



Antitrust Referral Analysis Submission by Board or Commission

Board or Commission: Ohio State Cosmetology and Barber Board

Contact Name: Charley L. Yaniko, Agency Counsel

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Referral Topic: Disciplinary Process for Unlicensed Tanning Facilities

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 Cosmetology and Barber Board uses the following approach when the Board identifies a facility where a form of a tanning is being offered and the facility or facility owner has never held a permit issued under Chapter 4713 of the Revised Code. This approach is based on the Board's internal Violation Guidance Matrix and established Board policy.

1st Offense: The individual owner (either an individual real person or a registered business entity) is issued a Notice of Opportunity for Hearing, along with a proposed Consent Agreement, proposing a \$250 fine.

2nd Offense: The individual owner (either an individual real person or a registered business entity) is issued a Notice of Opportunity for Hearing, along with a proposed Consent Agreement, proposing a \$500 fine.

3rd Offense: The individual owner (either an individual real person or a registered business entity) is issued a Notice of Opportunity for Hearing, along with a proposed Consent Agreement, proposing a \$1,000 fine. The matter is also presented to the Board's Administrative Review Group to determine if additional action is necessary, and the recommendations of the Administrative Review Group are presented to the full Board for review and approval at the next regular, public meeting. These potential actions include referring the individual (or individual agent(s) of a business entity) to the local prosecuting authority for consideration of potential criminal charges under section 4713.99 of the Revised Code, and seeking an injunction against the individual or business entity in accordance with section 4713.13 of the Revised Code.

4th (or more) Offense: The individual is issued a Notice of Opportunity for Hearing proposing a \$1,000 fine (no Consent Agreement is offered). The matter is also presented to the Board's Administrative Review Group to determine if additional action is necessary, and the recommendations of the Administrative Review Group are presented to the full Board for review and approval at the next regular, public meeting. These potential actions include referring the individual (or individual agent(s) of a business entity) to the local prosecuting authority for consideration of potential criminal charges under section 4713.99 of the Revised Code, and seeking an injunction against the individual or business entity in accordance with section 4713.13 of the Revised Code.

In all cases where the Board seeks disciplinary action under Chapter 4713 of the Revised Code, the Board issues a Notice of Opportunity for Hearing in accordance with R.C. 4713.64(G) that sets forth a statement of the charges. This notice must be served upon the individual or business in accordance with section 119.07 of the Revised Code. Once proper service has been obtained, the individual or business may request a hearing pursuant to section 119.07 of the Revised Code. If a hearing is requested, the Board holds an administrative hearing before a Hearing Officer in accordance with Chapter 119 of the Revised Code, and the affected party is permitted to participate in this hearing. If the individual or business fails to request a hearing pursuant to section 119.07, and does not settle the matter through a consent agreement, the matter is presented directly to the Board, and the Board is specifically authorized under R.C. 4713.64(G) to impose disciplinary action, in accordance with the standardized process above, without holding a hearing.

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

Section 4713.01 of the Revised Code defines "tanning facility" as

...any premises, building, or part of a building that contains one or more rooms or booths with any of the following:

- (A) Equipment or beds used for tanning human skin by the use of fluorescent sun lamps using ultraviolet or other artificial radiation;
- (B) Equipment or booths that use chemicals applied to human skin, including chemical applications commonly referred to as spray-on, mist-on, or sunless tans;
- (C) Equipment or beds that use visible light for cosmetic purposes.

Board inspectors, during routine inspections of facilities and investigations of complaints, encounter facilities one or more of the following types of tanning. As operating a tanning facility without a current, valid permit is specifically listed as a prohibited act under division (P) of section 4713.14 of the Revised Code, these facilities receive an inspection report noting this alleged violation, unless they are covered by one of the exemptions or exceptions listed in sections 4713.16 and 4713.17 of the Revised Code. This inspection report is then forwarded to Board staff for the processing of a potential administrative action against the individual facility owner (or business entity owner). The proposed action presented in this referral is the standardized disciplinary approach for these administrative action cases. The Board is currently holding a number of inspection reports noting a violation of R.C. 4713.14(P) for individual owners (either an individual real person or a registered business entity) who have never held a tanning facility permit issued by the Board, pending a decision on this referral.

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).

Yes. R.C. 4713.14(P) specifically prohibits operating a tanning facility that is offered to the public for a fee or other compensation without a current, valid permit issued under section 4713.48 of the Revised Code.

R.C. 4713.64(A)(1) authorizes the Board to take disciplinary action (including the imposition of fines) for failure to comply with the licensing requirements of Chapter 4713 of the Revised Code.

R.C. 4713.99 establishes that a violation of R.C. 4713.14(P) is a fourth degree misdemeanor on a first offense, and a third degree misdemeanor on each subsequent offense.

R.C. 4713.07(A)(2) and 4713.66(A) explicitly state that the Board's authority to investigate and/or inspect activities or premises for alleged violations of Chapter 4713 of the Revised Code and the rules promulgated thereunder, and to take disciplinary action for any such violations, applies to unlicensed individuals.

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.

N/A. The proposed process is specifically authorized by statute.

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 action is designed to protect public health and safety and to provide protection for consumers.

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

The proposed action serves as a method to deter individuals from operating tanning facilities without a permit. This helps to ensure that tanning services are only provided in facilities that meet initial safety and sanitation requirements and are subject to inspection by the Board, which protects consumers from harm (overexposure, burns, skin diseases, infections, etc.) that could be caused by unsafe or unsanitary practices.

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 action is consistent with state and federal antitrust law as it implements a clearly articulated state policy. Specifically, the Ohio General Assembly has determined that facilities offering tanning services should be permitted and regulated, and have tasked the Ohio State Cosmetology and Barber Board with carrying out this permit process and regulation. The Ohio General

Assembly has also directly stated that engaging in such practice without a permit is prohibited, and have even determined that such activity should be considered criminal in nature. The Board's proposed process carries out this state policy within the framework established by the General Assembly in section 4713.64 and Chapter 119 of the Revised Code.

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 developed its original Violation Guidance Matrix through a committee made up of members of the Board and Board staff. This original Violation Guidance Matrix was adopted by the Board during a public meeting on July 14, 2015. Am. Sub. SB 213 of the 131st General Assembly, which took effect on September 13, 2016, changed the disciplinary provisions and fine amounts in section 4713.64 of the Revised Code. Accordingly, the Violation Guidance Matrix was modified to reflect the changes, and was simplified for ease of use. The Violation Guidance Matrix is reviewed and updated whenever changes are made to Board statutes or rules, and the current version, which has a revision date of July 19, 2018, was approved by the Board at its regular meeting on August 13, 2018.

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 has attached a copy of its current Violation Guidance Matrix for Chapter 4713 of the Revised Code and the rules promulgated thereunder. This matrix has been annotated to assist with CSI review.

*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.

OHIO STATE COSMETOLOGY AND BARBER BOARD

To protect and support the public through regulation and education, while promoting the integrity of the cosmetology and barbering industries.



Violation Guidance Matrix – Cosmetology

Revision Date 07/19/2018

ANNOTATED FOR CSI REVIEW

All violations charged under R.C. 4713.64(A), unless noted separately, shall be fined as follows:

Occurrence	Violation	Additional First-Time Violations in the Same Inspection
1 st	\$250	\$100 each
2 nd	\$500	\$200 each
3 rd	\$1000	\$300 each
4 th	\$1000 or Suspend/Revoke	\$300 each

Each violation must be monitored for the number of past occurrences to ensure the appropriate fine amount, as only first-time violations will be given the reduced amount for additional violations. For example, if a salon is found in violation of OAC 4713-1-10 and OAC 4713-15-10, they would be fined \$350 (\$250 for one first-time violation, and \$100 for the additional first-time violation). If, during a later inspection, the salon was found in violation of the same two rules plus an additional rule, they would be fined \$1,200 (\$500 for each second-time violation, and \$200 for the additional first-time violation).

First-Time Warning Violations

The following violations shall receive warnings on a first violation, and will then follow the process from the table above for additional violations (with the second violation being treated as a first violation for fine purposes), unless noted separately:

4713.14(F) – Glamour Photography Services	4713-15-03(C) – Labeling of Disinfectant Containers
4713.56 – Posting or Producing Licenses	4713-15-03(E) – Storage of Unused Porous Implements
4713-1-06 (B) – Services in Medical Facilities	4713-15-04 – Cleaning and Disinfecting Shampoo Bowls
4713-1-08 – Approval of Chemicals, Equipment, & Services	4713-15-05 – Neck Protection
4713-1-09 – Animals in a Salon	4713-15-06 – Dispensing Creams
4713-1-10(D)(5) – Posting Inspection Reports	4713-15-09 – Dispensing Powders
4713-1-11(A) – Changes in Personal Information	4713-15-11 – Proper Laundering
4713-1-12(A) – Sign in English	4713-15-15(A) – Maintaining Equipment Manuals
4713-1-12(D) – Facility Sign Visible from Street	4713-15-15(C) – Disinfecting Heated Equipment
4713-1-14(B) – Human Trafficking Posters *Warnings are issued for all occurrences*	4713-15-15(D) – Cleaning and Disinfecting Electrical Equipment and Attachments
4713-3-05(A)(3) – Posting Sanitary Rules in School Clinics and Classrooms	4713-15-17 – Infection Control of Rooms Used for Other Professional Services
4713-3-05(B)(3) – Furnishing School Ads to the Board	4713-19-04(A)(5) – Handrail on Tanning Booths
4713-5-08(A) and (B) – Filing School Rules with the Board and	4713-19-04(A)(6) – Instruction on Body Position in Tanning

listing in School Handbook	Units
4713-5-16 – Maintaining Board Law, Rules, and Notices in Schools	4713-19-04(A)(12) – Installing Bulbs to Allow Inspectors to Clearly View Bulbs
4713-5-22 – Paying Students for Clinic Services in Schools	4713-19-05(C)(4) – Maintaining Equipment Manuals for Sunlamp Products
4713-6-03 – Schools Must Submit Internship Agreements	4713-19-05(C)(5) – Prohibition on Storing Disinfectants and Cleaners in Tanning Rooms
4713-6-05 – Student Interns Must Wear ID Cards	4713-19-08(A) – Requirements for Residential Tanning Facilities
4713.081 – Posting of Board Sanitary Standards	4713-19-13 – Notification and Removal of Tanning Equipment when a Salon Ceases Offering Tanning
4713-11-05 – Restroom Requirement in Salons	4713.082 – Posting Tanning Standards
4713-15-01 – General Cleanliness and Infection Control of Service Areas	4713.48(B) – Posting of Tanning Permit

Other Violations

The following violations shall be acted upon as noted below, and shall not follow the standard fine procedure noted above:

4713.14(A) – Fraud or Deceit in License Application	1 st Occurrence: Denial for one (1) year 2 nd Occurrence: Denied
4713.14(B)(2) – Aiding or Abetting Someone to Falsely Obtain a License	1 st Occurrence: Suspend two (2) years 2 nd Occurrence: Revoke
4713.14(B)(3) – Aiding or Abetting Someone to Pretend to Hold a License	1 st Occurrence: Suspend two (2) years 2 nd Occurrence: Revoke
4713.14(C)(1-5) – Practicing Without a Valid License	Follow normal fine schedule, with the following exceptions on a first-time violation: No License: Fine and verify practice has ceased. License not renewed (within 30 days of expiration): Verify renewal, and if not, fine.
4713.14(H) – Practicing as an Independent Contractor Without a Valid IC License	Follow normal fine schedule, with the following exceptions on a first-time violation: No license: 30 day abeyance. License not renewed (within 30 days of expiration): Verify renewal, and if not, fine.
4713.14(I) – Operating	Follow normal fine schedule, with the following exception on a first-time violation:

a Salon Without a Valid License	License not renewed (within 30 days of expiration): Verify renewal, and if not, fine.
4713.14(L) – Operating a School of Cosmetology Without a Valid License	Follow normal fine schedule for first two occurrences, with the following exceptions on a first-time violation: No License: Verify operations have ceased until in compliance. License not renewed (within to 30 days of expiration): Verify renewal, and if not, fine. 3 rd Occurrence: Denial
4713.14(P) – Operating a Tanning Facility Without a Valid License	Follow normal fine schedule, with the following exception on a first-time violation: License not renewed (within 30 days of expiration): Verify renewal, and if not, fine.
4713.50(A), (B)(2)-(3) – Tanning Age Restrictions	1 st Occurrence: \$500 2 nd Occurrence: \$500 or suspend/revoke 3 rd Occurrence: \$1,000 or suspend/revoke
4713-1-07(D) – Interference with a Board Inspector	Follow normal fine schedule for first two occurrences. 3 rd Occurrence: Suspend/Revoke
4713-3-05(B)(2)(d) – Advertising that a School is Open before Obtaining a License	1 st Occurrence: \$250 2 nd Occurrence: Closure until valid 3 rd Occurrence: Denial
4713-5-13(B) – School Must File Training Record Within 15 days of a Transfer Request	1 st Occurrence: \$250 2 nd Occurrence: \$500 3 rd Occurrence: Suspend/Revoke
4713-5-15(A) – (D) – School Obligations when a Student Withdraws	1 st Occurrence: \$250 2 nd Occurrence: \$500 3 rd Occurrence: Suspend/Revoke
4713.64(A)(3)-(6) – Drunkenness/Addiction, False Advertising, Falsification of Records, and Failure to Comply with Board Order	Board discretion, but fines cannot exceed the maximum amounts in R.C. 4713.64(E)
4713-11-03(B) – Sewage Disposal	1 st Occurrence: \$250 2 nd Occurrence: \$500 3 rd Occurrence: Suspend/Revoke
4713-11-04 – State, Local, and Federal	Refer to agency with jurisdiction.

Permits	
4713-11-05 – Restrooms (After Receiving an Initial Warning)	1st Occurrence: \$250 2nd Occurrence: \$500 3rd Occurrence: Suspend/Revoke
4713-11-10(A)(1) – Services in a Salon by Other Licensed Professionals	Refer to agency with jurisdiction.
4713-11-14(A)(4) – Waste Disposal for a Mobile Salon	Refer to agency with jurisdiction.
4713.42 – Licensed Cosmetic or Massage Therapist Practicing in a Salon	Refer to agency with jurisdiction.