental Examiners v. FTC, U.S. , 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015).

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107-3-03**Procedure for referral of actions or proposed actions to the common sense initiative office.**

(A) A person that is affected by or likely to be affected by the action or proposed action of a board or commission may refer the action or proposed action to the Office for review pursuant to section 107.56 of the Revised Code within 30 days of receiving notice of the action or proposed action.

(B) In accordance with section 107.56(B) of the Revised Code, boards and commissions should refer to the Office for review any and all proposed actions that, in the board's or commission's judgment, potentially have any of the effects described in section 107-3-01 of the Administrative Code. Boards and commissions should make referrals of proposed actions and actions to the Office as soon as is practicable.

(C) When an action or proposed action is referred to the Office for review under section 107.56 of the Revised Code, the following information shall be presented to the Office:

(1) If the action or proposed action is referred by a board or commission, that board or commission shall submit, on a form prescribed by the Office, the following:

(a) An explanation of the action or proposed action and which effect(s) described in section 107-3-01 of the Administrative Code make the action or proposed action subject to review by the Office;

(b) An explanation of the purported statutory or other legal authority of the board or commission to take the action or proposed action;

(c) The factual background, nature and purpose of the action or proposed action, including any consumer protection, or health and safety, or other state policy rationale for the action and any supporting evidence;

(d) The steps taken by the board or commission as part of the process of arriving at its decision to take this action, including but not limited to public hearings held, public comments invited, studies conducted, data collected, or interviews conducted;

(e) An explanation of the action or proposed action's alleged consistency with state or federal antitrust law;

(f) Whether the action or proposed action relates to or depends upon a question that is the subject of a formal opinion request pending before the Ohio Attorney General; and

(g) Any other information the board or commission deems appropriate for the Office's review of the action or the proposed action.

(2) If the action or proposed action is referred by anyone other than those referenced in division (C)(1) above, that person shall submit on a form prescribed by the Office the following:

(a) An explanation of the action or proposed action, the name of the board or commission taking or proposing the action, and which effect(s) described in section 107-3-01 of the Administrative Code make the action or proposed action subject to review by the Office;

(b) An explanation, if relevant, of the purported statutory or other legal authority, or lack of authority of the board or commission to take the action or proposed action;

(c) Relevant factual background that the person referring the matter wishes to include;

(d) An explanation of the action or proposed action's alleged inconsistency with state or federal antitrust law, which may include a description of how the action or proposed action may affect the number of competitors and those competitors' incentives to compete in amount, quality, variety, or other aspects of the good or service offered;

(e) Evidence that a copy of the referral form has been transmitted to the board or commission pursuant to section 107.56(C)(2) of the Revised Code;

(f) An explanation of the harm that the action or proposed action will impose on the regulated industry of the boards or commission; and

(g) Any other information the individual deems appropriate for the Office's review of the action or proposed action.

(3) If the action or proposed action is referred pursuant to (C)(2) above, the subject board or commission shall inform the Office of any pending formal opinion from the Ohio Attorney General on the matter and shall provide to the Office one of the following:

(a) A response to the referral containing the information required in division (C)(1);

(b) If the subject board or commission believes the referral to be an action or proposed action not subject to review by the Office pursuant to section

107.56(B)(2) of the Revised Code, a brief statement explaining why the action is not subject to review by the Office.

(D) In completing its review and determination as provided in section 107.56 of the Revised Code, the Office may, as it deems necessary, do any of the following:

(1) Require the subject board or commission to provide information, including all or any portion of the materials assembled by the board or commission in arriving at its decision to take action, which is not otherwise made confidential by law, to the Office upon request;

(2) Set a period of time for public review and comment on the action or proposed action, as described in division (L);

(3) Conduct public hearings;

(4) Review and analyze market conditions;

(5) Review, perform, or commission studies;

(6) Create forms for use in the review process as the Office determines to be useful in that process; or

(7) Consult with appropriate subject matter experts, including legal counsel.

(E) The Office shall determine whether an action or proposed action is consistent with clearly articulated state policy as expressed in the statutes creating the board or commission or the statutes and rules setting forth the board's or commission's powers, authority and duties, or other statutes which relate to the occupations, professions, or activities regulated or licensed by the board or commission.

(F) If the Office determines that the action or proposed action is consistent with a clearly articulated state policy, the Office shall then determine whether the action or proposed action is, or is not, merely a pretext by which the members of an occupation or industry regulated by the board or commission engaged or propose to engage in anticompetitive conduct that could be subject to state or federal antitrust law.

(G) In making its determination under this rule and section 107.56 of the Revised Code, the Office may consider the following:

(1) The degree to which the Revised Code directs or specifically authorizes the board of commission to take the action or proposed action;

- (2) Any health or safety, consumer protection, or other state purpose for taking the action or proposed action, as articulated by the subject board or commission, and any supporting evidence of that purpose or of the articulated harm to be protected against, and any countervailing evidence that the action or proposed action does not advance the stated purpose or sufficiently mitigate the stated harm; and
- (3) Any other evidence that the action or proposed action under review is, or is not, merely a pretext by which the members of an occupation or industry regulated by the board or commission engage in anticompetitive conduct that could be subject to state or federal antitrust law if the action or proposed action were taken by a private party or a combination of private parties;
- (4) If an action or proposed action referred to the Office relates to or depends upon a question that is the subject of a formal opinion request pending before the Ohio Attorney General, the Office will stay its review of the action or proposed action pending the release of the Attorney General's formal opinion. The Office will review the Attorney General's opinion in connection with the Office's consideration of and decision on the referred action or proposed action; and
- (5) Any other relevant information or evidence that the Office finds helpful in completing its review and determination.
- (H) The Office shall approve or disapprove the action or proposed action pursuant to division (E) of section 107.56 of the Revised Code, and shall memorialize that approval or disapproval in a memorandum of decision pursuant to division (F) of section 107.56 of the Revised Code. The memorandum of decision shall be issued to the subject board or commission, and to any other person who referred the action or proposed action to the Office, and shall be posted on the Office's web site.
- (I) Pursuant to division (E)(2) of section 107.56 of the Revised Code, any action or proposed action that the office disapproves shall be void.
- (J) If a referred action or proposed action concerns a proposed Ohio Administrative Code rule by a board or commission, the same referral and review process as provided for in this section applies. This referral and review shall be separate and distinct from the Office's evaluation of any board or commission's draft rule analysis for business impact as provided in section 107.54 of the Revised Code.
- (K) A completed referral form, located at governor.ohio.gov/CSISReferrals, and any additional documentation shall be sent to the Common Sense Initiative Office by registered mail to 77 S. High Street, 30th Floor, Columbus, OH 43215 or by email to CSISReferrals@governor.ohio.gov.

(L) The Common Sense Initiative Office may allow public comment concerning actions reviewed by the Office in the following manner:

(1) Upon notice of public comment, the referral shall be posted at governor.ohio.gov/CSIReferrals and shall include a link to relevant information and a link for stakeholder comment. The CSI Office may share public notice directly with stakeholders at its discretion.

(2) Stakeholders may provide comment on the referral to the Office by emailing comments to CSIReferrals@governor.ohio.gov within the time period specified in the notice of public comment.

(3) The Office shall forward the comments to the subject board or commission.

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