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The Honorable Lt. Governor Jon Husted  
Common Sense Initiative  
77 S. High Street, 30th Floor  
Columbus, OH 43215-6117  
[CSReferrals@governor.ohio.gov](mailto:CSReferrals@governor.ohio.gov)  
**Via E-mail**

**Re: July 28, 2020 Antitrust Referral Analysis from John A. Izzo, Esq.**

Dear Lt. Governor Husted,

Please accept this letter as the State Medical Board of Ohio's ("the Medical Board") response to John A. Izzo, Esq's July 28, 2020 Antitrust Referral Analysis. Mr. Izzo submitted an Antitrust Referral Analysis stating that the Medical Board lacks the authority to limit who may diagnose a qualifying condition for the purpose of recommending medical marijuana. Currently, only a licensed physician may diagnose a patient with a qualifying condition for the purpose of medical marijuana treatment. Mr. Izzo asserts that by prohibiting other health care providers from diagnosing qualifying conditions for the use of medical marijuana, the Medical Board is limiting price competition, excluding present or potential competitors, and limiting the supply of a service provided by members regulated by the Medical Board.

In his referral, Mr. Izzo essentially requests that CSI order the Medical Board to rescind or revise O.A.C. 4731-32-03(B)(11), a regulation concerning the standard of care of physicians recommending medical marijuana treatment, because it prohibits non-physicians from diagnosing patients with qualifying conditions for the use of medical marijuana. Mr. Izzo suggests that it was the Medical Board that made the decision to restrict such diagnoses. But Mr. Izzo is incorrect. It was not the Medical Board, but the General Assembly that chose to restrict the diagnosis of qualifying conditions to physicians. See R.C. 3796.08(A)(2). Because the decision lies with the General Assembly, not the Medical Board, CSI is without authority to strike down the Medical Board's rule.

**A. There is no "action" for this body to review.**

CSI only has the authority to review "actions" taken or proposed to be taken by boards of commissions subject to review. See R.C. 107.56(B). CSI's authority includes review of actions taken by the Medical Board. R.C. 107.56(A)(25). And CSI's authority covers any action that may have a negative impact on competition. See R.C. 107.56(B). An action is defined as "a board's or commission's order, proposed order, or other proposed action which is subject to review." O.A.C. 107-3-01(B). To be clear, Mr. Izzo has pointed to no pending action related to this rule. The Board has not proposed to discipline anyone, has not issued a cease and desist letter, or proposed to take any kind of "enforcement" action on the basis of this rule. The only action that the Board has taken with respect to this rule was the adoption of the rule itself. To the extent that Mr. Izzo is complaining about the adoption of O.A.C. 4731-32-03, his complaint is very, very late.

Revised Code Section 107.56(C)(4) requires an aggrieved party to seek CSI review “within thirty days after receiving notice of the action or proposed action.” That requirement certainly belies any argument that the General Assembly intended to grant CSI the authority to review any rule or law – no matter the age. In this instance, Rule 4731-32-03(B)(11) became effective in September 2017. Because the rule has been in place for more than 3 years, Mr. Izzo’s request is untimely, and this body is without power to review this rule now.

**B. Rule 4731-32-03(B)(11) follows the requirements made by the General Assembly and review, therefore, is outside this agency’s purview.**

The General Assembly created the Medical Marijuana Control Program in 2016. It is governed by Revised Code Chapter 3796. In his referral, Mr. Izzo appears to suggest that psychologists and chiropractors (presumably amongst others) should be permitted to make qualifying-condition diagnoses for the purpose of recommending medical marijuana. But R.C. 3796.08 makes clear that it was the General Assembly’s intent that only physicians make qualifying-condition diagnoses. First, the General Assembly delegated the task of regulating those who can recommend medical marijuana to the Medical Board – an agency that regulates physicians, physician assistants, and certain other limited professions. The Medical Board does not license psychologists or chiropractors. Second, the General Assembly created a medical marijuana advisory committee, with members to be drawn from various specified groups. See R.C. 3796.021. Of the required members are two physicians (one of whom must be a member of the Medical Board). See R.C. 3796.021(A)(2). The General Assembly did not include psychologists or chiropractors amongst the necessary professionals to be seated on the Committee. Most importantly, the General Assembly limited the universe of practitioners who can recommend marijuana for a patient to physicians. See R.C. 3796.08(A)(1); R.C. 4731.30. The statute governing certificates to recommend medical marijuana makes only a “physician” eligible for the certificate. See R.C. 4731.30(B)(1), (C)(1), (C)(2), (D), (E), (F), (G), (H). Mr. Izzo’s suggestion that the Board has unnecessarily restricted the list of providers who can recommend medical marijuana or making a qualifying diagnosis is without merit. The General Assembly has made clear that only physicians are permitted to hold a certificate of authority to recommend medical marijuana. R.C. 4731.30. The General Assembly makes no mention of providers other than a licensed physician having authority to recommend medical marijuana or determining that the patient has a qualifying diagnosis.

In addition to limiting the authority to recommend medical marijuana to physicians, the General Assembly also set out some of the standards that must be met when doing so. Under R.C. 3796.08, a practitioner who recommends marijuana must meet several requirements. Subsection (A)(2) requires a physician who recommends medical marijuana to certify that a bona fide physician-patient relationship exists between the physician and the patient and that the patient suffers from a qualifying medical condition. That language is mirrored in Ohio Adm.Code 4731-32-03(A). The General Assembly directed the Board to establish rules relating to many aspects of the medical marijuana program, including the conditions that must be met to be eligible for a certificate to recommend and the minimal standards of care when recommending treatment with medical marijuana. R.C. 4731.301(A)(2), (A)(6).

The General Assembly also required the Board to approve continuing education courses for physicians in diagnosing qualifying medical conditions. R.C. 4731.301(C)(1). Presumably, if the General Assembly intended to grant authority to other practitioners to diagnose qualifying medical conditions, it would have made similar provision for those practitioners to obtain

continuing education in that area. Mr. Izzo has not pointed to any such requirement for chiropractors or other practitioners.

Pursuant to the rule, the physician must diagnose a qualifying medication condition or may confirm a diagnosis made by another physician. Ohio Adm.Code 4731-32-03(B), (C). The physician recommending medical marijuana may confirm a diagnosis made by another physician only if the physician recommending medical marijuana obtains the patient's medical records or a detailed summary from the other physician and the physician recommending medical marijuana "is satisfied that he or she can rely on those records" to confirm the diagnosis. Ohio Adm. Code 4731-32-03(B)(11). Even where the diagnosis has already been made by another physician, the physician recommending medical marijuana cannot merely "rubber stamp" the determination by the other physician, and must review records and be satisfied that they are sufficient to support the diagnosis. The recommending physician must still make an independent judgment that the diagnosis is supported. This rule is consistent with the General Assembly's direction that only licensed physicians with a certificate to recommend can recommend medical marijuana.

Further, nothing in the Medical Board's rule prohibits a treating physician from considering diagnoses from other health care providers before the physician makes a qualifying-condition diagnosis. The rule only states that a physician may not merely accept the diagnosis of another physician without reviewing pertinent records and engaging in an independent analysis. The physician recommending marijuana must make an independent judgment and take responsibility for the patient's medical marijuana treatment. The rule does not restrict chiropractors or other practitioners because even if the chiropractor diagnosed a qualifying condition, the General Assembly has decided that only a physician with the certificate to recommend can make the ultimate determination. Pursuant to the statute, the patient would still need to seek treatment from a physician with a certificate to recommend in order to receive medical marijuana.

The General Assembly has not authorized any other type of practitioner to recommend medical marijuana, and does not reference any other type of practitioner as having authority to diagnose a qualifying condition. Given that the General Assembly has expressly granted authority only to physicians to recommend medical marijuana that rule does not exceed the scope of the authority granted by law. Nor does it implicate antitrust concerns.

The Medical Board has no ability to regulate professions outside of its statutorily-defined scope. The Board's ability to license and regulate is restricted to the various practices of medicine and surgery and certain statutorily-defined limited branches of the practice of medicine. See, e.g., R.C. 4731.09 (physicians), 4731.15 (massage therapists), 4731.19 (limited branches of medicine), 4731.56 (podiatrists). Chiropractors and psychologists are regulated by separate State agencies. See R.C. 4734.02 (State Chiropractic Board), R.C. 4732.02 (State Board of Psychology). Any rule passed by the Medical Board, including the one cited by Mr. Izzo, O.A.C. 4731-32-03, can only apply to physicians and other Medical Board licensees. Therefore, O.A.C. 4731-32-03, concerning the standard of care for physicians recommending medical marijuana treatment, was issued not only in compliance with the Medical Board's authority to only regulate physicians, but was also in compliance with the General Assembly's decision to select physicians as the only group that can recommend medical marijuana or make diagnoses for the purpose of medical marijuana treatment.

### C. Conclusion

In this instance, it was not the Medical Board's act that restricted the ability to recommend marijuana to physicians, it was the General Assembly. CSI has not been granted the authority to strike down legislative enactments. In addition, there has been no "action" taken by the Board other than the promulgation of a rule, and that rule was passed in 2017. Because CSI review of the rule was not requested within 30 days, the request is untimely. For these reasons, the Medical Board asks that CSI find it has no jurisdiction to act here. Alternatively, CSI should find that O.A.C. 4721-32-03 does not raise antitrust concerns.

Sincerely,

*/s/ James T. Wakley*

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