OPINION NO. 82-032

Syllabus:

1. Out-of-state mail order retail pharmaceutical distributors, engaged solely in interstate commerce, are not subject to regulation by the Ohio State Board of Pharmacy under R.C. 4729.28 or R.C. 4729.51(C).

2. An out-of-state mail order retail pharmaceutical distributor, engaged solely in interstate commerce, may not be prohibited by the Ohio State Board of Pharmacy pursuant to R.C. 4729.36(A) from advertising its interstate business in Ohio, although such a distributor may be compelled to comply with the requirements of R.C. 4729.36(B).

3. Ohio third-party payors who pay out-of-state mail order retail pharmaceutical distributors for drugs provided to the payors' beneficiaries are not engaged in the sale of drugs, and need not be licensed as "terminal distributors of dangerous drugs" pursuant to R.C. 4729.54.

To: Franklin Z. Wickham, Executive Director, Ohio State Board of Pharmacy, Columbus, Ohio
By: William J. Brown, Attorney General, May 4, 1982

I have before me your request for my opinion concerning the operation of mail order retail pharmaceutical distributors. You state in your request that these distributors "operate from one or more central locations, located in one or more states, but they generally dispense or distribute through the mail a number of prescription drugs and pharmaceuticals, most of which are 'dangerous drugs' within the meaning of the Ohio Revised Code." In your request, you mention two different ways in which these distributors have contact with the state of Ohio. First, you state that these distributors advertise in Ohio, "sometimes through agents located and residing in Ohio." These advertisements encourage consumers to place their prescriptions for drugs (such prescriptions being written in most instances by Ohio

prescribers) in the mail. The drugs are then mailed directly to consumers. The second way in which these distributors have contact with Ohio is that several distributors have contracted with third party payors in Ohio (such as the Public Employees' Retirement System) "to provide these third-party payors and their beneficiaries with prescription drugs," for which the third-party payors directly pay the distributors.

Your specific questions regarding these distributors are as follows:

> (1) Is the solicitation of orders and mailing of dangerous drugs to residents of the state of Ohio, the "sale" of drugs in the state of Ohio within the meaning of Section 4729.28 of the Revised Code; and, as such, subject to regulation by this Board?
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> (2) Are the activities of mail order retail pharmaceutical distributors, in advertising and promoting their retail goods through the mails to Ohio consumers, "advertising" within the meaning of Section 4729.36 of the Revised Code; and, as such, subject to regulation by this Board?

Your final question may be restated as follows:

> (3) Is a third-party payor who, pursuant to a contract with a mail order retail pharmaceutical distributor, pays the distributor for "dangerous drugs" provided to the third-party payor's beneficiaries, a "purchaser" of dangerous drugs who must be licensed as a "terminal distributor of dangerous drugs" pursuant to R.C. 4729.54?

With respect to your first two questions, an examination of the concept of "interstate commerce" and the extent to which interstate commerce may be regulated by the individual states is necessary before R.C. 4729.28 and R.C. 4729.36 can fully be analyzed. The first relevant inquiry is whether the mail order retail pharmaceutical distributors described above are engaged in interstate commerce, or whether they are engaged in intrastate commerce, or "doing business" in Ohio. See generally R.C. 1703.02 (excepting corporations engaged in Ohio solely in interstate commerce from R.C. Chapter 1703, which regulates foreign corporations doing business in Ohio); R.C. 1703.03 (requiring foreign corporations doing business in Ohio to obtain a license from the Secretary of State).

Whether 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. See 1936 Op. Att'y Gen. No. 5652, vol. II, p. 769. It is well-established, however, 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. See Strong, Cobb & Co. v. United States, 103 F.2d 671 (6th Cir. 1939) (the shipment of cold tablets from Ohio to Oklahoma was a shipment in interstate commerce, even though the tablets were shipped in bulk, to be repackaged by the consignee before retail distribution); United States v. Tucker, 188 F. 741, 743 (Dist. Ct. S.D. Ohio 1911) ("[a] sale, the parties to which are from different states, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce. . ."); Toledo Commercial Co. v. Glen Manufacturing Co., 55 Ohio St. 217, 45 N.E. 197 (1896) (the sale and delivery in one state of goods manufactured in another state is interstate commerce); Golden Dawn Foods v. Cekuta, 1 Ohio App. 2d 464, 205 N.E.2d 121 (Trumbull County 1964) (the sale and delivery of merchandise to Ohio retail outlets by a foreign corporation was interstate commerce); Local Trademarks Inc. v. Derrow Motor Sales Inc., 120 Ohio App. 103, 201 N.E.2d 222 (Defiance County 1963) (a foreign corporation which sold its goods manufactured outside of Ohio to Ohio firms through traveling agents was engaged in interstate commerce). See also Eli Lilly & Co. v. Sav-on-Drugs Inc., 366 U.S. 276 (1961); Manhatten Terrazzo Brass Strip Co. v. A. Benzing & Sons, 38 Ohio L. Abs. 353, 50 N.E.2d 570 (App. Franklin County 1943); Maryland Casualty Co. v. Explosive Sales Co., 14 Ohio L. Abs. 491 (App. Mahoning County 1933); McClarran v. Longdin-Brugger Co., 24 Ohio App. 434, 157 N.E. 828 (Wayne County 1926). It is clear from the principles enunciated in these cases that, under the facts you have provided, the retail pharmaceutical

distributors, which are foreign corporations and which sell drugs though the mails, such drugs being shipped from another state for delivery in Ohio, are engaged in interstate commerce.

The fact that the distributors are advertising their interstate trade in Ohio does not change the character of the business from interstate to intrastate commerce, even though such advertising is placed by the companies' agents who are located in Ohio. Those acts of a corporation which are incidental yet essential to the corporation's interstate commerce will also be considered interstate commerce. See York Manufacturing Co. v. Colley, 247 U.S. 21 (1918); 1936 Op. No. 5652. See also 1948 Op. Att'y Gen. No. 3566, p. 412 (a foreign corporation, whose purpose was to purchase, hold, and sell real property was not doing business in Ohio by acquiring real estate in Ohio); 1936 Op. No. 5652 (a foreign corporation which maintained an office in Ohio, kept its books and held meetings in Ohio, and received rental payments at its Ohio office, was not doing business in Ohio since all of these acts were essential and incidental parts of its interstate business). Advertising can clearly be seen as an incidental yet necessary part of a corporation's ordinary business. Indeed, the solicitation of interstate business has itself been held to be part of interstate commerce. Memphis Steam Laundry Cleaner Inc. v. Stone, 342 U.S. 389 (1952); Robbins v. Taxing District of Shelby County, 120 U.S. 489 (1887). Merely because the corporation is advertising its interstate business in Ohio does not mean it is "doing business" in Ohio. See Eli Lilly & Co. v. Sav-on-Drugs Inc.; Robbins v. Taxing District of Shelby County; Toledo Commercial Co. v. Glen Manufacturing Co.; McClarran v. Longdin-Brugger Co.

While a corporation which is engaged in interstate commerce may also be doing business within a state, and thus subject to state regulation concerning those intrastate activities, Eli Lilly & Co. v. Sav-on-Drugs Inc., you have provided me with no facts which would indicate that the distributors about which you have inquired are involved in any purely intrastate activity. Thus, I conclude that the mail order retail pharmaceutical distributors described in your letter are engaged solely in interstate commerce, both in their direct solicitation of Ohio consumers, and in their contracts with Ohio third-party providers.[1]

The next relevant inquiry is whether the state has the power to regulate the mail order distributors, even though they are engaged solely in interstate commerce. The Commerce Clause, U.S. Const. art. I, §8, the purpose of which is to facilitate free trade among the states, Dayton Power and Light Company v. Lindley, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979), confers upon the United States Congress the power to regulate interstate commerce. Notwithstanding the Commerce Clause, the states have the power to regulate matters of local concern which unavoidably involve some regulation of interstate commerce, if Congress has not exercised its powers with regard to such matters. See California v. Thompson, 313 U.S. 109 (1941). If Congress has exercised its power, however, the relevant inquiry is whether the federal regulation preempts further state regulation. See Southern Pacific Co. v. State of Arizona, 325 U.S. 761 (1945); Glenwillow Landfill Inc. v. City of Akron, 485 F.Supp. 671 (N.D. Ohio 1979), aff'd sub nom. Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981).

Acting pursuant to the power conferred upon it by art. I, §8, Congress has extensively regulated the interstate flow of controlled substances by enacting the Federal Controlled Substances Act of 1970, tit. II, 84 Stat. 1242 (codified in scattered sections of 18, 21, 42 U.S.C). 21 U.S.C. §801 states in part:

> The Congress makes the following findings and declarations:
> . . .

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[1]Although a corporation may not be considered "doing business" within Ohio for purposes of R.C. Chapter 1703 (regulating foreign corporations) and other state regulatory provisions, it may still be subject to personal jurisdiction in Ohio under this state's long arm statute. See R.C. 2307.382; McCormick v. Haley, 29 Ohio Misc. 97, 279 N.E.2d 642 (C.P. Franklin County 1971).

> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
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> (A) after manufacture, many controlled substances are transported in interstate commerce,
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> . . .
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> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
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> . . .
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> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
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> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

Acting on these findings, the Congress has passed a comprehensive system of registration and regulation. For example, pursuant to 21 U.S.C. §822(a), "[e]very person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage" therein, must register with the United States Attorney General. See 21 U.S.C. §823 (setting out the registration requirements for manufacturers and distributors of controlled substances). See also 21 U.S.C. §841. Registrants are subject to various regulations. See, e.g., 21 U.S.C. §822(f) (inspection of a registrant's or applicant's establishment); 21 U.S.C. §825 (labeling and packaging); 21 U.S.C. §827 (recordkeeping). See also 21 U.S.C. §842; 21 U.S.C. §843.

Of particular significance to the issue of whether the federal regulations have preempted further state regulation, however, is 21 U.S.C. §903, which reads:

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. (Emphasis added.)

Thus, Congress has indicated that the state may still continue to regulate those matters concerning controlled substances properly within their jurisdiction, unless such regulation is inconsistent with federal regulation. While no federal or Ohio court has interpretated this particular provision, at least one state court has held that to the extent that the federal government has acted with regard to the interstate dispensing of controlled substances, a state is preempted from imposing additional requirements on out-of-state prescribers. State v. Rasmussen, 213 N.W.2d 661 (Iowa 1973). The court in Rasmussen recognized the state's power to regulate intrastate transactions which would complement the federal government's scheme of regulation, but noted that state regulation of those aspects of interstate transactions already controlled by the federal government would in practical effect negate the operation of the federal act. Accordingly, the court concluded that state regulation, with regard to the registration of out-of-state prescribers, was in positive conflict with federal regulation so that the two could not stand together, and thus the state was preempted by 21 U.S.C. §903 and U.S. Const. art. VI, cl. 2, the Supremacy Clause, from requiring the registration of out-of-state prescribers.

Even if a court with jurisdiction to decide this question in Ohio would not adopt the reasoning in Rasmussen and would not find that Ohio was preempted from regulating those aspects of interstate drug transactions already subjected to federal regulation, such court would have to consider whether the Commerce Clause would otherwise prohibit the state from acting in this situation to regulate the mail order distributors. In considering whether a state regulation is inconsistent with the Commerce Clause, it must be determined: whether the regulation serves a legitimate local purpose; whether the statute regulates evenhandedly with only incidental effects on interstate commerce; whether the local purpose justifies the regulation's impact on interstate commerce; and whether the regulation affects an area which requires a uniform national policy. See Pike v. Bruce Church Inc., 397 U.S. 137 (1970); Glenwillow Landfill Inc. v. City of Akron; Panhandle Eastern Pipe Line Co. v. P.U.C., 56 Ohio St. 2d 334, 383 N.E.2d 1163 (1978).

The specific statutes about which you have inquired are part of the state's attempt to regulate the sale and possession of dangerous drugs by imposing a series of licensure requirements, and other restrictions, on persons engaged in the distribution of dangerous drugs. Before considering any specific statutes, therefore, I believe certain general observations are warranted.

State regulation of the filling of Ohio consumers' prescriptions undoubtedly serves a legitimate local purpose. Ohio clearly has the power to protect its citizens' health, life, and safety, and may pass statutes which carry out this power, even though such legislation indirectly affects interstate commerce. See Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). See also California v. Thompson. Moreover, the provisions set forth in R.C. Chapter 4729 appear to be evenhanded in their intended application and do not appear to discriminate against foreign corporations. See Head v. New Mexico Board of Examiners in Optometry; Pike v. Bruce Church Inc.; Dayton Power and Light Company v. Lindley. However, 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). Panhandle Eastern Pipe Line Co. v. P.U.C., 56 Ohio St. 2d at 339, 383 N.E.2d at 1166. 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. See Pike v. Bruce Church Inc.

The fourth requirement under the Commerce Clause analysis focuses on the need for uniformity of regulation. A state may not act where uniformity of regulation is essential to the functioning of interstate commerce. See Southern Pacific Co. v. Arizona; Panhandle Eastern Pipe Line Co. v. P.U.C. As noted above, the federal Congress has recognized this need, and has extensively legislated in this area, with the expectation of producing an efficient and uniform scheme for the regulation of controlled substances moving through interstate commerce. While Congress has acted to regulate controlled substances which move in interstate commerce, the state still has the power to control the distribution and dispensing of drugs in Ohio pursuant to R.C. Chapter 4729. Taken together, these acts effectively control the manufacture and distribution of controlled substances and protect consumers, yet still permit the free movement of goods between the states. To allow the various states to impose their own system of regulation of interstate commerce would arguably destroy the purpose behind the Federal Controlled Substances Act. It may be argued that this need for uniformity, as demonstrated by the federal act, outweighs the state's local interest in controlling the distribution of drugs outside the state, especially in light of the fact that the federal act is designed to provide protection to consumers, such protection being the basis of the state's interest in regulation. See State v. Rasmussen.

With these constitutional principles in mind, I turn now to your specific questions. The dispositive inquiry in each case will be whether the General

Assembly intended the specific statute to be applicable to persons engaged solely in the interstate distribution of dangerous drugs. Of overriding significance to any such analysis will be R.C. 1.47(A), which provides that "[i]n enacting a statute, it is presumed that compliance with the constitutions of the state and of the United States is intended. . . ."

You have asked whether mail order retail pharmaceutical distributors which solicit orders and mail dangerous drugs to residents of Ohio are engaged in the sale of drugs in Ohio within the meaning of R.C. 4729.28. This section reads: "No person who is not a registered pharmacist or a pharmacy intern under the personal supervision of a registered pharmacist shall compound, dispense, or sell drugs, dangerous drugs, and poisons." R.C. 4729.28, if applied to out-of-state retailers, would absolutely prohibit the companies' sales of drugs to Ohio residents. It is my understanding that the retailers in question are corporations rather than natural persons. Only a natural person or individual may become a registered pharmacist. See R.C. 4729.08 (requiring an applicant for registration as a pharmacist to be a citizen of the United States, of good moral character and habits, a graduate of an approved school or college of pharmacy, and eighteen years old). See also 1981 Op. Att'y Gen. No. 81-055. Obviously, a corporation could never be registered in Ohio as a pharmacist, and thus foreign corporate retailers could never be in compliance with R.C. 4729.28. Such an absolute prohibition on the retailers' interstate sales in Ohio clearly places an impermissible burden on the flow of interstate commerce, and thus R.C. 4729.28 may not constitutionally be interpreted as applicable to foreign retail distributors who sell their drugs to Ohio consumers.

I note that based upon the foregoing analysis even an Ohio corporation would be prohibited from selling drugs, if R.C. 4729.28 were the sole relevant statute. A more appropriate focus of inquiry with regard to the registration of corporations engaged in the distribution of drugs appears to be R.C. 4729.51(C), which provides that "[n]o person, except a licensed terminal distributor of dangerous drugs or a practitioner shall purchase for the purpose of resale, possess for sale, or sell, at retail, dangerous drugs." R.C. 4729.51(C), therefore, implicity authorizes a "licensed terminal distributor of dangerous drugs" to possess and sell dangerous drugs, and accordingly, provides an express exception to the broad prohibition set out in R.C. 4729.28. To fully respond to your inquiry, I must, therefore, consider whether the General Assembly intended this latter statute to be applicable to foreign distributors.

A "terminal distributor of dangerous drugs" is defined in R.C. 4729.02(Q) as:

> a person other than a practitioner who is engaged in the sale of dangerous drugs at retail, or any person other than a wholesale distributor or a pharmacist who has in his possession, custody, or control dangerous drugs for any purpose other than for his own use and consumption, and includes pharmacies, hospitals, nursing homes, and laboratories,and all other persons who procure dangerous drugs for sale or other distribution by or under the supervision of a pharmacist or medical practitioner.

For the purposes of this definition the term "person" includes a corporation. R.C.4729.02(S). A corporation or other person may obtain a license as a terminal distributor of dangerous drugs pursuant to R.C. 4729.54 if he meets the licensure requirements set forth in R.C. 4729.55. R.C. 4729.51(E), however, provides that a licensed terminal distributor of dangerous drugs must obtain a license for each place or establishment where dangerous drugs are sold, distributed, maintained, controlled, or in the possession or custody of the applicant or licensee. Thus, if out-of-state mail order distributors were found to be subject to regulation under R.C. 4729.51(C) and R.C. 4729.54, they would have to obtain a license for the physical location, which is outside the state of Ohio, from which their drugs are actually distributed. As discussed previously, however, to require a retailer to obtain licenses from the various states into which it ships its goods will almost certainly impede its interstate business. Moreover, the state's legitimate interest in regulating distributors of dangerous drugs is lessened in the instance of the interstate distributor because there is extensive federal regulation in this area and because the distributor is not maintaining possession or custody of the drugs in this

state. I note that the licensure requirements set forth in R.C. 4729.55 deal primarily with concerns which are applicable only to facilities at which drugs are kept. For example, pursuant to R.C. 4729.55, an applicant for a terminal distributor's license must demonstrate that he is equipped as to land, buildings, and equipment to properly carry on the business, and that a pharmacist or practitioner will supervise and control the possession and custody of the dangerous drugs maintained by the applicant. Since a mail order distributor never maintains custody of the drugs in this state, certain of the standards set forth in R.C. 4729.55 would have little relevance if applied to such distributors. Accordingly, consistent with R.C. 1.47(A), I must conclude that the General Assembly intended R.C. 4729.51(C) and R.C. 4729.54 to apply only to persons who are selling and otherwise distributing dangerous drugs from establishments located within the state.

Your second question asks whether the activities of the mail order retail pharmaceutical distributors in advertising and promoting their goods to Ohio consumers may be regulated by the Pharmacy Board pursuant to R.C. 4729.36, which reads:

> (A) No place except a pharmacy shall display any sign or advertise in any fashion, using the words "pharmacy," "drugs," "drug store," "drug store supplies," "pharmacist," "druggist," "pharmaceutical chemist," "apothecary," "drug sundries," "medicine," or any of these words or their equivalent, in any manner.
>
> (B) A pharmacy or pharmicist making retail sales may advertise by name or therapeutic class the availability for sale or dispensing of any dangerous drug provided such advertising contains a brief statement of the use and a warning of the specific harms resulting from abuse of such dangerous drug and if such advertisement also includes price information as defined in division (N) of section 4729.02 of the Revised Code.

The applicability of R.C. 4729.36 to out-of-state mail order distributors depends initially on whether such distributors fall within the meaning of the term "pharmacy." If a mail order distributor is not a "pharmacy," R.C. 4729.36(A) would absolutely prohibit a mail order distributor from advertising its interstate business. Because, as discussed above, the solicitation of an interstate business is itself interstate commerce, even when accomplished through the use of local agents, R.C. 4729.36 would act as an absolute restraint on interstate commerce, and thus, would be impermissibly applied in such situation. If, on the other hand, a mail order distributor falls within the definition of a "pharmacy," R.C. 4729.36 does not prohibit advertising by such distributor, it merely subjects such distributor to the requirements set forth in R.C. 4729.36(B).

The term "pharmacy" as used in R.C. 4729.36 means a "place of business. . .where prescriptions are filled or where drugs [or] dangerous drugs. . .are compounded, sold, offered, or displayed for sale, dispensed, or distributed to the public." R.C. 4729.02(A). This definition of "pharmacy" appears sufficiently broad to include mail order distributors. Accordingly, it is necessary to determine whether the conditions on advertising set forth in R.C. 4729.36(B) may constitutionally be applied to foreign mail order distributors.

Division (B) of R.C. 4729.36 requires pharmacies and pharmacists to include in their advertising of dangerous drugs a statement of the use of the drug, a warning of the drug's harms, and price information. The Federal Controlled Substances Act contains no provision regulating the advertisement of drugs moving in interstate commerce. Thus, there is no federal preemption of such advertising, and the states are free to impose their own regulations, as long as interstate commerce is not unduly burdened thereby. It does not appear that the minimal information required by R.C. 4729.36(B) to be in a pharmacy's advertisements would constitute an impermissible burden. An out-of-state retailer is not absolutely prohibited from advertising. He need only be sure that certain information is provided in advertisements which are sent into Ohio if the advertisement mentions a dangerous drug by name or therapeutic class. Thus, I conclude that out-of-state distributors may advertise their interstate business in Ohio, subject to the requirements of R.C. 4729.36(B).

I now turn to your final question as to whether third-party payors who pay pharmaceutical retailers for drugs provided to the payors' beneficiaries are "purchasers" of dangerous drugs who must be licensed as "terminal distributors" pursuant to R.C. 4729.54. As noted previously, R.C. 4729.02(Q) defines a "terminal distributor of dangerous drugs" as

> a person other than a practitioner who is engaged in the sale of dangerous drugs at retail, or any person other than a wholesale distributor or a pharmacist who has in his possession, custody, or control dangerous drugs for any purpose other than for his own use and consumption, and includes pharmacies, hospitals, nursing homes, and laboratories, and all other persons who procure dangerous drugs for sale or other distribution by or under the supervision of a pharmacist or medical practitioner.

Admittedly, R.C. 4729.02(J) defines "sale" and "sell" broadly to include "delivery, transfer, barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal proprietor, agent, or employee." However, I do not believe that a third-party payor's payment for drugs provided to its beneficiaries can be considered a "sale" of those drugs pursuant to R.C. 4729.02(J) and (Q). The beneficiaries do not pay any consideration to the third-party payor for the drugs, nor does the payor deliver or transfer the drugs to the beneficiaries, barter with the beneficiaries for the drugs, exchange anything with the beneficiaries for the drugs, or offer the drugs as a gift. At no time does the payor have the drugs in its possession, custody or control. The exchange takes place between the retailer and the beneficiaries. The payor merely reimburses its beneficiaries for the money they have expended or pays the retailer directly. In no way can the payor be said to be selling the drugs for purposes of R.C. 4729.54.

In conclusion, it is my opinion, and you are advised, that:

1. Out-of-state mail order retail pharmaceutical distributors, engaged solely in interstate commerce, are not subject to regulation by the Ohio State Board of Pharmacy under R.C. 4729.28 or R.C. 4729.51(C).

2. An out-of-state mail order retail pharmaceutical distributor, engaged solely in interstate commerce, may not be prohibited by the Ohio State Board of Pharmacy pursuant to R.C. 4729.36(A) from advertising its interstate business in Ohio, although such a distributor may be compelled to comply with the requirements of R.C. 4729.36(B).

3. Ohio third-party payors who pay out-of-state mail order retail pharmaceutical distributors for drugs provided to the payors' beneficiaries are not engaged in the sale of drugs, and need not be licensed as "terminal distributors of dangerous drugs" pursuant to R.C. 4729.54.