



Antitrust Referral Analysis Submission by Person Affected by Board or Commission Action

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Referral Topic: Ohio Administrative Code Section 4731-32-03(B)(11)

ORC 107.56 provides a mechanism through which boards or commissions, or someone affected by an action by a board or commission, may refer to the Common Sense Initiative Office an action that may be subject to state or federal antitrust law. Please send this form, a complete copy of the action or proposed action, and evidence that this form was transmitted to the board or commission taking or proposing the action as required by ORC 107.56 (C)(2), and any other appropriate documentation to the CSI Office at CSIReferrals@governor.ohio.gov.

Referral Information

1. Name of board or commission taking or proposing to take action: State Medical Board of Ohio
2. Does this action/proposed action deny an application for licensure? It may.
3. Does this referral pertain to a disciplinary action by the licensing board or commission taken against you or your company? Nothing is pending with our clients at this time.

4. What is the action/proposed action being taken? There are two. First, disciplinary action by the State Medical Board of Ohio against physicians with a Certificate to Recommend who comply with R.C. 3796.08(A)(2)(a)(ii) and rely upon a diagnosis from an non-MD or DO that a patient has been diagnosed with a qualifying medical condition. The rule promulgated by the Medical Board, OAC 4731-32-03(B)(11), allows physicians with a Certificate to Recommend to **only** consider diagnoses from holders of a license to practice medicine and surgery issued by the Medical Board (M.D.'s) and holders of a license to practice osteopathic medicine and surgery issued by the Medical Board (D.O.'s). The second action of the Medical Board, then, is it is preventing other licensed professionals from providing diagnoses of qualifying medical conditions to physicians with a Certificate to Recommend.
5. Please describe the relevant factual background you wish to include in this referral (e.g., history, context). Marijuana use for medicinal purposes is legal in Ohio under Chapter 3796. of the Revised Code. Only patients with a qualifying medical condition can obtain marijuana for medical reasons. Only a physician with a Certificate to Recommend may recommend a patient receive marijuana for medical reasons. The recommendation may be based upon the physician diagnosing a patient with a qualifying condition, or the physician relying upon another health care professional's diagnosis of a qualifying condition. The Ohio Revised Code states that a physician may recommend the use of medical marijuana if the patient has been diagnosed with a qualifying condition. See R.C. 3796.08(A)(2)(a)(ii). The Medical Board, contrary to the law, chose to limit the number of health care professionals who may diagnose a qualifying condition for the use of medical marijuana. See Rule 4731-32-03(B)(11). There is no need for the differentiation.
6. 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.

7. In a brief statement, explain why you believe the board or commission does not have the statutory or other legal authority to take the action/proposed action? The Medical Board does not have the authority to limit who may diagnose a qualifying condition for the purpose of medical marijuana use. The statute does not limit who may perform the diagnosis. It is the Medical Board's Rule that creates said limitation.
8. How is the action/proposed action consistent or inconsistent with state or federal antitrust law and how does it impact competitiveness? The Medical Board, through its rule, engages in competitor exclusion. Qualifying conditions for the use of medical marijuana include pain that is either of the following: (i) Chronic and severe; or (ii) Intractable; and post-traumatic stress disorder. According to the National Institute of Mental Health, a psychologist can diagnose PTSD. In addition, chiropractors have diagnostic codes for billing purposes indicating they can diagnose pain that is either chronic and severe, or intractable. The Medical Board promulgated Rule 4731-32-03(B)(11) to keep MD's and DO's in the program and exclude other health professionals. This is a violation of the antitrust laws.