

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: The Ohio Board of Cosmetology

Regulation/Package Title: Beauty and Nail Salon Licensing

Rule Number(s): 4713-13-01, 4713-13-02, 4713-13-03, 4713-13-04; 4713-13-05; 4713-13-06, 4713-13-07; 4713-13-08; 4713-13-09; 4713-13-10, (4713-13-11 rescinded before), 4713-15-12.

Date: originally written November 14, 2012, edited for resubmission January 16, 2013, revised again April 18, 2013.

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Rule Type:

New

5-Year Review

Amended

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Chapter 4713-13

This chapter sets forth the licensing requirements for salons. The rules recently went through the five-year process. Given that the rules were just recently revised, it would not have been necessary to do more. However, the decision was to revise with a goal of making this chapter

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more understandable, easier to follow and thereby lessening the cost in time and money of compliance. Many people have worked long hours to simplify and clarify the rules in this chapter.

A number of innovative, pro-entrepreneurial modifications were made to this section. The former rules rather onerously restricted what type of business that a salon owner could or could not conduct in the salon. These proposals allow for more leeway, and ultimately, more freedom for owners to run legal businesses out of their salon, as long as they maintain the required safety and infection control standards in the salon.

These new rules also create enhanced personal responsibility not just for a business entity, but upon an individual licensee. This important nuance is a shift of responsibility from strictly the business to an individual, granting both shared responsibility. This upgrade allows licensed professionals to be responsible for their own actions, an important concept to promulgate.

Ohio Adm. Code 4713-13-01. Rescind/new The rule has been changed to clarify that a license does not transfer from one salon to another salon when the real property or the business itself is sold to another person. The rule indicating how one got a license for a salon was consolidated with other similar rules in proposed rule 4713-1-11 of the Ohio Adm. Code as it consolidates the requirements for the physical transfer of salons, schools and tanning facilities to simplify following the regulations. Added to this rule was a means for a licensed salon moving from one part of a building to another without altering its street address to just change the specific location of the space information on the license rather than applying for an entirely new license.

Ohio Adm. Code 4713-13-02. Rescind/new As noted in the definition of “independent contractor’s license in R.C. 4713.01, the independent contractor’s license allows the licensee to rent a booth in a salon. The rule elaborates on R.C. 4713.39, the statutory provision allowing individuals to be independent contractors. Independent contractors essentially are operating their own businesses within the setting of a salon. Under R.C. 4713.39, to get an independent contractor’s license, an individual must first have a managing license in a branch of cosmetology or in cosmetology. The license is a different color to distinguish it from a practicing license and to make it easier for someone to know if the licensee is properly operating as an independent contractor. The independent contractor may work at several salons, and, like other licensees, is required under R.C. 4713.56 to post the license in a spot where it can be seen. The amount of fraud in the cosmetology profession has made issuing duplicate licenses impractical. For that reason, the rule mandates that the license be carried from salon to salon with the independent contractor and posted in the salon. The proposed rule clarifies the current rule. The rule also requires that the independent contractor’s license reference the holder’s home address as a letter or other information sent to one of several salons in which the individual works might not get to

the individual in a timely manner. A new requirement for a contract between the salon and the independent contractor, to protect both, has been added. The Board's authority to create rules to regulate the independent contractor's license can be found in R.C. The contract rule was developed with a considerable amount of help from stakeholders.

Ohio Adm. Code 4713-13-03. Edit. The necessity of managers in salons is still under discussion. The requirement to have an individual with a managing license in a salon having charge of and immediate supervision over the salon at all times has been in the Board's laws since the Board first had laws in 1932. At this time, almost the exact words describing the role of an individual holding a managing license as were found in 1932 can be found in the current law, R.C. 4713.41. In the 21st Century, with the size of salons expanded and with many more chemicals and treatments used on hair, some salon owners have questioned if it is the individual with a managing license who should have that much control and power over a salon. The discussion is ongoing. For that reason, only two minor changes to the rule have been made. In general, the rule has been left out of the proposed changes to the rules and will remain the same until the Board, with the assistance of stakeholders, determines what the role of a person with a managing license should be. A new rule will follow the policy and whatever law changes are needed to implement that policy. The current rule parallels R.C. 4713.41, adding only permission for a manager to take a short period time away from the salon. The rule also requires retail businesses that have a licensed salon to have an individual with a manager's license in the salon.

Ohio Adm. Code 4713-13-04. Edit. The current rule describes how licenses should be displayed and requires that any individual hired by a salon hold a valid and current Ohio license. Individuals holding licenses issued by other boards may also work in a salon. The proposed rule clarifies the language of the current rule and affirms that licensees from other regulated professions may be work in salons.

Ohio Adm. Code 4713-13-05. Rescind Rule moved to proposed OAC 4713-1-10 This rule, inspections of salons, has been moved to proposed Ohio Adm. Code 4713-1-10 for purposes of consolidating all similar rules.

Ohio Adm. Code 4713-13-06. Rescind The requirement that salons keep and monthly update a licensee list has been eliminated at the request of several stakeholders. While the inspectors found the list a useful tool to help determine whether licensees operated within their scope of practice, the Board decided to support the business interests and remove a requirement some thought was onerous and unnecessary.

Ohio Adm. Code 4713-13-07 and 08. There are currently no rules with these numbers. Proposed new rules for these numbers follow below:

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Ohio Adm. Code 4713-13-07. New This proposed rule would make the individual licensee in a salon as well as the owner of the salon responsible for maintaining infection control and safety standards of an individual station area assigned to a licensee or a station being used by the licensee.

Ohio Adm. Code 4713-13-08. New The proposed rule would require an agreement between a salon and any employees of the salon, similar to what would be required for independent contractors. R.C. 4713.41 and R.C. 4713.08(A)(19) allow the Board to enact a rule mandating an agreement between a salon and an employee. Several stakeholders applauded this change, as long as the Board has a basic agreement on its web page. This requirement is expected to decrease the number of violations on individuals acting as if they were independent contractors, and on the salons that have encouraged the practice. Unfortunately, there has been wide spread confusion as to whether a licensee is an employee or independent contractor, leading to violations of R.C. 4713.39. This rule is an attempt to help the licensees clarify their status.

Ohio Adm. Code 4713-13-09. Rescind/new The current rule allows salons to retail merchandise. The proposed rule allows merchandising in salons as long as it does not create a health, safety or sanitation problem. There is no prohibition in Chapter 4713 of the Revised Code against retail sales in salons. The only restriction is that food must be sold consistent with rules adopted by the board R.C. 4713.41(E).

Ohio Adm. Code 4713-13-10. Rescind/new The current rule allows demonstrations at trade shows and other events. The proposed rule clarifies the language and allows anyone to be used as models. At the suggestion of a stakeholder, the proposed rule removes the requirement to pay the models and the requirement that there be a contract for models in which payment and other terms are established in writing.

Ohio Adm. Code 4713-13-11. This rule didn't exist at the time the Board started to revise rules.

Ohio Adm. Code 4713-13-12. Rescind/move to OAC 4713-8-09 This rule is being rescinded in this chapter and will be in Chapter 4713-8. The current rule describes a special services certification, allowing a licensee to perform certain services not specifically described in R.C. 4713.01, but closely related to those services. The licensee is required to receive further education to provide those services. In addition, before the licensee may offer services not specifically described as part of the scope of the licensee, the Board must approve the special service on forms provided by the Board. This rule really belongs in Chapter 4713-8 of the

Administrative Code, as that chapter describes the scope of each licensee. It was renumbered 4713-8-09 in the proposed rules.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

R.C. 119.03, R.C. 4713.08, R.C. 4713.39

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

The regulation does not implement a federal requirement.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Federal requirements do not apply to these rules.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The General Assembly, in R.C. 4713.14, requires salons and those who work in them to be licensed. R.C. 4713.41 says the Board shall issue a license to operate a salon to an applicant who meets certain criteria. R.C. 4713.39 indicates that the Board should create rules to describe what an individual holding an independent contractor's license can and cannot do. The regulation develops the details as to how salons transfer ownership, and the requirements for the licensees who working in salons or who perform services at special events as permitted by R.C. 4713.37.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

Currently, no means of measuring the success of this regulation in terms of outputs and/or outcomes exists. The goal of this chapter was to simplify regulations, make them easier to follow and understand. The best measure would be to track the number and type of violations of the licensing requirements, especially those of independent contractors and individuals acting as independent contractors without the proper qualifications and license to do so.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Stakeholders, interested persons, Board members, and Board staff have spent many hours discussing the role of independent contractors in salons and the role of managers in salons. Steve Thompson, a former Board President, current Board member and one of the founders of the Ohio Independent Cosmetologists and Barbers Association made many suggestions that were incorporated into the rules of this chapter. Salon Loft stakeholders, Lisa Wilkins Doran, The Vice President of Operations for Salon Lofts, William Fitzgibbon, a partner in Larr Policy Consulting LLC, and Robert J. Tannous, Esq., a Partner with Porter Wright Morris & Arthur along with Jack Gravelle, an Associate at Porter-Wright Morris & Arthur provided considerable help with the restroom and independent contractor licensing law. Board member, Great Clips franchisee and founder of the Ohio Salon Loft Association Clara Osterhage and Elizabeth Murch, Executive Director of the Ohio Salon Association have expressed strongly the need to change the managing licensee's responsibilities at Board meetings. School leaders have also been involved in the discussion. In addition, representatives of all of Ohio's career technical schools and proprietary schools were consulted. The school leaders consulted included Don Yearwood, President, CEO and Owner of the Dayton school, Carousel Beauty College, President of the Private School Association, and Treasurer and team leader of business affairs of the American Association of Business Schools. Tim Hornsby, an owner of the Cincinnati-based Hornsby Group, Director of the American Association of Cosmetology Schools and an owner-evaluator of the National Accrediting Commission of Career Arts & Sciences ("NACCAS") also participated. The administrative leadership of the Columbus-based Salon Schools Group not only responded to the e-mails but also called a meeting to speak with key staff involved with the rewriting of the rules to discuss proposed changes. The Salon Schools Group individuals involved in the October 11, 2012 meeting were James Rogers, Chairman, Sue Carter Moore, President, Bobby Lott, Vice President and a Commissioner of NACCAS and Luke Hanks, the General Manager of Salon Schools Group, who is also a member of the Board. Board members, who, with the exception of two of the members, by statute must be involved in the profession of cosmetology, discussed the issues in this chapter quite often. The Board members talked about the manager and independent contractor issues in meetings with stake holders as well in their regular Board meetings, both before and after the rules were drafted. Other salon owners opined about this chapter. Nancy Brown, the owner of Ladies and Gentleman Salon and Spa and of Brown Avida Institute expressed concern about the

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controversy over the manager's license and the impact it might have on salons and on independent contractors. Tammy Hurley, Studio 33 Salon and Spa, sent back the forms giving her opinions on the proposed rules and discussed her thoughts in an in person meeting with one of the individuals revising the rule. She, also, was concerned about the manager requirement and thought it useless. However, as the requirement is firmly in R.C. 4713.41, R.C. 4713.39 and other laws in Chapter 4713 of the Revised Code, those in favor of the manager requirement remaining the same and those opposed must wait for changes in the law.

For Chapter 4713-13, once the first draft of the proposed rules for this chapter was completed, on September 14, 2012, the stakeholders were e-mailed a draft version of the proposed rules and were asked to comment on the proposals. The rules and the forms were also posted on the Board's website about ten days later, and the same stakeholders were informed that the rules also could be accessed through the Internet. The stakeholders were given a ten day period from the posting of the rules on the Internet to respond with any thoughts or questions. In late November, the rules were again posted on the Board's website and the general public, as well as stakeholders, were requested to send comments to the CSI Office as well as to the Board. At that time, stakeholder comments resulted in tweaking the independent consultant contract rule. The rules in this chapter were sent again to the Common Sense Initiative Office and were reposed on the Board's web page in January. The Common Sense Initiative Office raised a few questions, which the Board answered. During this time, stakeholders continued to comment, mostly positively, on the rules. The negative comments of the stakeholders were analyzed and, if the comment made sense and was better than the existing proposed rule, the comments were adopted.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

As mentioned above, the issue of the independent contractors drew quite a bit of discussion prior to the drafting of the rules. One concern was the high number of violations on individuals found practicing independent contracting without the proper license or, sometimes, with no license. Out of the discussions emerged the idea to require salons to have a contract with independent contractors and with employees. The contract was to clearly spell out requirements for both, so that it would no longer be possible for a licensee to say "I didn't know I was supposed to be an independent contractor with a license." Under the proposed rule, the Board will post the contract examples, thereby eliminating the need for a small business to hire an attorney to draw up the contracts. The Board's rule will allow the more sophisticated and the larger salons the freedom to use their own contracts, as long as the contracts include specific information that clarifies the status of the individual. The Salon Loft stakeholders, mentioned in number 8 of this BIA, contributed greatly to the

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writing of the independent contractor’s agreement rule. Jack Gravelle and Robert Tannous in particular helped with the drafting of significant changes to the original proposed rule for agreements between independent contractors and salons. So, too, did Steve Thompson and the Ohio Independent Cosmetologists and Barbers Association. Nancy Brown, the owner of Ladies and Gentlemen Salon and Spa and owner of Brown Aveda Institute expressed concern that the proposed contract requirements would not comport with the requirements of the IRS for independent contractors and for employees. With the help of Mr. Gravelle and Mr. Tannous, the contract’s required language will clarify for licensees whether the individual is to be working as an independent contractor or employee under the IRS guidelines for said. Former Board member Dr. Marilyn Huhey applauded the changes to the independent contractor rule, saying that the proposed rule is much clearer than the current rule. The discussions with stakeholders indicated that any change to the rule about managing licenses needed to be tabled. The suggestion of a stakeholder encouraged the Board staff to rename the “special services certification” rule “advanced services” and to place it in Chapter 8. Chapter 8 describes the scope of practice for each license type and allows licenses to practice advanced services. The proposed rule will clarify how licensees may get the certification necessary for them to perform the advanced services as permitted by the type of license they hold.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The Board did not use scientific data to develop the rules as they are not data driven. The chapter is designed to supplement the laws passed by the General Assembly.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

The Board’s goal in writing and rewriting these rules was to build on the requirements in R.C. 4713.39 and R.C. 4713.41 in order to make them easier for licensees to understand and follow. The current education requirement for a licensee is a minimum of a tenth grade education. For those licensed before 2003, the minimum requirement was an eighth grade education. The mandating of a contract/agreement between the salons and the independent contractors or licensees was one means of helping the licensees understand their status. The requirement that models for demonstrations be professional models, paid and under contract, was removed. While some thought the requirements should be even stricter to better protect those who would be models, those who wanted less regulation prevailed. The same thing happened for the glamor photography business, which will no longer need to obtain a salon

license to have its clients made up for their photographs. In general, the rules were designed to be easier to follow and also to deregulate from what previously existed.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The Board did not specifically consider performance-based regulations. The Board believes that the rules in this chapter needed to enforce certain important policies for the licensees to follow and to better protect the general public.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

No other organizations or boards regulate the profession of cosmetology. As a result, no rules in this chapter are duplicated in the rules of other agencies. The moving of the rule explaining “special services” to another chapter is an attempt to consolidate several different rules in several chapters to help licensees better how to be certified to perform those services. The consolidation is also one of many attempts to end duplication and confusion in the Boards laws.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Board plans a massive educational program to ensure the cosmetology professionals in Ohio are aware of the changes in the rules and will become more knowledgeable about those rules that will not change or will only be edited. The new and amended rules will be widely published, on the Board's web site and in professional magazines. In addition, the Board's inspectors and investigators will be retrained as to how to enforce the rules. The staff members at the Board overseeing the administrative violation program will continue to watch to make certain that all license holders in Ohio are treated in a similar manner.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The rules in this chapter concern all who would like to hold a cosmetology licensee, and all salons, a number of approximately one hundred and forty thousand licensees. The rules also touch the general public who use salons.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

While the goal of rewriting the rules has been to deregulate and help promote business growth, and to simplify the process of being an Ohio cosmetology licensee, some regulations are necessary to set minimum standards for the profession. All who answered questions indicated that the time in following the rules is hard to quantify. The violators of the Boards rules may face a fine with a maximum of \$500 for a first violator, although the new corrective action education program may replace that for the less serious violators. There are also punishments such as suspension and revocation permitted for repeat violators. One violator, a nail salon, found four times to be using individuals without any license was recently fined \$8100 and given a two week suspension. While this may seem harsh, this same violator was fined \$100 in 2009 when first found with unlicensed individuals painting nails. At that time, the violator promised it would not happen again, but three times later, it is clear that this is a repeat violator. With newly enacted R.C. 4713.64 offering the possibility of corrective action courses, first-time violators will receive a re-training instead of other punishment unless the violation is serious and possibly life-threatening. The Board, under OAC 4713-8-02, has the power to mitigate any punishment given under certain circumstances.

The stakeholders responding to questions about this and other chapters indicated the changes to this chapter would be easier to follow and would take less time with which to comply. The amount of time needed to follow the rules would be subjective and would vary from person to person, depending upon the size of a facility, the number of people working in it, the experience of the licensee, etc.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative *business*.” Please include the source for your information/estimated impact.

It is not often that the fines go above \$500. Usually, a first time offender will take the opportunity to settle. The cost of violations depends upon the nature of the violation and the number of times an individual has violated a particular provision of the law or rules. As noted above, the newly enacted R.C. 4713.64 has opened up the possibility that an offender will take courses instead of receiving other punishment for violations. The Board may mitigate the punishment even after the first violation, given certain circumstances. Stakeholders indicated that they thought the new rules would take less time and would be easier to follow, but no one had statistics upon which such a hypothesis could be based. Hopefully, with new rules, no one will violate them and have to pay a fine, have a license suspended or revoked and/or pay attorney's fees.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The rules are needed to protect the general public and the licensees. As stated above, the rules in this chapter either amplify statutes or are required by statutes. Further, the proposed rules clarify language and consolidate existing rules, thereby making the rules in general less burdensome and time-consuming to follow.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The goal was to establish uniform requirements for the cosmetology profession. Further, most of the salons and licensed independent contractors regulated by the Board would qualify as small businesses.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

R.C. 4713.64 gives the Board guidelines as to how to determine a penalty. The Board investigators and inspectors write up all violations, but only the repeat violations or the more serious first-time violations are actually charged. Minor paper violations are not charged.

18. What resources are available to assist small businesses with compliance of the regulation?

The Board's website provides comprehensive information pertaining to requirements for cosmetology professionals, including up-to-date information about the Board's laws and rules, possibilities for updating skills, and schools teaching each branch of the cosmetology profession. All forms are posted on the Board's website. The Board's staff is available during reasonable business hours to answer questions and to provide assistance.