

# Occupational Licensing Review Act – PCC comments (September 2019).

## Model Legislation August 17, 2019

A bill for an act relating to occupational regulations; establishing the state policy for the regulation of occupations, specifying criteria for government regulation to increase opportunities, promote competition, encourage innovation, protect consumers; establishing canons of statutory interpretation; creating a process to review criminal history to reduce offenders' disqualifications from state recognition; comply with federal and state antitrust laws; and proposing coding for new law as \_\_\_\_\_ chapter \_\_\_\_.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF \_\_\_\_\_:

**100.01 Policy.** For occupational regulations and their boards, it is the policy of the state that:

1. The right of an individual to pursue a lawful occupation is a fundamental right.
2. Where the state finds it is necessary to displace competition, it will use the least restrictive regulation to protect consumers from ~~present~~, significant, and substantiated or recognized imminent harms that threaten public health ~~and~~ safety or welfare.
3. Legislative leaders will assign the responsibility to review legislation and laws related to occupational regulations.
4. (OPTIONAL) The governor will establish an office of antitrust and active supervision of occupational boards. The office is responsible for actively supervising ~~the~~ certain of the state's occupational boards.

**100.02 Definitions.**

Subdivision 1. **Scope.** For the purposes of this chapter, the words defined in this section have the meaning given.

Subd. 2. **Government certification.** "Government certification" means a voluntary, government-granted, and nontransferable recognition to an individual who meets personal qualifications related to a lawful occupation. Upon the government's initial and continuing approval, the individual may use "government certified" or "state certified" as a title. A non-certified individual also may perform the lawful occupation for compensation but may not use the title "government certified" or "state certified." In this chapter, the term "government certification" is not synonymous with "occupational license." It also is not intended to include credentials, such as those used for medical-board certification or held by a certified public accountant, that are prerequisites to working lawfully in an occupation.

**Commented [PCC1]:** A workable evidentiary burden must provide means for the state to prevent against recognized harms that have thus far been adequately prevented. For example, no state allows someone without even a high school degree to practice medicine, so there is no data on the harm from doing so. By using the phrase "recognized imminent," we hope to address II's opposition to opening the door to licensure laws addressing speculative threats.

**Commented [PCC2]:** Inclusion of protection from other kinds of harm than bodily harm is a legitimate concern of the state.

**Commented [PCC3]:** As addressed in our comments to Section 100.07, active state supervision is needed only with respect to occupational licensing boards that are controlled by active market participants. Antitrust concerns are not otherwise implicated by state occupational licensing boards.

Subd. 3. **Government registration.** “Government registration” means a requirement to give notice to the government that may include the individual’s name and address, the individual’s agent for service of process, the location of the activity to be performed, and a description of the service the individual provides. “Government registration” does not include personal qualifications and is not transferable but it may require a bond or insurance. Upon the government’s receipt of notice, the individual may use “government registered” as a title. A non-registered individual may not perform the occupation for compensation or use “government registered” as a title. In this chapter, “government registration” is not intended to be synonymous with “occupational license.” It also is not intended to include credentials, such as those held by a registered nurse, which are prerequisites to working lawfully in an occupation.

Subd. 4. **Lawful occupation.** “Lawful occupation” means a course of conduct, pursuit or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling them is subject to an occupational regulation.

Subd. 5. **Least restrictive regulation.** “Least restrictive regulation” means, from least to most restrictive,

1. market competition,
2. third-party or consumer-created ratings and reviews,
3. private certification,
4. voluntary bonding or insurance,
5. specific private civil cause of action to remedy consumer harm,
6. deceptive trade practice act,<sup>1</sup>
7. mandatory disclosure of attributes of the specific good or service,<sup>2</sup>
8. regulation of the process of providing the specific good or service,<sup>3</sup>
9. regulation of the facility where the specific good or service is sold,<sup>4</sup>
10. inspection,<sup>5</sup>
11. bonding,<sup>6</sup>
12. insurance,<sup>7</sup>
13. government registration,<sup>8</sup>
14. government certification,<sup>9</sup>

---

<sup>1</sup> Deceptive trade practices acts are an effective means to protect consumers from fraud.

<sup>2</sup> Mandatory disclosures may reduce misleading or confusing attributes. Disclosures that favor certain goods or services, such as a country-of-origin label, should not be used.

<sup>3</sup> A housing/building code is an example of a regulation of a process; it may be more effective than enacting occupational licensing of tradesmen.

<sup>4</sup> A facility requirement may ensure that equipment, such as an eyewash station, is available to address accidents or emergencies.

<sup>5</sup> Periodic inspections protect consumers from unsanitary facilities.

<sup>6</sup> Requiring bonding protects against a provider’s failure to fulfill contractual obligations.

<sup>7</sup> Requiring insurance protects against a provider’s damaging a consumer or third party.

<sup>8</sup> Registering with the secretary of state or other agency protects against fly-by-night providers.

<sup>9</sup> Government certification is a voluntary signal that addresses the concern of asymmetrical information.

15. specialty occupational license for medical reimbursement,<sup>10</sup> and
16. occupational license.<sup>11</sup>

Subd. 6. **Occupational license.** “Occupational license” is a nontransferable authorization in law for an individual to perform exclusively a lawful occupation for compensation based on meeting personal qualifications established by the legislature. In an occupation for which a license is required, it is illegal for an individual who does not possess a valid occupational license to perform the occupation for compensation.

Subd. 7. **Occupational regulation.** “Occupational regulation” means a statute, rule, practice, policy, or other state law that allows an individual to use an occupational title or work in a lawful occupation. It includes government registration, government certification, and occupational license. It excludes a business license, facility license, building permit, or zoning and land use regulation except to the extent those state laws regulate an individual’s personal qualifications to perform a lawful occupation.

Subd. 8. **Personal qualifications.** “Personal qualifications” are criteria related to an individual’s personal background and characteristics. They may include one or more of the following: completion of an approved educational program, satisfactory performance on an examination, work experience, apprenticeship, other evidence of attainment of requisite knowledge and skills, [adherence to relevant standards of ethics](#), passing a review of the individual’s criminal record, and completion of continuing education.

Subd. 9. **Private certification.** “Private certification” is a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing the occupation as determined by the private organization. The individual may use a designated title of “certified,” [or such other title conferred by the credential](#), as permitted by the private organization.

**Commented [PCC4]:** Some certification organizations use titles such as “registered” or “chartered.”

Subd. 10. **Specialty occupational license for medical reimbursement.** “Specialty occupational license for medical reimbursement” means a non-transferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the non-exclusive provision of new or niche medical services based on meeting personal qualifications established by the legislature. A private health insurance company or other private company may recognize this credential. Notwithstanding this specialty license, it is legal for a person regulated under another occupational regulation to provide similar services as defined in that statute for compensation and reimbursement. It is also legal for an individual who does not possess this specialty license to provide the identified medical services for compensation, but the non-licensed individual will not qualify for payment or reimbursement from a government agency.

### 100.03 Sunrise Review of Occupational Regulations.

<sup>10</sup> Specialty licenses allows for medical reimbursement without disputes over scope of practice.

<sup>11</sup> Only occupational licensing exposes board members to antitrust litigation. The 15 alternatives to licensing do not include that risk.

Subdivision 1. **Sunrise analysis of legislation involving occupational regulations.** The Speaker of the House of Representatives, the President of the Senate and the chair each relevant standing committee of the Legislature will assign to the \_\_\_\_\_ staff (hereafter “staff”) the responsibility to analyze proposals and legislation (1) to create new occupational regulations or (2) modify existing occupational regulations.

*(See footnote<sup>12</sup> for a discussion of the legislature giving the responsibility to analyze occupational licenses to a staff in the legislative or executive branch. This responsibility may also be assigned to an ad hoc commission or interim study committee.)*

Subd. 2. **Sunrise reviews.** (a) The staff is responsible for reviewing legislation to enact or modify an occupational regulation to ensure compliance with the policies in section 100.01.

(b) The staff will require proponents to submit evidence of ~~present,~~ significant, and substantiated harms or demonstrate recognized imminent harms that threaten public health, safety, or welfare to consumers in the state. The staff also may request information from state agencies that contract with individuals in regulated occupations and others knowledgeable of the occupation, labor-market economics, or other factors, costs and benefits.

**Commented [PCC5]:** A workable evidentiary burden must provide means for the state to prevent against recognized harms that have thus far been adequately prevented. For example, no state allows someone without even a high school degree to practice medicine, so there is no data on the harm from doing so. By using the phrase “recognized imminent,” we hope to address IJ’s opposition to opening the door to licensure laws addressing speculative threats.

(c) The staff will determine if the proposed regulation meets the state’s policy in section 100.01(2) of using the least restrictive regulation necessary to protect consumers from ~~present,~~ significant, and substantiated harms or from recognized imminent harms that threaten public health, safety, or welfare.

**Commented [PCC6]:** Inclusion of protection from other kinds of harm than bodily harm is a legitimate concern of the state.

(d) The staff’s analysis in (c) will employ a rebuttable presumption that consumers are sufficiently protected by market competition and private remedies, as listed in Section 100.02 subdivision 5 (1)-(4). The staff will give added consideration to the use of private certification programs that allow a provider to give consumers information about the provider’s knowledge, skills and association with a private certification organization.

**Commented [PCC7]:** A workable evidentiary burden must provide means for the state to prevent against recognized harms that have thus far been adequately prevented. For example, no state allows someone without even a high school degree to practice medicine, so there is no data on the harm from doing so. By using the phrase “recognized imminent,” we hope to address IJ’s opposition to opening the door to licensure laws addressing speculative threats.

**Commented [PCC8]:** Inclusion of protection from other kinds of harm than bodily harm is a legitimate concern of the state.

(e) The staff may rebut the presumption in (d) if it finds both credible empirical evidence of ~~present,~~ significant and substantiated harm or recognized imminent harms that threaten public health, safety, or welfare, and that consumers do not have the information and means to protect themselves against such harm. If evidence of such ~~unmanageable~~ harms is found, the staff will recommend the least restrictive government regulation to address the harm, as listed in Section 100.02 subdivision 5 (5)-(16).

**Commented [PCC9]:** A workable evidentiary burden must provide means for the state to prevent against recognized harms that have thus far been adequately prevented. For example, no state allows someone without even a high school degree to practice medicine, so there is no data on the harm from doing so. By using the phrase “recognized imminent,” we hope to address IJ’s opposition to opening the door to licensure laws addressing speculative threats.

**Commented [PCC10]:** Inclusion of protection from other kinds of harm than bodily harm is a legitimate concern of the state.

<sup>12</sup> There are many places in state government for legislative leaders to place the responsibility to perform the analysis needed for Sunrise and Sunset reviews. It could be given to a subcommittee of the legislature or the legislature’s non-partisan staff. Another possibility is to give the responsibility to an agency or department in the executive branch. For example, Colorado is recognized for doing these reviews well. The state puts the responsibility to perform both reviews in the executive branch. Specifically, the responsibility is with the Colorado Office of Policy, Research & Regulatory Reform (COPRRR) in the Department of Regulatory Agencies (DORA). The key features are (1) the analysts doing the analysis are insulated to the greatest extent possible from lobbying and political pressure by industry advocates and (2) the agency or staff must issue its recommendations prior to the initial committee in the legislature voting on the proposed legislation.

(f) The staff will use the following guidelines to form its recommendation in (e). If the harm arises from:

1. contractual disputes, including pricing disputes, staff may recommend enacting a specific civil cause of action in small-claims court or district court to remedy consumer harm. This cause of action may provide for reimbursement of the attorney's fees or court costs, if a consumer's claim is successful;
2. fraud, staff may recommend strengthening powers under the state's deceptive trade practices acts or requiring disclosures that will reduce misleading attributes of the specific good or service;
3. general health and safety risks, staff may recommend enacting a regulation on the related process or requiring a facility license;
4. unclean facilities, staff may recommend requiring periodic facility inspections;
5. a provider's failure to complete a contract fully or to standards, staff may recommend requiring the provider to be bonded;
6. a lack of protection for a person who is not a party to a contract between providers and consumers, staff may recommend requiring the provider have insurance;
7. transactions with transient, out-of-state, or fly-by-night providers, staff may recommend requiring the provider register its business with the secretary of state;
8. ~~a shortfall or imbalance in the consumer's knowledge about the good or service relative to the provider's knowledge (asymmetrical information), staff may recommend enacting government certification;~~
9. an inability to qualify providers of new or highly-specialized medical services for reimbursement by the state, staff may recommend enacting a specialty license for medical reimbursement;
10. a systematic information shortfall in which a reasonable consumer of the service is ~~permanently~~ unable to distinguish between the quality of providers or there is an imbalance in the consumer's knowledge about the good or service relative to the provider's knowledge (asymmetrical information) ~~and there is an absence of institutions that provide guidance to consumers,~~ staff may recommend enacting an occupational license and may consider recognizing or requiring private certification or as a condition of licensure; and
11. the need to address multiple types of harm, staff may recommend a combination of regulations. This may include a government regulation combined with a private remedy including third-party or consumer-created ratings and reviews, or private certification.

**Commented [PCC11]:** There is almost no circumstance in which it makes sense to mandate establishment of a government certification program. This provision appears more properly addressed in #10 below.

(g) The staff's analysis of the need for regulation in (e) will include the effects of legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects.

(h) The staff's analysis of the need for regulation in (e) also will compare the legislation to whether and how other states regulate the occupation, including the occupation's scope of practice that other states use and the personal qualifications other states require.

(i) The staff will report its findings and recommendations to the initial and subsequent committees that will hear the legislation. The report will include recommendations addressing:

1. the type of regulation, if any;
2. the requisite personal qualifications, if any; and
3. the scope of practice, if applicable.

(j) The staff also may comment on whether and how much responsibility the legislation delegates to a licensing board to promulgate administrative rules, particularly rules relating to establishing (a) the occupation's scope of practice or (b) the personal qualifications required to work in the occupation. The comment may make legislators aware of exposure to antitrust litigation that the legislation may cause because of excessive or ambiguous delegation of authority to licensing boards to engage in administrative rulemaking.

Subd. 3. **Rule.** The House of Representatives and the Senate will each adopt a rule requiring a committee considering legislation to enact or modify an occupational regulation to receive the staff's analysis and recommendations in subdivision 2 prior to voting on the legislation.

Subd. 4. **Limitations.** Nothing in section 100.03 shall be construed (1) to preempt federal regulation or (2) to require a private certification organization to grant or deny private certification to any individual.

#### **100.04 Sunset Review of Occupational Licenses.**

Subd. 1. **Sunset analysis of existing occupational licenses.** (a) Starting on January 1, 20\_\_, the Speaker of the House of Representatives, the President of the Senate and the chair of each relevant standing committee of the legislature will assign to the \_\_\_\_\_ staff (hereafter "staff") the responsibility to analyze existing occupational licenses.

(b) Each relevant standing committee of the legislature is responsible for reviewing annually approximately 20 percent of the current occupational licenses under the committee's jurisdiction. The committee chair will select the occupational licenses to be reviewed annually.

(c) Each relevant standing committee of the legislature will review all occupational licenses under the committee's jurisdiction within the subsequent five years and will repeat such review processes in each five-year period thereafter.

Subd. 2. **Criteria.** The staff will use the criteria in section 100.03 paragraphs 2(b)-(h) to analyze existing occupational licenses, except that staff must also invite public comment from licensees, the occupational licensing board, and the public about the impact of the existing occupational license requirements.

**Commented [PCC12]:** The sunrise review required consideration of evidence from proponents. For existing regulations, the information sources the staff considers should be broader.

Subd. 3. **Sunset reports.** (a) Starting on January 1, 20\_\_, the staff will report annually the findings of its reviews to the Speaker of the House of Representatives, the President of the Senate, Chairs of the relevant standing committees, the Governor, and the Attorney General. The reports will be publicly available and posted on the website of the office, and must include the rationale for the staff's recommendation, including a description of the expected impact of any regulatory changes on public health, safety, or welfare. In its report, the staff will recommend the legislature enact new legislation that:

**Commented [PCC13]:** This provision is necessary to support informed review of the recommendations by the legislature, with public input.

1. repeals the occupational licenses,
2. converts the occupational licenses to less restrictive regulations in section 100.02 subdivision 5,
3. instructs the relevant licensing board or agency to promulgate revised regulations reflecting the legislature's decision to use a less restrictive alternatives to occupational licenses;
4. changes the requisite personal qualifications of an occupational license;
5. redefines the scope of practice in an occupational license; or
6. reflects other recommendations to the legislature.

(b) The staff also may recommend that no new legislation is enacted.

Subd. 4. **Limitations.** Nothing in section 100.04 shall be construed (1) to preempt federal regulation, (2) to authorize the staff to review the means that a private certification organization uses to issue, deny or revoke a private certification to any individual, or (3) to require a private certification organization to grant or deny private certification to any individual.

**100.05 Interpretation of Statutes and Rules.** In construing any governmental regulation of occupations, including an occupational licensing statute, rule, policy or practice, the following canons of interpretation are to govern, unless the regulation is unambiguous:

1. Occupational regulations will be construed and applied to increase economic opportunities, promote competition, and encourage innovation;
2. Any ambiguities in occupational regulations will be construed in favor of workers and aspiring workers to work; and
3. The scope of practice in occupational regulations is to be construed narrowly to avoid burdening individuals with regulatory requirements that only have an attenuated relationship to the goods and services they provide.

**100.06-A Review of a Criminal Record.**

Subdivision 1. **Fundamental right.** The right of an individual to pursue a lawful occupation is a fundamental right.

Subd. 2. **Application.** Notwithstanding any other law, a board, agency, department or other state agency (hereafter “board”) board, commission or department of the State, when determining eligibility for a license, registration, permit, government certification, or other state recognition (hereafter, “state recognition”), may consider convictions of the applicant of crimes only in accordance with this chapter. ~~will use only this chapter to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition because of a criminal conviction.~~

Subd. 3. **No automatic bar.** A board will not automatically bar an individual from state recognition because of a criminal record, except as provided in this chapter. ~~but will provide individualized consideration.~~

~~Subd. 4. **Information from a criminal record to be considered.** A board may consider only a conviction of a non-excluded crime that is a felony or violent misdemeanor.~~

Subd. ~~5~~4. **Excluded information from a criminal record.** ~~A~~ In considering an application for state recognition, a board will not consider:

1. ~~non-conviction information from the criminal justice system including~~ information related to a deferred adjudication, participation in a diversion program, or an arrest not followed by a conviction;
2. a conviction for which no sentence of incarceration can be imposed;
3. a conviction that has been sealed, dismissed, annulled, expunged, or pardoned;
4. a juvenile adjudication; or
5. ~~a non-violent misdemeanor; or~~ a conviction for an offense unrelated to the applicant’s suitability for the trade, occupation, or profession for which the applicant seeks state recognition.
6. ~~a conviction that occurred more than three years before the date of the board’s consideration except for a conviction of:~~
  - a. ~~a felony crime of violence pursuant to statute section \_\_\_\_\_;~~
  - b. ~~a felony related to a criminal sexual act pursuant to statute section \_\_\_\_\_; or~~
  - c. ~~a felony related to a criminal fraud or embezzlement pursuant to statute section \_\_\_\_\_;~~

Subd. ~~6~~5. **Rule of lenity.** (a) Any ambiguity in an occupational regulation relating to a board’s use of an individual’s criminal record will be resolved in favor of the individual.

**Commented [PCC14]:** Many of the changes here have been modeled on Pennsylvania HB 1477 (<https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=1477&pn=1860>), which we commend as an example of a bill the PCC does not oppose.

**Commented [PCC15]:** Unnecessary, given the next provision.

**Commented [PCC16]:** A criminal conviction that occurs while an individual holds a license should not be banned from consideration.

**Commented [PCC17]:** It is unclear what “non-conviction information” means. Does that include the underlying facts in the case?

**Commented [PCC18]:** Expanding the list to include another term that captures the same concept.

**Commented [PCC19]:** There should be a high bar for prohibiting a state board from even considering a conviction. Many offenders who have committed felony level violations plea the offense down to a misdemeanor, even though the underlying facts to which the individual has stipulated reflect a felony level of the offense. If the offense bears on the profession – such as a fraud conviction by an individual seeking a financial advisor license, or a child pornography conviction for someone seeking a license as a day care provider – the board should be permitted to at least consider the conviction. Neither of those examples are violent and, if misdemeanor level, would be barred from consideration here. In addition, the three-year lookback to the date of conviction is startlingly short, especially as the time does not even run from completion of the sentence. It is hard to assess likelihood of recidivism if the offender is still incarcerated. It is also relevant for a board in assessing a recent conviction to be able to consider similar past convictions. A board may give a pass to an individual with a one-time offense while deciding to decline the application of an individual who has a pattern of reoffending. A strict time-based limitation on consideration of conviction history would prevent a board from considering this relevant information.

(b) The board will not use a vague term in its consideration and decision including:

1. good moral character;
2. moral turpitude; or
3. character and fitness

Subd. 7.6. ~~Included information~~ **State action authorized.** A board may refuse to grant or renew, or may suspend or revoke any state recognition based in whole or in part on a conviction of a crime if all of the following apply:

(1) The individual has been convicted of a felony or a misdemeanor which directly relates to the trade, occupation or profession for which the state recognition is sought.

(2) The board has conducted an individualized assessment of the relation of the conviction to the individual's overall suitability to engage in the trade, occupation or profession for which the state recognition is sought. An individualized assessment conducted under this paragraph shall include a consideration of the particular facts or circumstances surrounding the offense or criminal conduct and the grade and seriousness of the offense or criminal conduct.

Subd. 7. A board may not refuse to grant or renew and may not suspend or revoke any license, certificate, registration or permit under Subd. 6 if the individual can establish sufficient mitigation or rehabilitation and fitness to perform the duties of the trade, occupation or profession for which the state recognition is sought. Where the criminal conduct is directly related to the state recognition being sought, the board shall consider relevant proof of any factors that would rebut an adverse presumption or show rehabilitation. ~~The board will consider the individual's current circumstances including:~~

1. the facts or circumstances regarding the offense or criminal conduct;
2. the age of the individual when the individual committed the offense;
3. the time since the offense and since the completion of any criminal sentence;
4. the completion of the criminal sentence;
5. a certificate of rehabilitation or good conduct;
6. completion of, or active participation in, rehabilitative drug or alcohol treatment;
7. testimonials and recommendations including a progress report from the individual's probation or parole officer;
8. other evidence of rehabilitation or of repeat offenses;
9. education and training;
10. employment history;

**Commented [PCC20]:** Language adapted from Pa. HB 1477 which requires the board to engage in an individualized assessment that balances its role in protecting the public and the interest in the individual in gaining the state recognition.

11. employment aspirations;
12. the individual's current family responsibilities;
13. [whether the individual is bonded](#); and
14. other information that the individual submitted to the board.

Subd. 8. **Hearing.** The board will hold a public hearing, should the individual request one, pursuant to section \_\_\_\_\_ of the state's administrative procedure act.

~~Subd. 9. **Totality of the circumstances test.** (a) The board may deny, diminish, suspend, revoke, withhold or otherwise limit state recognition only if the board determines:~~

- ~~1. the state has an important interest in the regulation of a lawful occupation that is directly, substantially and adversely impaired by the individual's non-excluded criminal record as mitigated by the individual's current circumstances in subdivision 7, and~~
- ~~2. the state's interest outweighs the individual's fundamental right to pursue a lawful occupation.~~

~~(b) The board has the burden of making its decision by clear and convincing evidence.~~

Subd. 10. **Appeal.** The individual may appeal the board's decision as provided for in section \_\_\_\_\_ of the state's administrative procedure act.

[Subd. 11. \*\*Other State Recognition Requirements.\*\* Nothing in this chapter shall be construed to alter a board's authority to enforce other conditions of state recognition, such as eligibility requirements or compliance with board regulations.](#)

#### **100.06-B Petition for Board Determination Prior to Obtaining Personal Qualifications.**

Subd. 1. **Petition.** An individual with a criminal record may petition a board at any time, including before obtaining any required personal qualifications, for a decision whether the individual's criminal record will disqualify the individual from obtaining state recognition.

Subd. 2. **Content.** The individual will include in the petition the individual's criminal record or authorize the board to obtain the individual's criminal record.

Subd. 3. **Determination.** The board will make its decision using the criteria and process in section 100.03.

Subd. 4. **Decision.** The board will issue its decision no later than 60 days after the board receives the petition or no later than 90 days after the board receives the petition if a hearing is held. The decision will be in writing and include the criminal record, findings of fact and conclusions of law. [The decision may include conditions affecting whether state recognition should be granted.](#)

**Commented [PCC21]:** The private certification community, like the public, depends on the enforcement authority of licensing boards. Private certification organizations do not want to become the front line in signaling to the public whether criminal conduct warrants granting recognition that will lead the public to trust the services of an ex-offender. It is important for state boards to engage in individualized assessments, but without tipping the scale in one direction or the other.

**Commented [PCC22]:** A significant concern of the private certification community is that these laws may be interpreted as invalidating practice acts that condition licensure on current private certification, if an individual's certification was revoked or denied based on a violation of the organization's ethics code that was linked to the individual's criminal conduct.

**Commented [PCC23]:** This picks up on the concept in Subd. 5.

Subd. 5. **Binding effect.** A decision concluding that state recognition should be granted or granted under certain conditions is binding on the board in any later ruling on state recognition of the petitioner unless there is a relevant, material and adverse change in the petitioner's criminal record [or new material information having a bearing on the decision comes to light](#).

Subd. 6. **Alternative advisory decision.** If the board decides that state recognition should not be granted, the board may advise the petitioners of actions the petitioner may take to remedy the disqualification.

Subd. 7. **Reapplication.** The petitioner may submit a revised petition reflecting completion of the remedial actions before a deadline the board sets in its alternative advisor decision.

Subd. 8. **Appeal.** The petitioner may appeal the board's decision as provided for in section \_\_\_\_\_ of the state's administrative procedure act.

Subd. 9. **Reapply.** The petitioner may submit a new petition to the board not before one year following a final judgment on the initial petition or upon obtaining the required personal qualifications, whichever is earlier.

Subd. 10. **Cost.** The board may charge a fee to the petitioner to recoup its costs not to exceed \$100 for each petition.

**100.06-C Reporting.** (a) The Department of \_\_\_\_\_ will establish an annual reporting requirement of thea:

1. number of times that each board acted to deny, diminish, suspend, revoke, withhold or otherwise limit state recognition from a licensed individual because of a criminal conviction;
2. offenses for which each board acted in subparagraph 1;
3. number of applicants petitioning each board under section 100.04,
4. numbers of each board's approvals and denials under section 100.04,
5. offenses for which each board approved or denied petitions under section 100.04, and
6. other data the Department determines.

(b) The Department will compile and and publish annually a report on a searchable public website.

**100.06-D Limitation.** Nothing in this chapter shall be construed to require a private certification organization to grant or deny private certification to any individual.

**(OPTIONAL)**

**100.07 Office of Antitrust and Active Supervision of Occupational Boards.**

Subdivision 1. **Antitrust law.** By establishing and executing the policies in section 100.01, the state intends to ensure that occupational boards and board members will avoid liability under federal antitrust laws.

Subd. 2. **Active Supervision.** To help execute the policies, the governor will establish the Office of Antitrust and Active Supervision of Occupational Boards.

Subd. 3. **Responsibility.** The office is responsible for the active supervision of ~~the~~ any state's occupational boards with a majority of board members who are elected by active market participants in the occupations regulated by the board ("covered boards"), in order to ensure compliance with section 100.01, the applicable licensing statutes, and federal and state antitrust laws. Active supervision requires the office to play a substantial role in the development of covered boards' rules and policies to ensure they (a) benefit predominantly consumers and (b) do not benefit unreasonably or serve merely private interests of providers who the boards regulate. The office shall not have oversight of any occupational board that is not a covered board.

Subd. 4. **Approval.** The office will exercise control over covered boards' processes and substantive actions to ensure they are consistent with section 100.01, the applicable licensing statutes, and federal and state antitrust laws. The office must review, and approve or reject any proposed board rule, policy, enforcement actions related to unlicensed practice, or other regulatory action of a covered board prior to it being adopted or implemented. The office's approval must be explicit; silence or failure to act will not be deemed approval. The office must provide or withhold approval or send a proposed action back to the covered board for modification or seek supplemental information from the covered board within 30 days of the date that a covered board seeks approval of any proposed action or within 5 days of a proposed emergency action; the 30-day or 5-day period runs from each initial, modified, or supplemented request for approval. Any decision by the office other than approval of a proposed action must be accompanied by a written rationale for the decision, which shall be subject to the same public disclosure as the associated proposed board action. No approval from the office is needed for covered boards' enforcement actions unrelated to unlicensed practice rules.

Subd. 5. **Personnel.** The office personnel must be independent of covered boards. A government or private attorney who provides general counsel to a covered board ~~will~~ may not also serve in the office.

Subd. 6. **Cost Allocation.** The office may assess its costs on each covered board for the services of active supervision. Each covered board may recoup the assessment by increasing the fees paid by license holders.

**100.08** **Effective date.** This chapter is effective on \_\_\_\_\_.

**Commented [PCC24]:** In *N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015), the Supreme Court held that state-action immunity from federal antitrust liability did not apply to a state occupational licensure board because it was both (i) "controlled by active market participants" and (ii) was not "actively supervised by the State." In that case, seven of the eight members of the North Carolina State Board of Dental Examiners were elected either by licensed dentists or licensed dental hygienists; only one member -- a "consumer" -- was appointed by the Governor. Without the element of control by active market participants, there is no need for additional state supervision of occupational licensing boards. A single oversight office will, almost by definition, not have the subject matter expertise that occupational licensing boards develop and thus, absent a need to avoid antitrust liability, should not interfere with the functions of occupational licensing boards.

**Commented [PCC25]:** A large volume of occupational boards' work is enforcement and disciplinary actions. For practical reasons, it would be overwhelming to charge a single office with review of every enforcement action. More significantly, however, antitrust concerns are not implicated unless the board is using its enforcement power to block unlicensed individuals from providing services to consumers.

**Commented [PCC26]:** The purpose of the office is to avoid antitrust liability, not to be a roadblock to appropriate regulatory action.

**Commented [PCC27]:** State licensure boards perform important safety functions in issuing emergency orders or summary suspensions; the time frame for response should be faster in such circumstances.

**Commented [PCC28]:** This is necessary to provide guidance to the covered board and allow public oversight of the office's function.