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To: Chair Paul G. Pinsky, Senate Education, Health and Environmental Affairs Committee

From: Office of the Attorney General, Criminal Division

Re: SB 305 State Board of Physicians – Dispensing Permits

The Criminal Division of the Office of the Attorney General has significant concerns that HB 260 / SB 305 (the "Bill") could, during the greatest opioid crisis in history, pave the way for an expansion of a program that already poses a significant risk of abuse by doctors seeking to profit from the vulnerable population of Marylanders suffering from addiction. Every year since 2017, over 2,000 Marylanders have fatally overdosed on opioids.[1] The National Institute of Health published studies showing that heroin initiation was 19 times higher among people who reported prior non-medical pain reliever use[2], and that 86 percent of intravenous drug users had used opioid pain relievers nonmedically prior to heroin use.[3]

The Bill in its current form would reduce barriers to entry into the in-office dispensing program under MD Code, Health Occupations § 12-102 while maintaining the current system of limited oversight by government authorities and creating self-serving incentives for physicians that could drive the state further into the opioid crisis. Moreover, the proposed Bill would create a system under which investigation and prosecution of pill mills and unscrupulous doctors would be hamstrung by the veil of secrecy afforded to physician under MD Code, Health Occupations, § 14-411.

The small number of in-office dispensing permits currently active in the state is not a proper metric by which to measure the potential impact of the present Bill because the Bill removes barriers to entry to the in-office dispensing program and would incentivize those who seek to subvert the system for personal gain. The Bill, by eliminating training requirements and reducing fees and requiring only limited and secretive oversight, virtually guarantees that the number of physicians in the state seeking these permits will increase. Notably, oversight of the in-office

[1] MARYLAND OPIOID DASHBOARD, https://beforeitstoolate.maryland.gov/oocc-data-dashboard/ (last visited Feb. 7, 2022).

[2] National Institute on Drug Abuse, National Institute of Health, *Prescription Opioids and Heroin Research Report*, 3 (Rev. Jan. 2018) https://nida.nih.gov/download/19774/prescription-opioids-heroin-research-report.pdf?v=fc86d9fdda38d0f275b23cd969da1a1f.

[3] *Id*. at 4.

dispensing program under MD Code, Health Occupations, § 12-102 is already far more limited than that of its Title 5, MD Code, Criminal Law counterpart. As an initial matter, physicians who fill prescriptions for opioids in-office avoid the oversight of the Prescription Drug Monitoring Program ("PDMP"). They also avoid the oversight of OCSA who inspects and reports on both ends of a Title 5 transaction, physician and pharmacy; thus providing multiple opportunities for detection. Loss of this dual monitoring of both physician and pharmacy also affects OAG's primary source of detection and reporting of potential pill mills – pharmacy insurance claims.

Many over-prescribing physicians rely on cash payments for prescriptions to make their pill mill operations profitable by charging far more than an insurance company would pay for an office visit. Such cash transactions are almost undetectable unless a patient dies or a family member reports to law enforcement. However, insurance companies as well as state and federal health plans are able to identify pharmacy claims with no corresponding doctor visit, a red flag for a cash for prescription pill mill operation. A majority of the OAG's opioid prosecutions began with such a referral. Simply put, this type of oversight does not, and cannot, exist within the silo of physician monitoring of in-office dispensing.

The assurance that the Board of Physicians ("BOP") can provide referrals to law enforcement in appropriate circumstances should be taken as cold comfort. In the last five years, the Medicaid Fraud Control unit has not received one referral from the BOP despite receiving referrals from other similar licensing boards. While much has been made of the practical and economic efficiencies created by placing inspection authority with the BOP, what has been omitted in these discussions is the secrecy inherent in BOP proceedings, secrecy that does not exist in the context of OCSA inspections. And while BOP can provide information to law enforcement when they deem it appropriate, it is important to recognize that MD Code, Health Occupations, § 14-410 renders any information provided inadmissible at the resulting trial. Inadmissible evidence is hardly evidence at all. Law enforcement loses valuable time re-investigating in an effort to obtain useful evidence. This duplication of efforts is anything but efficient. To reiterate, this is a restriction that does not affect OCSA in their inspection activities and resulting referrals.

Finally, this Bill expands a system that creates exactly the type of perverse incentive that governments, both state and federal, have sought to eliminate in the medical community. The anti-kickback statute and its state corollary MD Code, Crim. Law § 8-511 expressly forbid physicians from receiving a monetary incentive for the referral of business or use of a particular product. These laws are designed to divorce financial considerations from medical treatment decisions in order to ensure that a patient's best interests – and not the physician's bottom line – are the focus of medical decision making. The proposed Bill would provide for the expansion of a program that raises very similar concerns. Where a physician is able to bill for both the diagnosis and drugs for a patient, the incentive to provide the most profitable treatment could interfere with the objective assessment of the patient's needs. In the midst of a crisis where many addictions began with the prescription of unnecessary or excessive opioids, facilitating the expansion of a program that could incentivize the prescription of opioids over other treatment options while also reducing oversight, seems ill-advised. The efficiency sought by the Bill is not without its costs. It comes at a cost to law enforcement and Marylander's health and well-being.