

April 3, 2015

Corey Schaal, Executive Director
Ohio Respiratory Care Board
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

SYLLABUS:

2015-013

1. Whether particular provisions of R.C. Chapter 4752 or 11B Ohio Admin. Code Chapter 4761:1 may be applied to an out-of-state home medical equipment services provider implicates the Dormant Commerce Clause of the U.S. Constitution, involves questions of fact, and cannot be determined by a formal opinion of the Attorney General.
2. Pursuant to R.C. 4752.17(A), the Ohio Respiratory Care Board may adopt an administrative rule requiring an in-state home medical equipment services provider to pass a pre-licensure inspection of its in-state facility as a condition of licensure.
3. Whether the Ohio Respiratory Care Board may require a home medical equipment services provider to pass an inspection of its out-of-state facility as a condition of providing home medical equipment services within the state of Ohio implicates constitutional questions and cannot be determined by a formal opinion of the Attorney General.
4. Whether the Ohio Respiratory Care Board may offer certificates of registration, but not licenses, to out-of-state facilities of home medical equipment services providers implicates the Dormant Commerce Clause of the U.S. Constitution and cannot be determined by a formal opinion of the Attorney General.
5. R.C. 4752.04 requires an applicant for a license to provide home medical equipment services in the state of Ohio to provide the Ohio Respiratory Care Board with the name and location of the facility from which services will be provided. If an applicant fails to provide the Ohio Respiratory Care Board

with this information, the Board may refuse to issue the license on the basis that the application is incomplete.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2015-013

Corey Schaal, Executive Director
Ohio Respiratory Care Board
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

Dear Executive Director Schaal:

Your predecessor requested an opinion regarding the Ohio Respiratory Care Board's authority to regulate home medical equipment services providers under R.C. Chapter 4752 and 11B Ohio Admin. Code Chapter 4761:1. With limited exceptions, *see* R.C. 4752.02(B), "no person shall provide home medical equipment services¹ or claim to the public to be a home medical equipment services provider² unless" the person holds a valid license or certificate of registration issued by the

¹ For purposes of R.C. Chapter 4752, "[h]ome medical equipment services" is defined as "the sale, delivery, installation, maintenance, replacement, or demonstration of home medical equipment." R.C. 4752.01(C). R.C. 4752.01(B) defines "[h]ome medical equipment," in turn, as:

equipment that can stand repeated use, is primarily and customarily used to serve a medical purpose, is not useful to a person in the absence of illness or injury, is appropriate for use in the home, and is one or more of the following:

(1) Life-sustaining equipment prescribed by an authorized health care professional that mechanically sustains, restores, or supplants a vital bodily function, such as breathing;

(2) Technologically sophisticated medical equipment prescribed by an authorized health care professional that requires individualized adjustment or regular maintenance by a home medical equipment services provider to maintain a patient's health care condition or the effectiveness of the equipment;

(3) An item specified by the Ohio respiratory care board in rules adopted under [R.C. 4752.17(B)].

See also 11B Ohio Admin. Code 4761:1-3-02 (2014-2015 Supplement) (further defining "home medical equipment" for purposes of R.C. Chapter 4752).

² "Home medical equipment services provider" is defined, for purposes of R.C. Chapter 4752, as "a person engaged in offering home medical equipment services to the public." R.C. 4752.01(D).

Ohio Respiratory Care Board (the Board). R.C. 4752.02(A) (footnotes added). To comply with this requirement, a person seeking to provide home medical equipment services must apply for either a license or certificate of registration issued by the Board. R.C. 4752.03(A). A person intending to provide home medical equipment services from more than one facility must apply for a separate license or certificate of registration for each facility. R.C. 4752.03(B). Licenses are issued to applicants that either: (1) meet the standards for licensure established by the Board in administrative rules, or (2) are licensed as a pharmacy pursuant to R.C. Chapter 4729 and receive total payments of ten thousand dollars or more each year from selling or renting home medical equipment. R.C. 4752.05(A). Alternatively, certificates of registration are issued to applicants that are accredited by the Joint Commission on Accreditation of Healthcare Organizations or another national accrediting body recognized by the Board in its administrative rules. R.C. 4752.03(A)(2). A certificate-holder is granted the same rights and privileges to provide home medical equipment services that are granted to a license-holder.

Your predecessor has raised the following questions regarding the Board's authority to license or certify home medical equipment services providers:

1. Does the Board have authority to require applicants for a home medical equipment services provider license to pass an inspection prior to the issuance of that license?
2. Does the Board have authority to limit the issuance of home medical equipment services provider licenses to facilities that are resident in the state of Ohio? Note: This would not prohibit the issuance of certificates of registration to out-of-state home medical equipment services providers.
3. Are internet-based companies that do not have a storefront in the state of Ohio or elsewhere eligible for a home medical equipment services provider license pursuant to R.C. 4752.05?

The Ohio Respiratory Care Board's Authority to Regulate Commerce

The Board has interpreted R.C. Chapter 4752's licensure and certification requirements as applying to both in-state and out-of-state home medical equipment services providers. *See, e.g.*, 11B Ohio Admin. Code 4761:1-8-03(C) (providing fees for inspection of out-of-state facilities licensed by the Board). That is, the Board has interpreted R.C. 4752.02(A) as requiring both in-state and out-of-state home medical equipment services providers to obtain a license or certificate of registration from the Board before selling, delivering, installing, maintaining, replacing, or demonstrating home medical equipment in Ohio. *See* R.C. 4752.01(C) (defining "home medical equipment services"). The regulation and licensure of out-of-state home medical equipment services providers implicates the Dormant Commerce Clause of the U.S. Constitution, which limits the power of states to regulate interstate commerce. *See Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 702 (9th Cir. 1997). It is axiomatic that the Board has authority to license and otherwise regulate in-state home medical equipment services providers, that is home medical equipment services providers who operate a facility within the state of Ohio or are otherwise engaged in intrastate commerce. *See, e.g.*,

Lake Erie, A. & W. R. Co. v. Pub. Utils. Comm'n, 109 Ohio St. 103, 109, 141 N.E. 847 (1923) (“[i]n purely intrastate traffic by shippers within the state, between points in the state, the Ohio Public Utilities Commission has exclusive jurisdiction when interstate commerce or foreign commerce is not involved”); 1982 Op. Att’y Gen. No. 82-032, at 2-93 (a corporation engaged in intrastate commerce is subject to state regulation concerning those intrastate activities). State regulation of interstate commerce is, however, more limited. In so far as your predecessor’s questions involve the Board’s authority to regulate out-of-state home medical equipment services providers, we must begin with an understanding of the Dormant Commerce Clause.

Article I, Section 8, Clause 3 of the U.S. Constitution, the Commerce Clause, grants Congress the power “to regulate Commerce ... among the several States[.]” While the Commerce Clause is an express grant of authority to Congress to regulate Commerce, the Supreme Court has long recognized that “the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). The Ohio Supreme Court has explained that “[t]he Commerce Clause contains two parts. First, there is the express grant of power to Congress to regulate interstate commerce. Second, there is the implied limitation on states from regulating matters that interfere with interstate commerce. This limitation is referred to as the negative or dormant Commerce Clause.” *Diehl, Inc. v. Ohio Dep’t of Agric.*, 102 Ohio St. 3d 50, 2004-Ohio-1870, 806 N.E.2d 533, at ¶11 (citations omitted). The Dormant Commerce Clause “limits the power of the states ‘to erect barriers against interstate trade.’” *Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488, 492 (6th Cir. 1996) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980)). The Dormant Commerce Clause’s underlying purpose is to facilitate free trade between the states. *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465, 467, 391 N.E.2d 716 (1979). Pursuant to the Dormant Commerce Clause, a state regulation may not significantly interfere with or substantially impede interstate commerce.³ 1982 Op. Att’y Gen. No. 82-043, at 2-123.

However, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. The Supreme Court has explained that:

[a]lthough the Commerce Clause acts as a limitation upon state power even without congressional implementation, our opinions have long recognized that, “in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.”

³ The Dormant Commerce Clause restrains state authority to regulate interstate commerce “even where no federal statute covers the regulated subject.” *BlueHippo Funding, LLC v. McGraw*, 609 F. Supp. 2d 576, 585 (S.D. W. Va. 2009); see also *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (the Commerce Clause is “an implicit restraint on state authority, even in the absence of a conflicting federal statute”).

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (citations omitted) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945)). That is, “[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.” *Lewis*, 447 U.S. at 36. States have authority to regulate areas of interstate commerce that are local in nature as long as such regulation does not impose an undue burden on the flow of that commerce. *Panhandle E. Pipe Line Co. v. Pub. Utils. Comm’n*, 56 Ohio St. 2d 334, 339, 383 N.E.2d 1163 (1978); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960) (“[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand”). Thus, states may enact police power regulations that incidentally affect interstate commerce provided that such regulations do not discriminate against out-of-state interests and legitimate local interests outweigh any incidental burden imposed upon interstate commerce. *See Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982); *Ferndale Labs., Inc.*, 79 F.3d at 494-96.

The Supreme Court has established two tiers of scrutiny that apply when determining whether state regulation complies with the Dormant Commerce Clause:

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Court has] examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citations omitted). Thus, when state law discriminates against interstate commerce, it is subject to heightened scrutiny under the Dormant Commerce Clause. For purposes of the Dormant Commerce Clause, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994). Restrictions on interstate commerce that are discriminatory are “virtually *per se* invalid” and will be upheld only where the state can establish that the regulation serves a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory means. *Id.* at 100-01. State laws that do not discriminate against, but rather incidentally affect, interstate commerce are subject to the balancing test set forth by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pursuant to the *Pike* balancing test, a state law with indirect effects on interstate commerce will be upheld “unless the burden it imposes upon interstate commerce is ‘clearly excessive in relation to the putative local benefits.’” *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010) (quoting *Pike*, 397 U.S. at 142).

The foregoing tests apply when scrutinizing state laws that purport to license and otherwise regulate out-of-state businesses. *See, e.g., V-1 Oil Co. v. Utah State Dep’t of Pub. Safety*, 131 F.3d 1415, 1423-27 (10th Cir. 1997); *Ferndale Labs., Inc.*, 79 F.3d at 494-96; *BlueHippo Funding, LLC v. McGraw*, 609 F. Supp. 2d 576, 585-94 (S.D. W. Va. 2009). For example, in 1982 the Attorney

General applied the *Pike* balancing test when considering whether the State Board of Pharmacy was authorized to regulate, through various licensure requirements, mail order retail pharmaceutical distributors that were engaged solely in interstate commerce.⁴ 1982 Op. Att’y Gen. No. 82-032, at 2-91. The 1982 opinion considered whether R.C. 4729.28 and R.C. 4729.51(C), which in conjunction prohibited persons not registered as pharmacists, pharmacy interns, or terminal distributors of dangerous drugs from selling dangerous drugs at retail, applied to an out-of-state pharmaceutical distributor that mailed prescription drugs directly to consumers within the state of Ohio. *Id.* at 2-95 to 2-97. That is, the opinion considered whether the out-of-state pharmaceutical distributor was required to register with the State Board of Pharmacy as a pharmacist, pharmacy intern, or terminal distributor of dangerous drugs before it could ship dangerous drugs at retail into the state of Ohio. *Id.* The opinion first considered whether R.C. 4729.28, which prohibited persons not registered as pharmacists or pharmacy interns from selling dangerous drugs in Ohio, applied to out-of-state pharmaceutical distributors. *Id.* at 2-96. Recognizing that only natural persons could be registered as pharmacists or pharmacy interns, the opinion noted that “foreign corporate retailers could never be in compliance with R.C. 4729.28.” *Id.* The opinion therefore concluded that R.C. 4729.28 could not be constitutionally interpreted as applying to foreign retail distributors who sell their drugs to Ohio consumers because “[s]uch an absolute prohibition on the retailers’ interstate sales in Ohio clearly places an impermissible burden on the flow of interstate commerce[.]” *Id.*

The opinion next focused on whether R.C. 4729.51(C) required the out-of-state pharmaceutical distributor to be licensed by the State Board of Pharmacy as a terminal distributor of dangerous drugs before shipping drugs to Ohio consumers. *Id.* at 2-96 to 2-97. R.C. 4729.51(C) provided that “[n]o person, except a licensed terminal distributor of dangerous drugs or a practitioner shall [...] sell, at retail, dangerous drugs.” *Id.* at 2-96 (quoting the version of R.C. 4729.51(C) in effect at that time). The opinion recognized that R.C. 4729.51(C) provided an exception to R.C. 4729.28 by allowing a non-pharmacist or non-pharmacy intern to sell dangerous drugs at retail if licensed as a terminal distributor of dangerous drugs. *Id.* Noting that the licensure requirements for terminal distributors of dangerous drugs appeared evenhanded, the Attorney General applied the *Pike* balancing test to analyze whether the licensure requirements could be constitutionally applied to out-of-state pharmaceutical distributors engaged solely in interstate commerce:

⁴ The 1982 opinion recognized that “[w]hether a corporation is engaged in interstate commerce or intrastate commerce is largely a factual determination, which is dependent on the totality of relevant circumstances surrounding the corporation’s business operations.” 1982 Op. Att’y Gen. No. 82-032, at 2-92. The opinion noted, however, that “[i]t is well-established ... that a person or corporation located in one state who contracts for the shipment of his goods into another state is engaged in interstate commerce.” *Id.* The 1982 opinion addressed the State Board of Pharmacy’s authority to regulate out-of-state pharmaceutical distributors that mailed prescription drugs directly to consumers within the state of Ohio. *Id.* at 2-91 to 2-92. The opinion noted that such conduct constitutes interstate commerce and limited its analysis to out-of-state pharmaceutical distributors engaged solely in interstate commerce. *Id.* at 2-92 to 2-93.

even though state regulation of mail order pharmaceutical distributors serves a legitimate public interest and is evenhandedly applied, it appears that the burden certain regulations would impose on interstate commerce could outweigh the benefits derived therefrom. “Regulation rises to the level of an undue burden if it may seriously interfere with or ‘impede substantially’ the free flow of commerce between the states” (citation omitted). For example, the interstate business of a mail order company is almost certainly to be “impeded substantially” if the company is forced to meet licensure requirements in fifty different states, although other regulations which have a less substantial impact on interstate commerce may be permissible under the Commerce Clause.

Id. at 2-95 (citations omitted). Based in part upon the limitations placed on the State Board of Pharmacy by the Dormant Commerce Clause, the Attorney General concluded that “[o]ut-of-state mail order retail pharmaceutical distributors, engaged solely in interstate commerce, are not subject to regulation by the ... State Board of Pharmacy under R.C. 4729.28 or R.C. 4729.51(C).” *Id.* (syllabus, paragraph 1). That is, the Attorney General advised that the laws prohibiting persons not registered as pharmacists, pharmacy interns, or terminal distributors of dangerous drugs from selling dangerous drugs at retail in Ohio did not apply to out-of-state companies engaged solely in interstate commerce.⁵

Similarly, the Attorney General has advised the State Board of Pharmacy that it may not require an out-of-state pharmacy to obtain a terminal distributor of dangerous drugs license for a location in another state, even when the pharmacy is transferring drugs to Ohio from that out-of-state location. 1982 Op. Att’y Gen. No. 82-033 (syllabus, paragraph 1). The Attorney General applied the *Pike* balancing test to determine whether licensure of an out-of-state pharmacy would comply with Dormant Commerce Clause principles. *See id.* at 2-102. While recognizing that the state has an interest in protecting the health and safety of Ohio citizens, the Attorney General concluded that the benefits that would be derived from requiring an out-of-state pharmacy to obtain a license for an out-of-state location did not justify the burden that the licensure requirement would place on interstate commerce. *Id.* The Attorney General noted that such licensure requirements may “discourage out-of-state pharmacies from transferring drugs into the state of Ohio, thus impeding the free flow of commerce.” *Id.*

Other licensing schemes have, however, been found to be less burdensome under the Dormant Commerce Clause, and thus, their application to out-of-state entities has been upheld. For example, the Sixth Circuit Court of Appeals has held that Ohio’s “registration” requirements for wholesale distributors of pharmaceuticals may be constitutionally applied to a Michigan wholesaler that ships

⁵ Since issuance of 1982 Op. Att’y Gen. No. 82-032, the General Assembly has enacted a law requiring each person, “whether located within or outside this state, who sells dangerous drugs at retail for delivery or distribution to persons residing in this state” to be licensed as a terminal distributor of dangerous drugs. R.C. 4729.551. To our knowledge, the constitutionality of this law has not been challenged.

pharmaceuticals into Ohio. *Ferndale Labs., Inc.*, 79 F.3d 488.⁶ The registration requirements considered by the court appeared in R.C. 4729.52 and provided that the State Board of Pharmacy could register a person who did not reside in Ohio as a wholesale distributor if the person possessed a current and valid wholesale distributor of dangerous drugs registration certificate or license issued by another state that had qualifications for registration or licensure that were comparable to Ohio's. *See* 1995-1996 Ohio Laws, Part I, 898, 1456 (Am. Sub. H.B. 117, eff. June 30, 1995). The law also required the out-of-state wholesaler to pay a \$100 licensing fee and maintain and provide to the state of Ohio records of drugs it shipped into the state. *Ferndale Labs., Inc.*, 79 F.3d at 490, 493. In applying the *Pike* balancing test to these registration requirements, the court recognized Ohio's local interest in having information "concerning the types and sources of prescription drugs entering Ohio." *Id.* at 495. The court determined that this local interest outweighed the licensing requirements' "relatively small impact on interstate trade." *Id.* The court noted that the burden on interstate commerce was small because "[r]egistration does not require [the out-of-state wholesaler] to change its business practices in any way." *Id.* at 496. Rather, the registration requirements simply required the Michigan wholesaler to complete a two-page application and pay the license fee. *Id.* at 495-96. The court therefore held that the registration requirements did not violate the Dormant Commerce Clause because the burden imposed on interstate commerce was "incidental and minimal while the benefit to the State of Ohio [was] substantial." *Id.* at 496. *See also Underhill Assocs., Inc. v. Coleman*, 504 F. Supp. 1147, 1150-51 (E.D. Va. 1981) (upholding law requiring out-of-state securities brokers to register with the Virginia State Corporation Commission in order to do business in Virginia because burden on interstate commerce was minimal (applicant simply required to file standard forms and pay nominal fee) and was outweighed by the state's legitimate interest in protecting its investors).

Whether application of a particular licensing scheme to an out-of-state entity will comply with Dormant Commerce Clause principles thus depends on the specific requirements imposed by the licensing scheme. *See generally W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (the Dormant Commerce Clause analysis should be undertaken by "eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects"). Additionally, the nature of an out-of-state entity's business operations in Ohio will affect whether the entity may be subject to licensure by Ohio. An entity that engages in intrastate commerce is clearly subject to regulation by the state. *See Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961). Conversely, an entity engaged solely in interstate commerce will be subject to licensure by Ohio only if the licensure requirements are nondiscriminatory and any burden imposed upon interstate commerce is not "clearly excessive in

⁶ While 1982 Op. Att'y Gen. No. 82-032, 1982 Op. Att'y Gen. No. 82-033, and *Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996) each address the State Board of Pharmacy's authority to regulate out-of-state entities, *Ferndale Labs., Inc.* addresses different licensure requirements under R.C. Chapter 4729 than those considered in the opinions. The opinions consider licensure requirements for terminal distributors of dangerous drugs while *Ferndale Labs., Inc.* considers licensure requirements for wholesale distributors of pharmaceuticals.

relation to the putative local benefits.” *Pike*, 397 U.S. at 142. Whether an entity is engaged in intrastate commerce or interstate commerce “is largely a factual determination, which is dependent on the totality of relevant circumstances surrounding the [entity’s] business operations.”⁷ 1982 Op. Att’y Gen. No. 82-032, at 2-92; *see also Dot Sys., Inc. v. Adams Robinson Enters.*, 67 Ohio App. 3d 475, 480, 587 N.E.2d 844 (Lawrence County 1990) (“[t]he determination of whether a corporation engages *solely* in interstate commerce and is thus exempt from a state’s [corporate] licensing requirements is largely factual, dependent upon the totality of the relevant circumstances surrounding the corporation’s business operations”). Accordingly, whether the Board may, within the limits of the Dormant Commerce Clause, apply its licensure requirements to a particular out-of-state home medical equipment services provider involves factual determinations that are beyond the scope of this opinion. *See* 2014 Op. Att’y Gen. No. 2014-007, at 2-66 (“[a]n opinion of the Attorney General cannot resolve questions of fact”); *see also generally Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283 (8th Cir. 1993) (“[t]he burden a state regulation places on a single firm’s interstate activities can be excessive under the Commerce Clause”). Further, because the Attorney General is not authorized to determine the constitutionality of state law, either facially or as applied, *see* 2002 Op. Att’y Gen. No. 2002-006, at 2-32 n.10, we are unable to advise you whether particular provisions of R.C. Chapter 4752 or 11B Ohio Admin. Code Chapter 4761:1 may be constitutionally applied to an out-of-state home medical equipment services provider. We caution, however, that the Board should consider the confines of the Dormant Commerce Clause when attempting to regulate out-of-state home medical equipment services providers. *Cf.* 1987 Op. Att’y Gen. No. 87-017, at 2-109 n.1 (advising the Director of the Department of Highway Safety to consider the impact of the Dormant Commerce Clause in implementing the provisions of R.C. Chapter 4738, which regulates the sale of salvage motor vehicles and salvage motor vehicle parts).

With the foregoing Dormant Commerce Clause principles in mind, we will now proceed to address your predecessor’s specific questions.

The Board’s Authority to Require Pre-Licensure Inspections

Your predecessor’s first question asks whether the Board may require applicants for a home medical equipment services provider license to pass an inspection of its facility prior to the issuance of

⁷ An out-of-state entity that merely contracts to sell and deliver goods manufactured outside of Ohio to customers within Ohio is likely engaged solely in interstate commerce. *Dot Sys., Inc. v. Adams Robinson Enters.*, 67 Ohio App. 3d 475, 480, 587 N.E.2d 844 (Lawrence County 1990); *Contel Credit Corp. v. Tiger, Inc.*, 36 Ohio App. 3d 71, 73, 520 N.E.2d 1385 (Summit County 1987); 1982 Op. Att’y Gen. No. 82-032, at 2-92 to 2-93. In contrast, an out-of-state entity that regularly performs services within Ohio, regularly has employees transacting business in Ohio, or has an established place of business in Ohio is more likely to be engaged in intrastate commerce. *See Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 32-33 (1974); *Dot Sys., Inc.*, 67 Ohio App. 3d at 481; *Contel Credit Corp.*, 36 Ohio App. 3d at 73.

that license. We will first consider whether the Board may require an applicant that is seeking to license a facility located in the state of Ohio to pass a pre-licensure inspection of that facility.

As a creature of statute, the Ohio Respiratory Care Board has only those powers that are expressly granted by statute or necessarily implied therefrom. *Cf.* 2014 Op. Att’y Gen. No. 2014-031, at 2-270 (same is true of a board of county commissioners). Therefore, if the Board is not granted a particular power expressly or by implication, it is precluded from exercising that power. *Cf. id.* (same as previous parenthetical). R.C. 4752.08(A) authorizes the Board to “inspect the operations and facility, subpoena the records, and compel testimony of employees of any home medical equipment services provider licensed under [R.C. Chapter 4752].” Inspections are to be conducted in accordance with administrative rules adopted by the Board. R.C. 4752.08(A). Because R.C. 4752.08(A) refers to home medical equipment services providers “licensed” by the Board, your predecessor questions whether the Board may inspect the operations and facility of an *applicant* for a home medical equipment services provider license.

As discussed earlier, R.C. 4752.05(A) provides that the Board shall issue a license to provide home medical equipment services to applicants that either: (1) meet the standards for licensure established by the Board in its administrative rules, or (2) are licensed as a pharmacy pursuant to R.C. Chapter 4729 and receive total payments of ten thousand dollars or more each year from selling or renting home medical equipment. By law, the Board is responsible for adopting administrative rules that establish “procedures for issuance and renewal of licenses[.]” R.C. 4752.17(A)(2); *see also* R.C. 4752.17(A) (the Board “shall adopt rules to implement and administer” R.C. Chapter 4752). The Board also shall adopt rules establishing “standards an applicant must meet to be eligible to be granted a license under [R.C. 4752.05.]” R.C. 4752.17(A)(4). Thus, the Board is charged with adopting administrative rules that establish both the procedures for the issuance of licenses and the standards that must be met by an applicant for licensure. The Board has discretion to promulgate and interpret its own rules in accordance with the mandates of R.C. 4752.17(A) so long as such rules and interpretations are reasonable in carrying out the intent of R.C. Chapter 4752. *See Frisch’s Rests., Inc. v. Conrad*, 170 Ohio App. 3d 578, 2007-Ohio-545, 868 N.E.2d 689, at ¶19 (Franklin County) (an agency has discretion to promulgate and interpret its own rules, and courts will give due deference to those determinations as long as the agency’s actions are reasonable in carrying out the statutory dictates of the legislature). Because the Board has wide discretion to adopt administrative rules governing the procedures and standards for licensure, we are of the opinion that the Board may promulgate rules requiring an applicant to pass an inspection of its in-state facility as a condition of licensure. *See Merriam-Webster’s Collegiate Dictionary* 1216 (11th ed. 2005) (defining “standard,” in part, as “something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality”); *Webster’s New World Dictionary* 1133 (2d college ed. 1986) (defining “procedure,” in part, as “the act, method, or manner of proceeding in some process or course of action; esp., the sequence of steps to be followed”); *see also Meyer v. Dunifon*, 88 Ohio App. 246, 249, 94 N.E.2d 471 (Franklin County 1950) (recognizing that the Board of Liquor Control, under its statutory authority to promulgate rules and regulations regarding applications for and the issuance of liquor permits, adopted an administrative rule requiring pre-licensure inspection). Adoption of such a rule is consistent with the Board’s authority to establish procedures and standards governing the issuance of home medical equipment services provider licenses and is within the Board’s discretion. *See*

generally *Nw. Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (2001) (“[i]t 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”); 2006 Op. Att’y Gen. No. 2006-020, at 2-189 (“[i]n exercising its rule-making powers, the [Ohio Manufactured Homes] Commission has discretion to determine the contents of its rules in any reasonable manner that is consistent with constitutional limitations and provisions of the Revised Code”).

However, we are unable to advise you whether the Board may require an out-of-state home medical equipment services provider to pass an inspection of its out-of-state facility as a condition of providing home medical equipment services within the state of Ohio.⁸ Whether the Board may impose such a requirement on an out-of-state home medical equipment services provider implicates the Dormant Commerce Clause. Assuming that the Board would apply the pre-licensure inspection requirement evenhandedly to both in-state and out-of-state facilities, a court would analyze the requirement under the *Pike* balancing test. Thus, a court would consider whether the inspection’s burden on interstate commerce is “clearly excessive in relation to the putative local benefits” to be derived from the inspection. *Pike*, 397 U.S. at 142.

For example, in *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir. 1976) the court considered whether a Chicago ordinance that required out-of-state milk processors to submit their out-of-state plants and dairy farmer suppliers to inspections by Chicago inspectors violated the Dormant Commerce Clause. In that case, an Indiana milk processing plant sought a permit to sell milk in the City of Chicago and objected to the city’s inspection requirement, claiming that the requirement resulted in inspections of its plant that were duplicative of the inspections performed by Indiana authorities. *Id.* at 1304-06. Because the court did not have evidence that Chicago’s inspection requirement applied unevenly to out-of-state milk processors, the court analyzed the constitutionality of the ordinance under the *Pike* balancing test. *Id.* at 1307. The court affirmed the district court’s finding that the ordinance imposed a significant burden on interstate commerce. *Id.* at 1308-10. This burden was illustrated by the fact that, with but three exceptions, no out-of-state milk processors held a permit issued by the City of Chicago. *Id.* at 1308. The court then weighed this heavy burden against Chicago’s local interest in public health. *Id.* at 1310-11. The court found that the inspection ordinance had “no appreciable effect in promoting [the public health] interest” because the inspection standards and procedures adopted by Indiana, the milk processor’s home state, were “sufficient to fully and adequately protect Chicago’s health interests.” *Id.* at 1310. Because the burden imposed on interstate commerce by the inspection ordinance outweighed its putative local benefits, the court affirmed the district court’s holding that the ordinance violated the Dormant Commerce Clause. *Id.* at 1310-11.

⁸ In light of information provided to us with regard to your predecessor’s second question, it appears possible that the Board may not be interested in inspecting out-of-state facilities. We will, nevertheless, discuss the Board’s authority in that regard.

In *Nat'l Farmers Org. Irasburg v. Comm'r of Agric.*, 711 F.2d 1156 (2d Cir. 1983), the court upheld part and struck down part of a Connecticut statutory scheme that required dairy farms, both in-state and out-of-state, to submit to inspections by Connecticut authorities as a condition of receiving a permit to sell milk in Connecticut. The Connecticut statutes required dairy farms to be inspected before they could obtain a permit to sell milk in Connecticut and also required the farms to undergo regular inspections thereafter. *Id.* at 1159. An association of dairy farmers in Vermont challenged the statute, arguing that the inspection requirements violated the Dormant Commerce Clause. *Id.* at 1157. Because the statutory scheme applied evenly to both in-state and out-of-state dairy farms, the court examined the statutes under the *Pike* balancing test. *Id.* at 1161-64. The court stated that “[a]lthough both the increased burden and the benefits resulting from the Connecticut inspection system appear to be very limited, we are persuaded that the burden imposed by Connecticut inspections on shipments from Vermont to Connecticut, with one exception, is not ‘clearly excessive in relation to the putative local benefits.’” *Id.* at 1162 (quoting *Pike*, 397 U.S. at 142). The court noted that the only substantial burden placed on out-of-state dairy farmers as a result of Connecticut’s inspection system was the additional delay experienced by out-of-state farmers in seeking an initial permit as compared to Connecticut farmers requesting such a permit. *Nat'l Farmers Org. Irasburg*, 711 F.2d at 1162. Specifically, as a result of the initial inspection requirement, Vermont applicants were required to wait three to four weeks longer for the issuance of a permit than Connecticut applicants. *Id.* at 1162. The court found that this burden was not justified by Connecticut’s local health interests because there was no evidence that Connecticut’s initial inspection was “more stringent or offer[ed] greater putative benefits than [Vermont’s earlier] inspection of the same farm[.]” *Id.* at 1163. Because the initial inspection requirement did not provide significant local health benefits and caused substantial delays in the licensure of out-of-state dairy farms, the court found that the Connecticut inspection system violated the Dormant Commerce Clause in that regard. *Id.* at 1163-64. With regard to the requirement of subsequent inspections, however, the court found that no burden was imposed on interstate commerce because the subsequent inspections did “not substantially inconvenience the farmers.” *Id.* at 1160; *see also id.* at 1164. The court found that Connecticut’s local health interests were served by the subsequent inspections because Connecticut’s subsequent monitoring and inspection procedures were more rigorous and advanced than Vermont’s. *Id.* at 1161-62, 1164. Accordingly, the court upheld the constitutionality of the Connecticut inspection statute to the extent that it required subsequent inspections of out-of-state dairy farms, but struck down the statute to the extent that it required initial inspections that delayed the issuance of permits to out-of-state dairy farms. *Id.* at 1164.

We cannot predict whether an Ohio court would determine that the Board may, within the confines of the Dormant Commerce Clause, require an out-of-state facility to undergo inspection as a condition of providing services in Ohio. The foregoing authorities demonstrate that a court would weigh Ohio’s local health, safety, and other purported interests against any burden imposed on interstate commerce by the inspection requirement. We cannot predict whether an Ohio court would find that inspection of an out-of-state facility unduly burdens interstate commerce. Whether the Board may constitutionally require an out-of-state facility to undergo inspection as a condition of providing home medical equipment services within the state is a question that must be answered by the courts and cannot be determined by a formal opinion of the Attorney General. *See* 2014 Op. Att’y Gen. No. 2014-034, at 2-308 to 2-309. *Compare* 2011 Miss. Att’y Gen. Op. No. 2011-00321 (opining that a

Louisiana pharmacy that had applied for a non-resident permit to dispense prescriptions in Mississippi voluntary subjected itself to the jurisdiction of the Mississippi Board of Pharmacy and was, therefore, subject to inspection by the Mississippi board), *with* 1986 Tex. Op. Att’y Gen. No. JM-555 (opining that the Texas legislature could not have intended the Texas State Board of Pharmacy to physically inspect facilities located in other states), *and* 1982 Ala. Op. Att’y Gen. No. 82-00402 (“[m]anifestly, the [Alabama Board of Funeral Service] is not authorized to inspect out-of-state businesses”).⁹

The Board’s Authority to Limit Issuance of Licenses to Facilities Located in Ohio

Your predecessor next asks whether the Board may limit the issuance of home medical equipment services provider licenses to facilities that are resident in the state of Ohio. He explains that the Board would prefer not to issue licenses to out-of-state facilities because the Board is required to inspect licensed facilities. Inspecting out-of-state facilities has presented challenges given the staffing, resources, and jurisdiction of the Board.¹⁰ Presumably, the Board would like to enact an administrative rule that makes residency in the state of Ohio a condition of licensure. We will refer to this proposed licensure requirement as the “proposed regulation.” Your predecessor has indicated that after enactment of the proposed regulation, out-of-state facilities would still be eligible to receive a Board-issued certificate of registration authorizing them to provide home medical equipment services within the state. To be eligible for a certificate of registration, a home medical equipment services provider must be accredited by the Joint Commission on Accreditation of Healthcare Organizations or another national accrediting body recognized by the Board in its administrative rules. R.C. 4752.03(A)(2). We are unable to predict whether a court would find that the Board’s proposal to offer certificates of registration, but not licenses, to out-of-state facilities complies with Dormant Commerce Clause principles. We will, however, examine and explain relevant Dormant Commerce Clause principles.

In analyzing the proposed regulation, a court would first determine which tier of Dormant Commerce Clause scrutiny to apply, the strict rule of virtual *per se* invalidity or the *Pike* balancing test. *See Oregon Waste Sys., Inc.*, 511 U.S. at 99. This determination turns on whether the court

⁹ In 1982 Op. Att’y Gen. No. 82-033, at 2-102, the Attorney General advised the State Board of Pharmacy that the Due Process Clause of the U.S. Constitution limits the power of a state to extend the effects of its laws beyond its borders. The Attorney General explained that “[t]o extend Ohio’s licensing requirements [for terminal distributors of dangerous drugs] to an out-of-state location would be an obvious effort to make Ohio law control in a geographical area outside the confines of this state. Such an extension would arguably be in violation of the Due Process Clause of the United States Constitution.” *Id.* at 2-102. In addition to considering the Dormant Commerce Clause, a court may also consider the Due Process Clause in determining whether the Ohio Respiratory Care Board may inspect an out-of-state facility of a home medical equipment services provider.

¹⁰ As explained in response to the previous question, subjecting out-of-state facilities to inspections by the Ohio Respiratory Care Board also raises constitutional concerns.

considers the proposed regulation to discriminate against interstate commerce. *See id.* A state law or regulation is said to discriminate against interstate commerce if it mandates differential treatment of in-state and out-of-state economic interests in a way that benefits the former and burdens the latter. *Id.*; *see also generally Granholm v. Heald*, 544 U.S. 460, 475 (2005) (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)) (“States cannot require an out-of-state firm ‘to become a resident in order to compete on equal terms’”). Here, the proposed regulation clearly constitutes differential treatment of in-state and out-of-state interests in that it proposes to offer out-of-state home medical equipment services providers certificates of registration only while offering in-state facilities the option of seeking either licensure or a certificate of registration. Whether this differential treatment benefits in-state home medical equipment services providers while burdening out-of-state providers involves questions of fact that are beyond the scope of this opinion. For example, relevant factors that a court might consider in determining whether out-of-state facilities are burdened by the proposed regulation include the expense and time of obtaining a certificate of registration as compared to the expense and time required to obtain a license. In order to obtain a certificate of registration, a home medical equipment services provider must be accredited by a national accrediting body that is recognized by the Board. *See* R.C. 4752.11(B)(5). If obtaining national accreditation is more expensive and time-consuming than the Board’s licensure process, a court may find that the proposed regulation burdens out-of-state facilities. Additionally, a court might consider the fact that an applicant for a certificate of registration is required to pay a fee both to obtain national accreditation and to obtain the certificate of registration, *see* R.C. 4752.11(A), while an applicant for a license is required to pay only one fee. *See* R.C. 4752.04. A court might also compare the standards that must be met in order to earn national accreditation to the standards that must be met to obtain a license. If the national accreditation standards are more stringent than those imposed on applicants for a license, a court will likely find that the proposed regulation burdens out-of-state facilities. If the Board’s differential treatment of in-state and out-of-state facilities is found to burden out-of-state interests, the court will subject the proposed regulation to the rule of virtual *per se* invalidity. Pursuant to this rule, the proposed regulation will be upheld only if the state can establish that the regulation “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Oregon Waste Sys., Inc.*, 511 U.S. at 101. If, however, the court finds that out-of-state interests are not burdened by the proposed regulation’s differential treatment, the court will apply the *Pike* balancing test. *Id.* at 99. In that case, the proposed regulation will be upheld “unless ‘the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” *Id.* (quoting *Pike*, 397 U.S. at 142).

The Supreme Court has recognized that “there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the [*Pike*] balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.” *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Several U.S. District Courts have reached varying conclusions on which test appropriately applies to state laws imposing an in-state business location requirement. *Compare Nutritional Support Servs. v. Miller*, 830 F. Supp. 625 (N.D. Ga. 1993) (applying rule of virtual *per se* invalidity in holding that Georgia Medicaid reimbursement policy that required providers of durable medical supplies to maintain an in-state business location or a business location within fifty miles of the state border violated the Dormant Commerce Clause), *and Ga. Ass’n of Realtors, Inc. v. Ala. Real Estate Comm’n*,

748 F. Supp. 1487 (M.D. Ala. 1990) (applying rule of virtual *per se* invalidity in striking down Alabama law that required an applicant for an Alabama real estate broker's license to maintain a "place of business" within Alabama), with *Dun & Bradstreet, Inc. v. McEldowney*, 564 F. Supp. 257 (D. Idaho 1983) (applying *Pike* balancing test in upholding Idaho law that required a collection agency to maintain an in-state office as a condition of receiving a permit to operate as a collection agency within the state).

In *Nutritional Support Servs. v. Miller*, the court considered whether a Georgia Medicaid reimbursement policy that required providers of durable medical supplies to maintain an in-state business location or a business location within fifty miles of the state border violated the Dormant Commerce Clause. 830 F. Supp. at 627-29. Because the court found that the practical effect of the policy was to discriminate against providers outside of the fifty mile limit, the court reasoned that the policy would be permissible "only if the State [carried] its burden of showing that the policy [promoted] a legitimate state interest and there [were] no less burdensome means of accomplishing [that] purpose." *Id.* at 628. The court accepted that the state's objectives of reducing the administrative costs of the Medicaid program and protecting its citizens were legitimate. *Id.* at 629. However, the court noted that the cost to an out-of-state business of maintaining an in-state office imposed a considerable burden on interstate commerce. *Id.* Further, the court found "that the State's policy of requiring an office within fifty miles of the state border is not the least burdensome means of reducing administrative costs and protecting Georgia citizens." *Id.* A less burdensome alternative that would have satisfied the state's objectives would have been to require durable medical suppliers to maintain copies of documentation to support Medicaid claims within the state or within fifty miles of the state's borders. *Id.* Because the Medicaid reimbursement policy discriminated against interstate commerce and was not the least burdensome means of accomplishing its stated purpose, the court held that the policy violated the Dormant Commerce Clause. *Id.*

In contrast, the court in *Dun & Bradstreet, Inc., v. McEldowney* upheld a state licensure scheme that included an in-state office requirement. 564 F. Supp. at 262-64. In that case, Idaho law required a collection agency to maintain an office within the state of Idaho as a condition of receiving a permit to operate as a collection agency within the state. *Id.* at 259-60. The court found that the in-state office requirement did not discriminate against interstate commerce because it applied "evenhandedly both to [the out-of-state collection agency] and each and every other collection agency that may be operating in the State of Idaho." *Id.* at 262. Therefore, the court applied the *Pike* balancing test, weighing the requirement's putative local benefits against its burden on interstate commerce. *Id.* at 263. The court upheld the in-state office requirement, finding that it was sufficiently justified by its objective of protecting Idaho debtors from abusive, unethical, and unfair practices of collection agencies. *Id.* at 263-64.

The foregoing cases demonstrate that courts have reached different conclusions on which tier of Dormant Commerce Clause scrutiny to apply to state laws containing an in-state business location requirement. As described above, a determination of the appropriate level of scrutiny depends on whether the proposed regulation is found to discriminate against out-of-state facilities. We cannot predict which level of Dormant Commerce Clause scrutiny a court would apply to the Board's proposed regulation. Whether the Board's proposal to offer certificates of registration, but not

licenses, to out-of-state facilities complies with Dormant Commerce Clause principles is a question that ultimately must be answered by the courts. *See W. Lynn Creamery, Inc.*, 512 U.S. at 201 (the Dormant Commerce Clause analysis should be undertaken by “eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects”); 1981 Op. Att’y Gen. No. 81-100, at 2-377 (it is not a function of the office of Attorney General, as part of the executive branch of government, to opine on the constitutionality of state laws).¹¹

Regulation of Home Medical Equipment Services Providers that Lack a Storefront Facility

Your predecessor’s final question asks about internet-based home medical equipment services providers. He has explained that an increasing number of companies are selling and renting home medical equipment through the internet. These companies often have no storefront in the state of Ohio or elsewhere. Your predecessor asks whether such companies are eligible to receive a license from the Board pursuant to R.C. 4752.05 even though they have no storefront business that can be inspected or surveyed by the Board.

¹¹ The Board’s proposed regulation, which would limit the issuance of licenses to home medical equipment services providers seeking to license an in-state facility, may also be alleged to violate the Privileges and Immunities Clause of Article IV, Section 2 of the U.S. Constitution. The Privileges and Immunities Clause provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. VI, § 2, cl. 1. The Supreme Court has explained:

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. “[O]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.”

Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (syllabus) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). *See generally Piper*, 470 U.S. at 288 (holding that New Hampshire Supreme Court rule that limited bar admission to state residents violated the Privileges and Immunities Clause); *Toomer*, 334 U.S. 385 (1948) (holding that a South Carolina law that required a \$25 license fee for each shrimp boat owned by a South Carolina resident but a \$2,500 license fee for each boat owned by a non-resident violated the Privileges and Immunities Clause). Because the Privileges and Immunities Clause grants protections to “Citizens,” it has been interpreted as not applying to corporations. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 884 (1985) (O’Connor, S., dissenting); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981). Accordingly, the success of a Privileges and Immunities Clause challenge to the proposed regulation would depend, in part, on the party asserting the challenge.

No provision of R.C. Chapter 4752 requires an applicant for a license to provide home medical equipment services to operate a storefront business. R.C. 4752.07, however, sets forth various duties imposed upon license-holders. Included among those duties is the duty to “[m]aintain a physical facility and a medical equipment inventory[.]” R.C. 4752.07(A)(1). *See generally Webster’s New World Dictionary* 501 (2d College ed. 1986) (defining the term “facility,” in part, as “a building, special room, etc. that facilitates or makes possible some activity”). At the time of application, “the applicant shall specify the name and location of the facility from which services will be provided.” R.C. 4752.04; *see also* R.C. 4752.11(B)(1)-(2) (same is true regarding applicants for a certificate of registration). “A person intending to provide home medical equipment services from more than one facility shall apply for a separate license or certificate of registration for each facility.” R.C. 4752.03(B). Any license issued under R.C. 4752.05 is valid only for the facility named in the licensure application. R.C. 4752.05(E); *see also* R.C. 4752.12(C) (same is true regarding certificates of registration). Thus, it is clear that R.C. Chapter 4752 requires license-holders to maintain a physical facility. R.C. 4752.07(A)(1). In fact, each license issued pursuant to R.C. Chapter 4752 is to be issued in connection with a particular facility. *See* R.C. 4752.03(B); R.C. 4752.04; R.C. 4752.05(E). Therefore, if an applicant for a home medical equipment services provider license fails to specify the name and location of the facility from which services will be provided, the Board may refuse to issue the license on the basis that the application is incomplete. *See* R.C. 4752.04 (“the applicant *shall* specify the name and location of the facility from which services will be provided” (emphasis added)); *see also generally State v. Golphin*, 81 Ohio St. 3d 543, 545-46, 692 N.E.2d 608 (1998) (use of the word “shall” in a statute indicates the imposition of a mandatory obligation).

As explained earlier, R.C. 4752.02(A) generally requires a person to obtain a valid license or certificate of registration from the Board before providing home medical equipment services or claiming to the public to be a home medical equipment services provider. *See also* R.C. 4752.02(B) (exceptions).¹² Because operation of a physical facility is a statutory requirement for both license-holders, *see* R.C. 4752.04, and certificate-holders, *see* R.C. 4752.11(B)(1)-(2), a home medical equipment services provider that fails to maintain a physical facility may be prevented from providing home medical equipment services in the state of Ohio. However, we are not able to determine whether R.C. 4752.02(A)’s certification and licensure requirements may, within the limits of the Dormant Commerce Clause, be applied to home medical equipment services providers engaged solely in interstate commerce. *See generally* 2015 Op. Att’y Gen. No. 2015-013, slip op. at 2-8 (discussing the Dormant Commerce Clause generally); 1982 Op. Att’y Gen. No. 82-032 (advising that the laws prohibiting persons not registered as pharmacists, pharmacy interns, or terminal distributors of dangerous drugs from selling dangerous drugs at retail in Ohio did not apply to out-of-state companies engaged solely in interstate commerce). Whether application of R.C. 4752.02(A) to out-of-state or internet-based home medical equipment services providers unduly burdens interstate commerce is a question beyond the scope of this opinion.

¹² A person who violates R.C. 4752.02(A) may be subject to criminal penalties. R.C. 4752.99.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Whether particular provisions of R.C. Chapter 4752 or 11B Ohio Admin. Code Chapter 4761:1 may be applied to an out-of-state home medical equipment services provider implicates the Dormant Commerce Clause of the U.S. Constitution, involves questions of fact, and cannot be determined by a formal opinion of the Attorney General.
2. Pursuant to R.C. 4752.17(A), the Ohio Respiratory Care Board may adopt an administrative rule requiring an in-state home medical equipment services provider to pass a pre-licensure inspection of its in-state facility as a condition of licensure.
3. Whether the Ohio Respiratory Care Board may require a home medical equipment services provider to pass an inspection of its out-of-state facility as a condition of providing home medical equipment services within the state of Ohio implicates constitutional questions and cannot be determined by a formal opinion of the Attorney General.
4. Whether the Ohio Respiratory Care Board may offer certificates of registration, but not licenses, to out-of-state facilities of home medical equipment services providers implicates the Dormant Commerce Clause of the U.S. Constitution and cannot be determined by a formal opinion of the Attorney General.
5. R.C. 4752.04 requires an applicant for a license to provide home medical equipment services in the state of Ohio to provide the Ohio Respiratory Care Board with the name and location of the facility from which services will be provided. If an applicant fails to provide the Ohio Respiratory Care Board with this information, the Board may refuse to issue the license on the basis that the application is incomplete.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General