



Antitrust Referral Analysis Submittal by Board or Commission

Board or Commission: Ohio State Dental Board

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Referral Topic: Dental Specialties Recognition and Advertising Rules

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. The CSI office was codified by ORC 107.52 for agency rule review. Additional scope was added in 2017 under ORC 107.56 which describes actions to be reviewed by the CSI Office for determination of approval or disapproval.

Referral Information

1. What is the action/proposed action being taken?

The Ohio State Dental Board (“Board”) is changing its specialty recognition and advertisement rules. The new rules will recognize those dentists as specialists who complete an accredited, full-time, post-doctoral education program. Dentists that are recognized as specialists may advertise as a “specialist” or use terms specifically related to their specialty in advertisements (such as endodontist or orthodontist).

2. In a brief statement explain the factual background, nature, purpose and rationale of the action/proposed action pertaining to this referral.

The Board currently regulates specialty recognition and advertising by recognizing as specialists those dentists who have completed an accredited post-doctoral education program in one of nine areas of

dentistry recognized by the American Dental Association (ADA). These areas are: orthodontics, oral and maxillofacial surgery, oral and maxillofacial radiology, periodontics, pediatric dentistry, prosthodontics, endodontics, oral pathology, and dental public health. Dentists recognized as specialists may advertise as a “specialist” or by using a term associated with a dental specialty such as “orthodontist” or “endodontist.” However, in recent years, additional post-doctoral education programs have developed in specialty areas not recognized by the ADA. For example, the American Board of Dental Specialties currently recognizes specialty certifying boards in the areas of oral implantology/implant dentistry, oral medicine, orofacial pain, and dental anesthesiology. The Ohio State Dental Board seeks to broaden its specialty recognition and advertising rules to include not only dentists who have completed an accredited post-doctoral education program in the nine areas currently recognized by the ADA, but also dentists who have completed an accredited post-doctoral education program in an area of general dentistry not included in the nine specialties recognized by the ADA, as well as dentists who have completed a post-doctoral education or residency program of at least two years in an accredited hospital or dental college.

The purpose of this rule is to continue to protect the public by ensuring that only those dentists who have completed an accredited post-doctoral education program are able to advertise as a specialist. Some dentists receive dental specialty education from continuing education providers that are not accredited by entities approved by the U.S. Department of Education, or other nationally-recognized agencies that accredit hospital training programs. The general public typically does not have knowledge or expertise in the level and types of education completed by dental specialists, and the public can be misled by advertising that represents a dentist as a specialist when the dentist does not have sufficient training in the specialty area. The unaccredited training programs are typically of a shorter duration and do not have the same quality control standards as accredited programs, and the Board cannot be assured of the quality of the training in the absence of accreditation.

The legislature has entrusted the Board with setting the requirements for recognition as a dental specialist. In the Board’s expertise, an accredited post-doctoral education ensures a sufficient level of education to consider a dentist a specialist.

3. Please check all of the following that apply as reasons the action/proposed action is subject to review? (ORC 107.56(B)(1))?

- Fixes prices or limits price competition;
- Divides, allocates or assigns customers or potential customers or geographic markets in this state among members of the occupation regulated by the boards;
- Excludes present or potential competitors from the occupation regulated by the board;
- Limits output or supply in this state of any good or service provided by the members of the regulated occupation;
- Prohibits offering a particular quality-level of a product or service;
- Restricts advertising or makes it more expensive or less effective;

- Substantially reduces the number of firms or providers that can serve a particular set of customers; or
- Any other activity that could be subject to state or federal antitrust law if undertaken by private persons.

4. Is the action/proposed action explicitly compelled or specifically authorized by statute? If so, please list the statute(s).

The Board is compelled to regulate the practice of dentistry and is authorized to promulgate rules governing the recognition and advertising of dental specialties. Under R.C. section 4715.01, the practice of dentistry includes any person who “advertises to perform” dental operations of any kind. Since the Board regulates the practice of dentistry including the advertising of dental services, the Board may promulgate rules to regulate advertising. Under R.C. section 4715.30(A)(3), the Board may take disciplinary action against an applicant or license holder for, “Advertising services in a false or misleading manner or violating the board’s rules governing time, place, and manner of advertising.” The Board is also compelled and authorized to establish standards for recognition of specialists pursuant to R.C. section 4715.02, which provides that two Board members “shall be persons recognized as specialists **pursuant to rules adopted by the board.**” R.C. section 4715.02 (emphasis added). Additionally, under R.C. section 4715.03(A), the Board is permitted to make “reasonable rules as it determines necessary pursuant to” R.C. Chapter 119. Thus, the Board is compelled and authorized to promulgate rules regulating the requirements for recognition and advertising of dental specialties.

5. Is the action/proposed action within the scope of the board or commission’s statutorily-delegated general authority to regulate in a given occupation or industry? If so, please describe how it is within scope and reference the statute.

The proposed rule to regulate the recognition and advertising of dental specialties is within the scope of the Board’s statutorily-delegated general authority to regulate the practice of dentistry. Under R.C. 4715.01, the practice of dentistry includes any person who “advertises to perform” dental operations of any kind. Since the Board regulates the practice of dentistry including the advertising of dental services, the Board may promulgate rules to regulate advertising. Under R.C. 4715.30(A)(3), the Board may take disciplinary action against an applicant or license holder for, “Advertising services in a false or misleading manner or violating the board’s rules governing time, place, and manner of advertising.” As discussed in response to Question 2, the public can be misled by an advertisement representing a dentist as a specialist if the dentist has not had sufficient accredited training in a dental specialty. The Board is also within the scope of the Board’s statutorily-delegated general authority to regulate the practice of dentistry to establish standards for recognition of specialists pursuant to R.C. 4715.02, which provides that two Board members “shall be persons recognized as specialists pursuant to rules adopted by the board.” Additionally, under R.C. 4715.03(A), the Board is permitted to make “reasonable rules as it determines necessary pursuant to” R.C. Chapter 119. Thus, regulating the recognition and advertising of dental specialties is within the scope of the Board’s statutorily-delegated general authority to regulate the practice of dentistry, which includes the recognition of specialists and advertising of dental services.

6. Please identify the clearly articulated state policy (e.g., health and safety, or consumer protection) in state statute or rule, or any supporting evidence of the harm the action/proposed action is intended to protect against?

The proposed rule furthers the clearly articulated state policy of setting standards for dental specialists, and protecting dental consumers by regulating the false or misleading advertising of dental specialties. Section 4715.30(A)(3) of the Revised Code provides that the Board may take disciplinary action against a licensee for, “Advertising services in a false or misleading manner or violating the board’s rules governing time, place, and manner of advertising[.]” The Board promulgated its advertising rules in O.A.C. Chapter 4715-13, including advertising specialty services. O.A.C. rule 4715-13-01(A) provides, “In order to facilitate the process of informed selection of a dentist by potential consumers of dental services, the holder of a license or certificate issued under this chapter (licensee), or dental organization, in accordance with section 4715.30 of the Revised Code, and the rules and regulations of the Ohio state dental board, may publish advertising statements in print media, or broadcast advertising over FCC-approved radio or television, or via the internet.” In O.A.C. rules 4715-13-04 and 4715-13-05, the Board provides rules regarding the advertising of dental specialty services. Thus, the Board, in its expertise, has determined that specific requirements are necessary for a dentist to advertise as a specialist to ensure that consumers of dental specialty services are not misled, and can make a better-informed selection when choosing a dentist.

Evidence was presented to the Board regarding consumer review of dental specialty advertising. The Ohio Dental Association (“ODA”) commissioned a survey by Saperstein and Associates to study Ohio residents’ views regarding dental specialty education, recognition, and advertising. The results of the ODA survey were presented to the Board during its May 9, 2018 meeting. In the Saperstein survey, participants were asked if they would think that a dentist who advertised as a specialist had completed an accredited residency program following dental school. Depending on which type of dental specialty was referenced in the question, 73 to 90 percent of the participants answered yes. Approximately two-thirds of the participants believed that a dentist who advertised as a specialist was more qualified than a general dentist in their specialty field. The participants in that survey were also asked whether they would be more or less likely to choose a dentist who advertised as a specialist but did not complete an accredited program. Depending on the specialty, 70 to 81 percent of the participants stated that they would be less likely to choose that dentist. Because of evidence that most consumers believe that a dental specialist has completed an accredited training program after dental school, it would be misleading for a dentist to advertise as a specialist without completing an accredited training program.

6a. How does the action/proposed action address the harm or advance the articulated state policy?

The proposed rule focuses on ensuring that dental specialists have a particular level of education rather than allowing a dentist to advertise as a specialist solely on the basis of recognition by a certifying board or trade association. The Board, in its expertise has determined that the level of accredited education is the best method of recognizing a specialist provider of dental services. The proposed rules do not allow

dentists to advertise as a specialist unless they have completed sufficient accredited training to ensure the quality of advanced education in the specialty area. Under the proposed rules, however, a dentist may truthfully advertise that the dentist has been awarded “diplomate” status or other similar credentials by an unaccredited training institution, as long as the dentist includes a disclaimer stating that the organization does not meet the specialty recognition requirements of the Board. This allows the dentist to truthfully advertise non-accredited specialty training, but provides information to allow the consumer to make a more informed decision in selecting a dentist.

8. If appropriate, explain the action/proposed action’s alleged consistency 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 incentive to compete in amount, quality, variety or other aspects of the good or service offered.

The Board’s proposed rule is entirely consistent with state and federal antitrust law. It does not exclude any competitors in the market from practicing dentistry. Anyone possessing a license to practice dentistry in Ohio may perform the same procedures and care, including specialty procedures, as long as they comply with the laws and rules governing the practice of dentistry in Ohio. The proposed rule merely restricts dentists from engaging in certain types of false and misleading advertising; specifically, it prohibits dentists from advertising that they are a specialist when they are, in fact, not.

In reviewing a referred action, pursuant to Section 107.56(D) of the Ohio Revised Code, the Common Sense Initiative Office should determine whether an action referred is supported by, and consistent with, a clearly articulated state policy as expressed in the statutes creating the board or the statutes and rules setting forth the board’s powers, authority, and duties. Section 107.56(D)-(E) of the Ohio Revised Code further requires the Common Sense Initiative Office to review the action and approve the action if it is consistent with a clearly articulated state policy or disapprove the action if it is not consistent with a clearly articulated state policy, but rather a pretext for self-dealing.

In the event that private actors in the market engage in collusive activity aimed at restricting advertising to further their own self-interest to the detriment of their competitors, antitrust issues could arise. However, antitrust concerns are eliminated where: (1) a state board’s rule is promulgated under a clearly articulated and affirmatively expressed state policy; and (2) a state board’s rule is actively supervised by the State. *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, syllabus, 191 L. Ed. 2d 35 (2015); R.C. 107.56(D). In fact, under these circumstances the board is immune from antitrust scrutiny – even if the board is comprised of predominately market participants. *See id.* The proposed rule at issue here falls squarely within this framework.

The Board’s proposed rule is promulgated under a clearly articulated and affirmatively expressed state policy. By virtue of its enactment of Chapter 4715 of the Revised Code, it is axiomatic that the Ohio General Assembly clearly articulated and affirmatively expressed as state policy that the Board has authority to regulate dentists and dental hygienists when it created the State Dental Board. The General Assembly clearly articulated and affirmatively expressed as state policy, by the enactment of R.C. 4715.02, that the Board has the duty and authority to create and adopt rules recognizing persons as specialists. In enacting Section 4715.30 of the Revised Code, the General Assembly clearly articulated

and affirmatively expressed as state policy that the Board has the authority and duty to prosecute disciplinary actions against individuals for “advertising services in a false or misleading manner or violating the board’s rules governing the time, place, and manner of advertising.” Thus, rules promulgated by the Board are done so pursuant to clearly articulated and affirmatively expressed state policy that the Board establish rules governing the manner in which dental professionals may advertise.

The State actively supervises the Board’s proposed rule. Here, the Common Sense Initiative Office’s current review of the Board’s proposed rule is, in fact, the State’s active supervision. Thus, if the Common Sense Initiative Office determines the Board’s proposed rule is consistent with the clearly articulated and affirmatively expressed state policy of the Ohio General Assembly in enacting Chapter 4715 of the Ohio Revised Code it should approve the Board’s proposed rule as required by Section 107.56(E)(1) of the Ohio Revised Code.

The Board’s proposed rule is not pretext for self-dealing; rather, it is a logical measure aimed at protecting the health, safety and consumer welfare of Ohioans that is entirely consistent with clearly articulated and affirmatively expressed state policy. The Board’s proposed rule sets educational standards for advertising as a specialist. It allows dentists to truthfully advertise other training or certificates, as long as they disclose that the educational provider does not meet the Board’s specialty requirements. The consumer can then choose whether he or she wishes to receive treatment from a specialist who meets the Board’s requirements (and who might therefore charge a higher fee), or another dentist who is not a recognized specialist, but still has some additional specialty training beyond that of a typical general dentist. Setting educational standards and requiring truthful information for consumers enhances competition by giving consumers relevant information to assist in their decision.

In the healthcare field, regulation is of particular importance. Education and training is a critical factor when choosing a dentist for a procedure and the general public does not necessarily have the knowledge or expertise to distinguish between different types of providers. Thus, it is beneficial for the Board to regulate by establishing educational standards and advertising requirements for the market. Rules such as the advertising rule at issue here are important means by which the Board furthers the State’s clearly articulated policy of ensuring that dental services are not advertised in a false or misleading manner.

For these reasons, and the reasons set forth in response to questions 2, 4, 5, 6, 6a, and 9 of the Antitrust Referral Analysis Submitted by the Board – the Board’s proposed rule is entirely consistent with state and federal antitrust law and should be approved.

9. What process did the board or commission follow to arrive at its decision to take action/proposed action including public hearings held, public comments invited, studies conducted, data collected interviews conducted, etc.?

The Board created the Ohio Specialties Education Advisory Group (OSEAG), which consisted of the three Board members along with representatives of The Ohio State University College of Dentistry, the American Board of Dental Specialties, the Ohio Dental Association, the American Society of Dentist Anesthesiologists, and the Commission on Dental Accreditation. OSEAG met on July 13, 2017 and voted to refer two options of proposed rule changes to the full Board for consideration.

For purposes of defending against litigation relating to the proposed rule changes, the Board commissioned a survey that was conducted by Measurement Resources Company to study Ohio residents' attitudes and understanding about dental specialist training, certification, and advertising. Additionally, the ODA conducted a separate survey by Saperstein and Associates to study Ohio residents' views regarding dental specialty education, recognition, and advertising. The results of the ODA survey were presented to the Board during its May 9, 2018 meeting.

The Board has also received public input regarding this issue. Counsel for the American Board of Dental Specialties ("ABDS") presented the organization's position to the Board on July 27, 2016. The Board has received written correspondence from interested parties, including the Ohio Society of Oral and Maxillofacial Surgeons, dated May 7, 2018, and the American Association of Orthodontists, dated July 11, 2017 and November 21, 2017.

10. Does the action/ proposed action relate to or depend upon a question that is the subject of a formal opinion request pending before the Ohio Attorney General?

No.

11. Provide any other information the board or commission deems appropriate for the Office's review of the action/proposed action.

The Board is currently being sued in federal district court by the American Academy of Implant Dentistry ("AAID") and two of its member dentists, on the grounds that the Board's advertising rules violate the plaintiff's constitutional rights to freedom of speech, due process, and equal protection. *See American Academy of Implant Dentistry v. Kamdar*, S.D. Ohio Case No. 2:18-cv-00015. Counsel for the plaintiffs has also threatened to bring antitrust claims against the Board members in their individual capacities. The parties agreed to stay the litigation until the completion of the Board's rule review process, and the Board has temporarily suspended enforcement of the challenged rules during the stay. Plaintiffs filed a motion to lift the stay after the Board voted to submit the proposed rule to CSI for review. That motion is pending before the district court.

In addition, the United States Board of Oral Implantology and the International Congress of Oral Implantologists recently filed suit against ABDS and AAID in federal district court in Illinois. *See United States Board of Oral Implantology v. American Bd. of Dental Specialties*, N.D. Ill. No. 1:18-cv-06520. In that case, plaintiffs alleged that ABDS and AAID have made false representations to multiple state boards of dentistry, and have engaged in a conspiracy to suppress competition by encouraging state boards to exclude other certifying organizations from specialty recognition.

*Send this completed form, a complete copy of action or proposed action, and any other documentation deemed appropriate for evaluation to CSISReferrals@governor.ohio.gov.

4715-5-04 Specialty advertising.

- (A) A licensed dentist is recognized as a specialist in Ohio if the dentist meets the standards set forth in paragraph (B) of this rule. Any licensed dentist who does not meet the standards set forth in paragraph (B) of this rule is a general dentist. A general dentist is permitted to render specialty services in Ohio.
- (B) A licensed dentist must comply with one of the following requirements before being recognized as a specialist in Ohio:
 - (1) Successfully complete a full-time post-doctoral education program accredited by an accrediting body approved by the United States Department of Education (“USDOE”) and provided by an accredited dental college (as defined in R. C. 4715.10), in one of the following specialty areas: dental public health, endodontics, oral and maxillofacial pathology and oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, or prosthodontics; or
 - (2) Successfully complete a full-time post-doctoral education program accredited by an accrediting body approved by the USDOE and provided by an accredited dental college (as defined in R. C. 4715.10), in an area of general dentistry not listed in subdivision (B)(1) of this rule, including but limited to dental anesthesiology, oral medicine, Implant dentistry, and orofacial pain; or
 - (3) Successfully complete a full-time post-doctoral education or residency program requiring at least two years of training in an area of general dentistry not listed in subdivision (B)(1) of this rule, including but limited to dental anesthesiology, oral medicine, Implant dentistry, and orofacial pain, and which was completed through an accredited dental college (as defined in R. C. 4715.10), or in a hospital accredited by one of the following entities: The Accreditation Council for Graduate Medical Education (ACGME), The Joint Commission on Accreditation of Healthcare Organizations (JCAHO), The Joint Commission on Accreditation of Hospitals (JCAH), or the Joint Commission; or
 - (4) The licensed dentist seeking specialty recognition announced their specialty or designation prior to August 1, 1974.
- (C) All licensed dentists who advertise services must comport with rules 4715-13-01 to 4715-13-05 of the Administrative Code.
- (D) Rules specifically related to the advertising of specialty services are set forth in rule 4715-13-05 of the Administrative Code.
- (E) For purposes of this rule, the term “accredited” in relation to a post-doctoral education program means a post-doctoral educational program that is accredited or holds “preliminary provision approval” or “accreditation eligible status” from an accrediting body approved by the USDOE.

4715-13-04 Statements tending to deceive or mislead the public.

All dental advertising, or solicitation, or testimonial endorsement statements which tend to deceive or mislead the public are prohibited.

(A) The following advertising, or solicitation, or testimonial endorsement statements are prohibited:

- (1) Statements which falsely indicate the number of years in practice, or the number of years in practice in one location, of any licensee;
- (2) Statements which misname any anesthetic, drug formula, material, or medicine, by not accurately stating the generic or brand name of such substances;
- (3) Statements which misrepresent the anesthetic, drug formula, material, or medicine, actually administered by a dentist or other qualified licensee;
- (4) Statements which misname any dental method or system;
- (5) Statements which misrepresent any dental method or dental system actually employed by a dentist or other qualified licensee;
- (6) The retention in or about the office or building of a sign or signs of a former dentist, owner, or occupant, for a period longer than ninety days. The owner dentist has ninety days from the date of change in employment to make all necessary changes to signs as necessary and warranted.
- (7) Statements on letterhead, business cards, brochures, or other advertisements indicating that a retired, deceased, or other dentist formerly affiliated with the dental practice is still actively practicing dentistry with the dental practice.
- (8) Advertisements, announcements, and/or promotions in any form, for dental services, which do not meet the requirements of rule 4715-13-05 of the Ohio Administrative Code.

(B) The state dental board, based on its expertise in regulating the dental profession, has identified certain statements which are likely to mislead the layman who is the target of dental advertising, solicitation, or testimonial endorsements.

4715-13-05 Advertising services as a specialist.

With regard to the advertising of specialty dental services all of the following shall apply:

- (A) A dentist who is recognized as a specialist in Ohio must avoid any implication that general dentists associated with him or her in practice are specialists.
- (B) The terms specialist, specializes, orthodontist, "oral and maxillofacial surgeon", "oral and maxillofacial radiologist", periodontist, "pediatric dentist", prosthodontist, endodontist, "oral pathologist", "public health dentist", "dental anesthesiologist", "oral medicine specialist", "orofacial pain specialist", "dental implant specialist" or other terms that would cause a reasonable person to believe that a dentist is a recognized specialist, may only be used by a licensed dentist meeting the requirements of paragraph (B) of rule 4715-5-04 of the Administrative Code for the specialty advertised.
- (C) A dentist who is not recognized as a specialist under paragraph (B) of rule 4715-5-04 of the Administrative Code may advertise truthful certification, diplomate status or other similar credentials from a bona fide national organization which grants credentials based upon the dentist's postgraduate education, training, and experience, and an examination based upon psychometric principles, if the following disclaimer appears in a reasonably clear and visible manner compared to the announcement of the credential: "[insert name of the organization] does not meet the specialty recognition requirements of the Ohio State Dental Board". Upon request by the board or a member of the public, the licensed dentist must identify the specific training completed and the organization that granted the credential.
- (D) A dentist who practices general dentistry and advertises performance of a specialty procedure but is not recognized as a specialist pursuant to Ohio Revised Code 4715-5-04(B) must clearly state in advertising, and/or public promotions, that he or she is a general dentist by stating "General Dentistry" or "General Dentist" in print larger and/or bolder and noticeably more prominent than any other area of practice or service advertised.
- (E) Terms referring to areas of practice are permitted, so long as all other provisions of the rules regarding advertising and specialty designation are adhered to.