August 11, 2003

Jacqueline Williams, Executive Director
Ohio Tuition Trust Authority
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SYLLABUS: 2003-028

1. Pursuant to R.C. 3334.01(H), the General Assembly has authorized the Ohio Tuition Trust Authority to determine, in a reasonable exercise of its discretion, whether particular components of a university's tuition model constitute "charges imposed to attend," or "fees required as a condition of enrollment" in, a university and, thus, part of that university's "tuition." In making such determinations, the Ohio Tuition Trust Authority must act in a reasonable manner, taking into account the manner in which such determination may affect the actuarial soundness of the Ohio tuition trust fund, and must base its determination upon a reasonable construction of the statutory scheme governing the Ohio college savings program.

2. In the determination of "weighted average tuition" and the establishment of the cost of tuition credits under R.C. 3334.07(B), it would be a valid exercise of discretion for the Ohio Tuition Trust Authority to adopt an interpretation under which the "annual undergraduate tuition charged to Ohio residents," R.C. 3334.01(I)(1), by a particular university consists of the total tuition charged, less a tuition reduction granted to every Ohio resident. It would also be a valid exercise of discretion for the Ohio Tuition Trust Authority to adopt an interpretation under which the "annual undergraduate tuition charged to Ohio residents," R.C. 3334.01(I)(1), does not incorporate any tuition reductions that vary in amount among individual recipients and that are awarded to Ohio residents based upon their particular circumstances.

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OPINION NO. 2003-028

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Dear Executive Director Williams:

We have received your request for an opinion concerning the Ohio Tuition Trust Authority's power to determine "weighted average tuition," a factor used in establishing the price of tuition credits that are sold pursuant to tuition payment contracts under R.C. 3334.09. You specifically ask:

3. Does the definition of "tuition" in R.C. 3334.01(H) allow for OTTA [(Ohio Tuition Trust Authority)] to use a figure other than the advertised sticker price of tuition?

4. If the definition of "tuition" does allow OTTA to use a different figure, can OTTA use a net figure (sticker price minus institutional aid provided by the university)?

5. If OTTA can show that state universities have increased tuition for the purpose of returning that as institutional aid, and can calculate that amount, can OTTA use that lesser amount as "tuition" for purposes of calculating the weighted average tuition?

By way of background, your opinion request states, in pertinent part:

> At issue is OTTA's use of the cost of tuition at Ohio's public universities to determine the price and payout value of a tuition unit[1] purchased by Ohioans enrolled in the Guaranteed Savings Fund. The key to setting the price and payout value of a tuition unit is establishing the weighted average tuition of the four-year state public institutions.
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> ....
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> In following the formula for calculating weighted average tuition, OTTA has always used the undergraduate tuition rate listed by each state university, or the sticker price, as the "tuition" amount in the calculation. Historically, this amount has been the full price charged, prior to the receipt of any financial aid, or other support.
>
> Most recently, the Miami University Board of Trustees adopted a tuition model that will result in a substantial tuition increase. This increase will then be returned to students in the form of institutional aid or scholarships. There is also a strong concern that other state universities will adopt similar tuition models. It appears that other state universities have already adopted similar tuition models on a much lesser scale—increasing tuition a smaller amount and using that increase to provide institutional aid and scholarships. OTTA's concern is that the true cost of tuition charged to students is something other than the new sticker prices. The "charges imposed to attend" the universities are less than the sticker price, due to the amount returned as institutional aid and scholarships. For example, if tuition is listed at $5000, but the average institutional aid and scholarships provided by the university is $1000, the actual average tuition cost at that university is $4000, not the sticker price of $5000. In this example, the net figure (sticker of $5000 minus the average returned in institutional aid of $1000) is $4000. In such situations some students will be paying the full $5000, and others will be paying less depending on the amount of institutional aid they receive. (Footnote added.)

Before addressing your particular concerns, it may be useful briefly to describe the functions of the Ohio Tuition Trust Authority (hereinafter OTTA). According to Article VI, § 6 of the Ohio Constitution:

> (A) To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to maintain a program for the sale of tuition credits such that the proceeds of such credits purchased for the benefit of a person then a resident

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[1] Your opinion request uses the term "tuition unit." The statutory scheme governing the Ohio college savings plan, however, uses the term "tuition credit." *See, e.g.*, R.C. 3334.07(A) (stating, in part, "[t]he Ohio tuition trust authority shall develop a plan for the sale of tuition credits"). For purposes of this opinion, we will refer to the units purchased under the Ohio college savings plan governed by R.C. 3334.07 as "tuition credits."

> of this state shall be guaranteed to cover a specified amount when applied to the cost of tuition at any state institution of higher education, and the same or a different amount when applied to the cost of tuition at any other institution of higher education, as may be provided by law.
>
> ....
>
> Laws shall be passed, which may precede and be made contingent upon the adoption of this amendment by the electors, to provide that future conduct of the tuition credits program shall be consistent with this amendment.

Within R.C. Chapter 3334, the General Assembly has established various programs through which OTTA may implement the objectives of Ohio Const. art. VI, § 6. Among such programs is the Ohio college savings program, which "shall consist of the issuance of college savings bonds and the sale of tuition credits and, if offered, supplemental credits," R.C. 3334.02(A).

Under the Ohio college savings program, OTTA may, with limited exceptions, "enter into a tuition payment contract with any person for the purchase of tuition credits if either the purchaser or the beneficiary is a resident of this state at the time the contract is entered into." R.C. 3334.09(A). Such a contract enables an individual to "purchase tuition credits at the price determined by [OTTA] pursuant to [R.C. 3334.07 or R.C. 3334.12] for the year in which the tuition credit is purchased," *id*. In accordance with R.C. 3334.09(B), "[e]ach tuition credit shall entitle the beneficiary to an amount equal to one per cent of the weighted average tuition." Thus, a tuition credit is purchased at the price set for the year in which the credit is purchased; the value of each such credit when used is one percent of the "weighted average tuition" determined for the year in which it is used. *See generally* R.C. 3334.10 (termination of tuition payment contracts and value of refunds).

R.C. 3334.11(A) establishes the Ohio tuition trust fund into which are placed "assets of the Ohio tuition trust authority reserved for payment of the obligations of the authority pursuant to tuition payment contracts." As trustee of the Ohio tuition trust fund, OTTA has a duty to administer the Ohio tuition trust fund "in a manner designed to be actuarially sound so that the assets of the fund will be sufficient to satisfy the obligations of the authority pursuant to tuition payment contracts and defray the reasonable expenses of administering the fund." R.C. 3334.11(D).[2]

The manner in which OTTA is to establish the price of tuition credits and determine "weighted average tuition" for purposes of the Ohio college savings plan is described in R.C. 3334.07(B), which requires OTTA to determine the weighted average tuition of four-year state

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[2] *See generally* R.C. 3334.11(F)(1) (requiring OTTA to "maintain a separate account for each tuition payment contract entered into pursuant to [R.C. 3334.09(A] for the purchase of tuition credits on behalf of a beneficiary or beneficiaries showing the beneficiary or beneficiaries of that contract and the number of tuition credits purchased pursuant to that contract").

universities[3] in the academic year beginning in August of that calendar year. R.C. 3334.07(B) also defines the role of "weighted average tuition" in the establishment of the price of a tuition credit for the ensuing sales period,[4] in part, as follows:

> Such price shall be *based on sound actuarial principles, and shall, to the extent actuarially possible, reasonably approximate one per cent of the weighted average tuition* for that academic year plus the costs of administering the tuition credit program that are in excess of general revenue fund appropriations for administrative costs.... If circumstances arise during a sales period that the authority determines causes the price of tuition credits to be insufficient to *ensure the actuarial soundness* of the Ohio tuition trust fund, the authority may adjust the price of tuition credits purchased during the remainder of the sales period. To promote the purchase of tuition credits and in accordance with actuarially sound principles, the authority may adjust the sales price as part of incentive programs, such as discounting for lump-sum purchases and multi-year installment plans at a fixed rate of purchase. (Emphasis added.)

R.C. 3334.07(B) thus requires OTTA to use sound actuarial principles in determining the price of a tuition credit, and, to the extent possible under such principles, to fix the price of a tuition credit to approximate one percent of the current academic year's "weighted average tuition" at four-year state universities, plus unfunded administrative costs of the tuition credit program. The General Assembly has also authorized OTTA to adjust the price of tuition credits more frequently if circumstances arise, as determined by OTTA, that cause the price of tuition credits to be insufficient to ensure the actuarial soundness of the Ohio tuition trust fund. R.C. 3334.07(B).

Within the statutory framework governing the sale of tuition credits, "tuition" means, in part, "the *charges imposed to attend* an institution of higher education as an undergraduate, graduate, or professional student and *all fees required as a condition of enrollment, as determined by the Ohio tuition trust authority*," R.C. 3334.01(H) (emphasis added). According to this definition, "tuition" has two components: "the charges imposed to attend ... as an

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[3] *See generally* R.C. 3334.01(L) (defining the term "four-year state university," as used in R.C. 3334.07, as meaning those state universities listed in R.C. 3345.011, the University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Ohio University, Ohio State University, Shawnee State University, University of Toledo, Wright State University, and Youngstown State University).

[4] *See generally* 5 Ohio Admin. Code 3334-1-03(L) ("[i]n accordance with [R.C. 3334.07(B)], the sales period shall begin on October first of each year").

undergraduate, graduate, or professional student" and "all fees required as a condition of enrollment," R.C. 3334.01(H).[5] Both such components are to be determined by OTTA.

It is significant to note that, in defining "tuition," the General Assembly has expressly delegated to OTTA the duty to determine in a reasonable exercise of discretion whether particular features within a university's "sticker price" constitute "charges imposed to attend" the university or "fees required as a condition of enrollment" in the university and, thus, part of that university's tuition. Such delegation indicates the General Assembly's intention to rely upon the particular expertise and experience of OTTA members to make such determinations.[6] *See State ex rel. McLean v. Industrial Comm'n*, 25 Ohio St. 3d 90, 92, 495 N.E.2d 370 (1986) ("courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command").

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[5] Excluded from the term "tuition" are "laboratory fees, room and board, or other similar fees and charges." R.C. 3334.01(H). Thus, laboratory fees and charges for room and board, as well as any charges or fees that are similar to either laboratory fees or room and board charges, do not constitute tuition. *See generally Akron Home Medical Services, Inc. v. Lindley*, 25 Ohio St. 3d 107, 109, 495 N.E.2d 417 (1986) ("[u]nder the canon of statutory construction commonly referred to as *ejusdem generis* (literally 'of the same kind'), whenever words of general meaning follow the enumeration of a particular class, then the general words are to be construed as limited to those things which pertain to the particularly enumerated class"). *Compare* R.C. 3334.01(H) (defining "tuition," as used in R.C. Chapter 3334) *with* R.C. 3334.01(P) (defining "other higher education expenses," as used in R.C. Chapter 3334, as including "room and board and books, supplies, equipment," and, with certain limitations, "nontuition-related fees associated with the cost of attendance of a beneficiary at an institution of higher education," but excluding "tuition," as defined in R.C. 3334.01(H)). According to R.C. 3334.08(A)(20), OTTA may "[d]etermine the other higher education expenses for which tuition credits or contributions may be used." Thus, tuition credits may be used not only for "tuition," as defined in R.C. 3334.01(H), but also for "other higher education expenses," as defined in R.C. 3334.01(P). By definition, however, "tuition" is distinct from "other higher education expenses."

[6] *See, e.g.*, R.C. 3334.03(D) (stating in part, "[t]he six gubernatorial appointees and the chancellor of the board of regents or the chancellor's designee shall serve as the executive committee of the authority.... The authority may delegate to the executive committee such duties and responsibilities as the authority determines appropriate, except that *the authority may not delegate to the executive committee the final determination of the annual price of a tuition credit*" (emphasis added)); 5 Ohio Admin. Code 3334-1-02 (authorizing the executive committee of OTTA "to perform all duties and responsibilities imposed upon the Ohio tuition trust authority and to take any action necessary or proper to the discharge of the authority's duties and responsibilities," and excepting from the executive committee's delegated powers and duties "[t]he final determination of the annual price of a tuition credit").

As recently stated in 2001 Op. Att'y Gen. No. 2001-032, at 2-193, "[t]he Attorney General is not empowered, in rendering opinions, to exercise discretion on behalf of other public officials." *See* 1986 Op. Att'y Gen. No. 86-076 at 2-422 (the Attorney General is "not authorized to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity"). It would be inappropriate, therefore, for the Attorney General to determine whether particular components of a university's tuition model constitute part of that university's "tuition," as defined in R.C. 3334.01(H). We can, however, discuss relevant factors within the statutory scheme governing the Ohio college savings program that OTTA may consider in the exercise of its discretion to make such determination.

Because OTTA's questions about the meaning of the term "tuition" arise from its duty to fix the price of tuition credits and to determine "weighted average tuition," it may be helpful to examine the definition of the latter term to ascertain the General Assembly's intent in the use of the word "tuition" in that context. *See generally D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 20 (statutes relating to the same subject matter must be read together in an attempt to "arrive at a reasonable construction giving the proper force and effect, if possible, to each statute").

As used in R.C. 3334.07(B), the term "weighted average tuition" means:

> the tuition cost resulting from the following calculation:
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> (1) Add the products of the *annual undergraduate tuition charged to Ohio residents* at each four-year state university multiplied by that institution's total number of undergraduate fiscal year equated students; and
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> (2) Divide the gross total of the products from division (I)(1) of this section by the total number of undergraduate fiscal year equated students attending four-year state universities.

R.C. 3334.01(I) (emphasis added). Thus, for purposes of calculating "weighted average tuition," the relevant "tuition" figure for each four-year state university is the amount of the "annual undergraduate tuition *charged to Ohio residents*," R.C. 3334.01(I)(1) (emphasis added).

The wording of R.C. 3334.01(I)(1) reveals certain features of the tuition figure, composed of charges and fees, that is to be used in determining "weighted average tuition." A university's tuition figure is that amount charged each year, rather than on a quarterly or semester basis, to an Ohio resident for attendance at the university as an undergraduate student. R.C. 3334.01(I)(1) thus appears to contemplate the existence of a single figure that each four-year state university charges to each Ohio resident for attendance as an undergraduate.[7]

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[7] The example used in your opinion request suggests that a university's "sticker price" for undergraduate Ohio residents may be reduced by the "average" institutional aid provided to students at that university in order to arrive at that university's "annual undergraduate tuition charged to Ohio residents," R.C. 3334.01(I)(1).

It is our understanding that traditionally, the universities established charges and fees for Ohio residents, to which they added a surcharge for out-of-state residents. So long as all the four-year state universities structured their tuition in this manner, the "annual undergraduate tuition charged to Ohio residents" consisted of the same components at each university, and excluded any sums paid only by out-of-state residents. It is within this traditional framework, under which all the four-year state universities similarly structured their tuition rates, that the General Assembly designed its plan for the sale and use of tuition credits, based upon an average of the tuition rates charged to Ohio residents at the state's four-year universities.

Recently, a single university has altered the structure of its tuition charges. Under the newly created tuition structure, all students, whether or not they are Ohio residents, will be charged the same amount. However, all Ohio residents will be granted a tuition reduction that consists of a single, fixed amount that is granted to all of the university's Ohio residents. While such amount may vary from year to year, it is fixed at a single amount for all Ohio residents who initially enroll in a particular year.[8] Accordingly, the amount charged every student is reduced for all Ohio residents by this fixed sum. In essence, then, the amount of tuition charged, less the uniform Ohio resident tuition reduction, constitutes the Ohio resident tuition, the amount of such reduction being an amount that is paid only by out-of-state students.

The definition of "tuition" in R.C. 3334.01(H), however, makes no mention of using an "average institutional aid" figure in computing a university's "tuition." *Cf.* R.C. 3334.01(I) (defining "weighted average tuition"). Rather, R.C. 3334.01(H) defines "tuition" in terms of "charges imposed to attend" and "all fees required as a condition of enrollment." There is no mention of averaging any figures to determine the amount of such charges and fees at any university. Had the General Assembly intended that a university's "tuition" exclude an amount equal to the "average institutional aid" received by the university's students, it could easily have expressed that intent by defining "tuition" in terms that excluded such "average" amount, having designed just such a formula in defining "weighted average tuition" in R.C. 3334.01(I). *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (the General Assembly, "[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"). It follows, therefore, that "average institutional aid" is not a factor in determining a university's "tuition."

[8] We understand that the amount of this tuition reduction is determined each year and is awarded in that amount to all Ohio residents in that year's entering class. The amount awarded to such students upon entering is then guaranteed, at a minimum, to those students until graduation for up to six years. Thus, although at any time there may be different reductions granted to Ohio residents, depending on the amount fixed for the year in which they entered, the amount of such reduction is determined each year for that year's entering class.

Your question appears to be whether the phrase "annual undergraduate tuition charged to Ohio residents" may be read to mean the total tuition charged, minus the tuition reduction granted to all Ohio residents. This appears to be a reasonable reading of that phrase, because it allows OTTA to use comparable figures when averaging the tuition charged by the four-year state universities for purposes of calculating "weighted average tuition."[9]

As discussed above, OTTA has discretion to adopt any reasonable interpretation of the statutory provisions it administers. The interpretation outlined above constitutes one such reasonable interpretation. We conclude, therefore, that it would be a valid exercise of discretion by OTTA to adopt an interpretation under which the "annual undergraduate tuition charged to Ohio residents" at a particular university consists of the total tuition charged, less a uniform tuition reduction granted to every Ohio resident.

You have informed us that the new tuition structure with which you are concerned offers an additional type of tuition reduction that will be awarded only to certain Ohio residents. Under this part of the new tuition structure, there would be no single amount by which the tuition of all recipients would be reduced, and, although only Ohio residents are eligible for this reduction, not all Ohio residents would receive the reduction. Rather, a tuition reduction granted under this portion of the plan would be based upon the student's particular circumstances, *e.g.*, financial need, area of study.

You state that traditionally, OTTA has not reduced the figure representing a university's "annual undergraduate tuition charged to Ohio residents" by any reductions in the amount a student ultimately pays due to the student's particular circumstances, and we find that this is a reasonable reading of OTTA's statutes. *See generally, e.g.*, R.C. 3334.10(F) (refund of tuition credits unneeded due to a scholarship (other than under a scholarship program governed by R.C. 3334.17), a waiver of tuition, or "similar subvention that the authority determines cannot be converted into money by the beneficiary"). As you have further explained, the feature of the new tuition structure that reduces the amount of tuition paid by some, but not all, Ohio residents is based upon the particular circumstances of the individual student. Just as OTTA has previously determined to disregard tuition reductions based on individual circumstances in determining a university's "annual undergraduate tuition charged to Ohio residents," it is reasonable for OTTA to disregard a similar type of tuition reduction based on individual circumstances granted by a university using the new tuition structure. *See generally* note seven, *supra*. Thus, all tuition reductions that vary among Ohio residents because of their individual, particular circumstances fit neatly within this general rule. We conclude, accordingly, that in

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[9] *See generally* R.C. 1.49 (stating, in part, "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; ... (E) The consequences of a particular construction; [and] (F) The administrative construction of the statute"); *Commerce & Industry Insurance Co. v. City of Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989) ("words and phrases in a statute must be read in context of the whole statute").

determining a university's "annual undergraduate tuition charged to Ohio residents," it would be a valid exercise of discretion for OTTA not to exclude from the full tuition charged any tuition reductions that vary in amount among individual recipients and that are awarded to Ohio residents based on their particular circumstances.

In summary, pursuant to R.C. 3334.01(H), the General Assembly has authorized OTTA to determine, in a reasonable exercise of its discretion, whether particular components of a university's tuition model constitute "charges imposed to attend" the university or "fees required as a condition of enrollment" in the university and, thus, part of that university's "tuition." In making such determinations, OTTA must act in a reasonable manner and base its determination upon a reasonable construction of the statutory scheme governing the Ohio college savings program.[10] Finally, in making any such determination, OTTA must consider the manner in which such determination may affect the actuarial soundness of the Ohio tuition trust fund. *See, e.g.*, R.C. 3334.07(B); R.C. 3334.11(D) (OTTA is trustee of the Ohio tuition trust fund, and "[a]ssets of the fund shall be administered by [OTTA] in a manner designed to be actuarially sound so that the assets of the fund will be sufficient to satisfy the obligations of the authority pursuant to tuition payment contracts and defray the reasonable expenses of administering the fund"); R.C. 3334.12(A) (OTTA's duty to have annual evaluation of actuarial soundness of Ohio tuition trust fund, and, if fund's assets are found to be insufficient to "ensure the actuarial soundness of the fund, the authority shall adjust the price of subsequent purchases of tuition credits").

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 3334.01(H), the General Assembly has authorized the Ohio Tuition Trust Authority to determine, in a reasonable exercise of its discretion, whether particular components of a university's tuition model constitute "charges imposed to attend," or "fees required as a condition of enrollment" in, a university and, thus, part of that university's "tuition." In making such determinations, the Ohio Tuition Trust Authority must act in a reasonable manner, taking into account the manner in which such determination may affect the actuarial soundness of the Ohio tuition trust fund, and must base its determination upon a reasonable construction of the statutory scheme governing the Ohio college savings program.

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[10] *See generally Northwestern Ohio Building & Construction Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (2001) ("[i]It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a *reasonable manner* based upon a *reasonable construction* of the statutory scheme" (emphasis added)); *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) ("every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty").

2. In the determination of "weighted average tuition" and the establishment of the cost of tuition credits under R.C. 3334.07(B), it would be a valid exercise of discretion for the Ohio Tuition Trust Authority to adopt an interpretation under which the "annual undergraduate tuition charged to Ohio residents," R.C. 3334.01(I)(1), by a particular university consists of the total tuition charged, less a tuition reduction granted to every Ohio resident. It would also be a valid exercise of discretion for the Ohio Tuition Trust Authority to adopt an interpretation under which the "annual undergraduate tuition charged to Ohio residents," R.C. 3334.01(I)(1), does not incorporate any tuition reductions that vary in amount among individual recipients and that are awarded to Ohio residents based upon their particular circumstances.

Respectfully,

JIM PETRO
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