OHIO VETERINARY MEDICAL ASSOCIATION

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Joint Committee on Agency Rule Review
December 12, 2022 Testimony
Jack Advent, Executive Director, Ohio Veterinary Medical Association

Chairman Gavarone, Vice Chair Callender, and members of the Joint Committee on Agency Rule Review, I am Jack Advent , Executive Director of the Ohio Veterinary Medical Association. The OVMA represents a little over 3000 members practicing in a variety of veterinary disciplines.

Thank you for the opportunity to provide our perspective on Ohio Department of Agriculture rule 901:1-6-05 pertaining to the overall health of canines in regulated commercial dog breeding operations, and specifically sections pertaining to the health care plan provided by the attending veterinarian.

First and foremost let me share that we believe the rule as offered is consistent with the legislative intent of House Bill 506 of the 132nd Ohio General Assembly as well as being otherwise consistent with the review considerations of JCARR.

When House Bill 506 was considered and ultimately passed, a number of interested parties, including the OVMA discussed and agreed to language which reflected a composite of viewpoints. The legislative sponsor was obviously involved and aware of these discussions incorporating into the legislation the specific and intended agreed upon changes he was in agreement with. Many of the final provisions were the result of a final extensive and lengthy interested party meeting of which OVMA was an active part. For that reason when we reference legislative intent I feel comfortable in verifying the accuracy of those elements which were indeed intended.

Along those lines and with respect to the surgical procedures language found in Ohio Revised Code Section 956.031 , section V it was agreed by the parties involved that required surgical procedures and euthanasia

should only be performed by a veterinarian. It was further discussed and agreed that dew claw and tail docking as long as they were performed between two to five days of birth were to be excluded from being considered part of that stipulation. Those actions, at that age stipulated, would not be considered a procedure that is required.

Though veterinarians are the best choice for any medical procedure, it is also understood variables with the level of complexity, extent of animal discomfort, and an ability to serve large animal populations within finite time periods can be factors considered in context as well. For those reasons and in the interest of having legislation important to overall animal welfare be adopted, we agreed to the language in HB 506.

This was what was agreed to by the interested parties in attendance at the time of adoption of HB 506 and therefore accurately reflects legislative intent. The ODA rule before you we believe reflects those provisions and intension.

Thank you for the opportunity to comment, I would be happy to answer any questions.

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December 12, 2022

Testimony Before Ohio's Joint Commission on Agency Rule Review (JCARR)
Vicki Deisner, Esq.
State Government Affairs Advisor
Animal Welfare Institute

RE: Animal Welfare Institute's Comments on OAC Rule 901:1-6-05

Animal Welfare Institute (AWI) comes before the Joint Commission on Agency Rule Review (JCARR) to testify to the fact that the Ohio Department of Agriculture's (ODA) proposed rule OAC 901:1-6-05 violates JCARR standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3).

The Ohio Revised Code (ORC) mandates the use of a veterinarian for surgical procedures. ORC Section 956.031 (V), in regard to high-volume commercial dog breeders, states, "If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure."

OAC proposed rule 901: 1-6-05 Section (B) states that "the attending veterinarian shall…provide a written annual plan requiring care for the adult dogs and puppies" which, under Subsection (3)(e)(ii)(a)-(e), is to include instructions on dew claw and tail docking, covering acceptable instruments; the process, pain control, and clotting; and cleaning and disinfecting of instruments." No "written plan" can equip commercial dog breeders for performing such surgeries. No "Instructions on medication usage for pain control and clotting" can confer the necessary medical training to use drugs appropriately and safely. And this still leaves the procedures to be conducted without anesthesia as only licensed medical professionals can administer those drugs. None of these plans, guidance, or instructions change the fact that the revised rule violates ORC Section 956.031 (V)'s requirement that only vets perform surgical procedures.

Dew claw removal and tail docking are surgical procedures that cause acute pain in puppies (AVMA Animal Welfare Division studies). AVMA opposes tail docking when done solely for the purpose of breed standards (https://www.avma.org/resources-tools/avma-policies/ear-cropping-and-tail-docking-dogs). AVMA research has shown that in addition to severe infections and amputation pain, central nervous system development can be impacted in young dogs (https://www.avma.org/resources-tools/literature-reviews/welfare-implications-tail-docking-dogs), Allowing a person to perform these surgical procedures on an animal, regardless of age, without proper pain management and anesthesia would be considered animal cruelty, torture and torment in violation of ORC 959.131-B. In addition, ORC Section 4741.19-A establishes that "[u]nless exempted under this chapter, no person shall practice veterinary medicine, or any of its branches, without a license or limited license issued by the state

veterinary medical licensing board pursuant to ORC sections 4741.11 to 4741.13, a temporary permit issued pursuant to ORC 4741.14."

Since the OAC Rule 901 rule package is before JCARR, it must now address the fact that OAC proposed rule 901: 1-6-05 is in violation of JCARR standards (prong 1 and prong 3) as ORC 956.031 (V) clearly states that a veterinarian is to perform all surgical procedures, and ORC 4791 states "[u]nless exempted under this chapter, no person shall practice veterinary medicine…without a license." In addition, ORC 959.131-B states that performing these surgical procedures without proper pain management and anesthesia would be considered animal cruelty, torture and torment. ODA lacks the authority to enact regulations that allows anyone other than veterinarians to conduct such surgical procedures**. The passage of this rule would open the door to anyone performing surgery on dogs.**

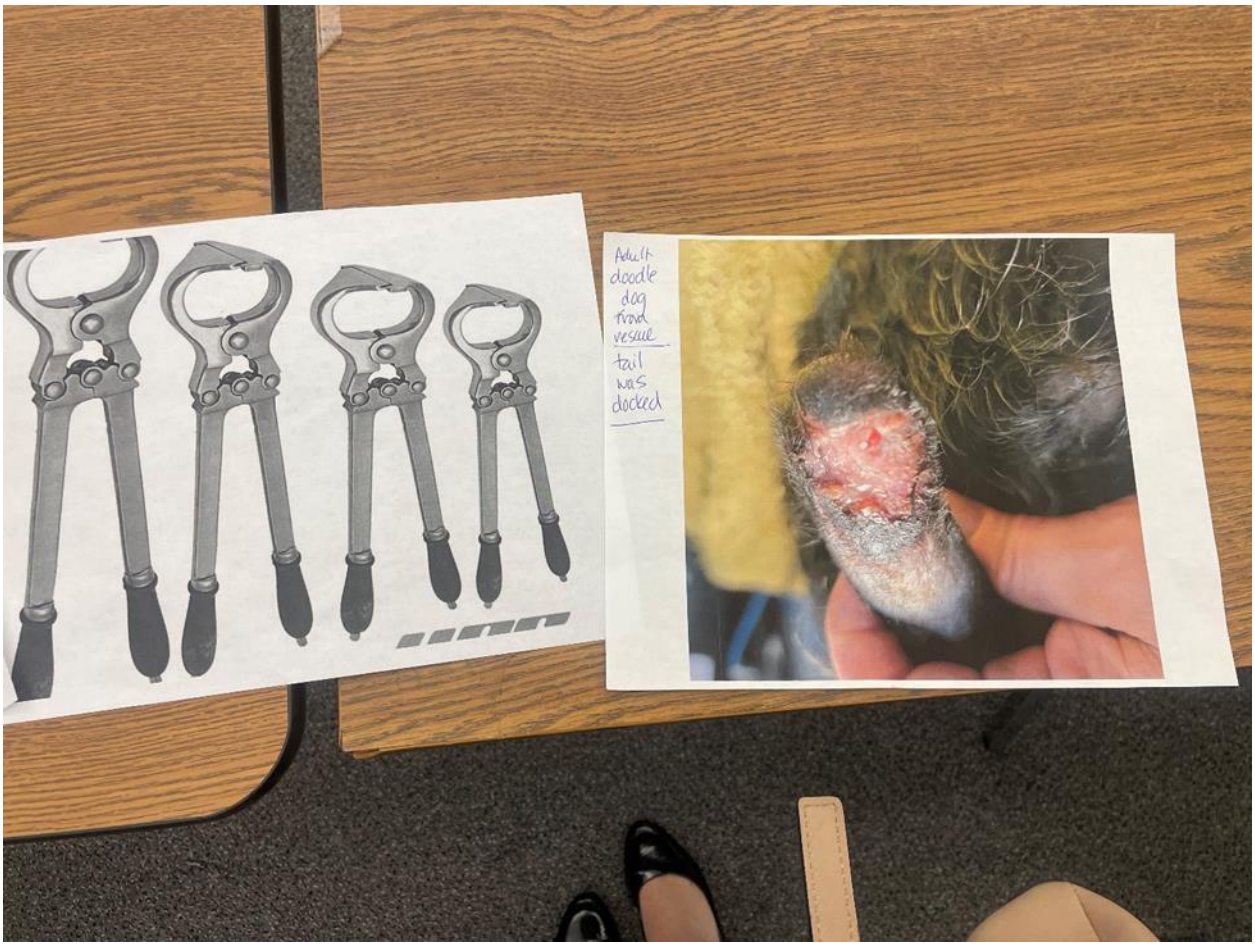
The regulation conflicts with the legislative intent reached through the MOU between the Humane Society of the US (HSUS) and the interested parties (OVMA, sportsmen, and breeders). Representative Brian Hill, HSUS, and the interested parties all agreed on the language in H 506, including ORC Section 956.031 (V), which was the premise for HSUS to end its 2018 ballot initiative.

Even though H 506 was passed in 2018, ODA did not do the 5 year-rule review with JCARR in 2018 and change the rule 901:1-6-05 to meet the change in the law that prohibits commercial dog breeders from performing surgical procedures. By proposing OAC 901:1-6-05, ODA is still trying to circumvent the law and allow breeders to perform these surgical procedures.

Some arguments in favor of the rule have hinged on the existing law's use of the word "required." Because tail docking and dew claw removal are considered by some to be "cosmetic" and therefore not "necessary," it should be noted that those surgeries are required to conform with AKC breed standards. If these surgeries are not being done to conform with AKC standards, then we are left to conclude they are being done simply to mutilate the animals. That is not something to which JCARR, the ODA, or Ohio taxpayers should be a party.

An additional torturous argument that ODA is relying on is that ORC 4741.20 (A) is an exception in the veterinarian licensing law for an owner of a dog to perform surgery on their dog. However, as Dr. Jeanette O'Quin, from OSU Veterinary College where her work centers around the performance and teaching of surgical procedure and the investigation of animal cruelty, points out, **ORC 4741.20 (A) states "A person who administers to animals, the title to which is vested in the person's self, except when the title is so vested for the purpose of circumventing the provisions of this chapter. No person shall vest title of an animal in the person's self for the purpose of circumventing the chapter." This is exactly what ODA is trying to do – circumvent the law.**

AWI strongly urges JCARR to find that the ODA's proposed rule 901:1-6-05 violates JCARR's standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3), and should be invalidated.



Botched Ohio tail docking presented at Ohio Commercial Dog Breeding Advisory Meeting

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December 8, 2022

Testimony Before Ohio's Joint Commission on Agency Rule Review (JCARR)
Alba M. Gonzalez, DVM, MS (Veterinary Forensics, Forensic Psychology)
Rascal Unit, Ltd

RE: OAC Rule 901:1-6-05 (F)

My name is Alba Gonzalez, and I am a practicing veterinarian in the State of Ohio. I also hold a Master's degree in both Veterinary Forensics and in Forensic Psychology and participate in the investigation of cases of animal abuse and neglect in Ohio. I am writing this as testimony in opposition of proposed OAC Rule 901:1-6-05 (F), which states that "Surgical procedures, except between two to five days of age the removal of the dew claw and tail docking, shall only be done by a licensed veterinarian."

All surgical procedures, including dew claw removal and tail docking of puppies, must only be performed by a licensed veterinarian regardless of age. The Ohio Revised Code Section 4741.01 defines the practice of veterinary medicine as any person who "Administers to or performs any medical or surgical technique on any animal that has any disease, illness, pain, deformity, defect, injury, or other physical, mental, or dental condition or **performs a surgical procedure on any animal** (A.2). The rule does not have a clause based on the age of the animal. Section 4741.19-A establishes that "Unless exempted under this chapter, no person shall practice veterinary medicine, or any of its branches, without a license or limited license issued by the state veterinary medical licensing board pursuant to sections 4741.11 to 4741.13 of the Revised Code, a temporary permit issued pursuant to section 4741.14 of the Revised Code, or a registration certificate issued pursuant to division (C) of this section, or with an inactive, expired, suspended, terminated, or revoked license, temporary permit, or registration." There are no provisions allowing for the practice of veterinary medicine based on the age of a companion

animal. Allowing a lay person to perform these procedures is in violation of the laws that establish the qualifications for a licensed veterinarian, and places animals in danger by providing permission to an unqualified individual to perform a surgical procedure, one which also alters the animal's body and can result in long term damage.

ORC 959.131, Prohibition concerning companion animals, defines a companion animal as "any dog or cat" and does not make exceptions in the definition of cruelty, torment or torture based on the companion animal's age. Dew claw removal and tail docking surgeries are cosmetic procedures which are not performed for health reasons. Performing these surgical procedures without proper pain management and sedation/anesthetic protocols are in violation of ORC 959.131-B, which states that "no person shall knowingly torture, torment, **needlessly mutilate or maim**, cruelly beat, poison, needlessly kill, or commit an act of cruelty against a companion animal", -C "no person shall knowingly cause serious physical harm to a companion animal", and D.1 "No person who confines or who is the custodian or caretaker of a companion animal shall negligently do any of the following: Torture, torment, or commit an act of cruelty against the companion animal". Serious physical harm is defined in section A.12.c as "Physical harm that involves acute pain of a duration that results in substantial suffering or that involves any degree of prolonged or intractable pain". The American Veterinary Medical Association Animal Welfare Division has evaluated studies that demonstrate that the puppy's reaction to these cosmetic procedures result in behavior consistent with acute pain. Based on this information, allowing a person to perform a cosmetic, surgical procedure on an animal, regardless of age, without proper pain management and anesthesia is considered animal cruelty, torture, and torment.

Veterinary surgery procedures can only be performed by a licensed veterinarian and, in some limited instances, by a registered veterinary technician under the supervision of a licensed veterinarian. Attempting to interpret the law as "a person can do whatever they want with their own animal" does not make at-home-surgeries legal. Inducing pain and suffering that is unnecessary and unjustifiable is animal cruelty and can be legally prosecuted. OAC Rule 901:1-

6-05 (F) is in violation of the law by permitting lay people to perform these procedures for the following reasons:

1. There are veterinary professionals that can perform this procedure while minimizing pain and discomfort to the animal, making it unnecessary for a high-volume breeder to be allowed to perform a surgical procedure that will inflict pain.
2. The procedure is not necessary for the health and wellbeing of the animal, making the causation of pain bot unnecessary and unjustifiable.
3. A veterinarian cannot create a manual for high-volume breeders to use to perform surgeries. Medications, sedatives, and anesthetics required to perform these procedures in a manner that decreases pain and discomfort are only available to licensed practitioners and it is illegal for lay people to purchase and use. Asking a veterinarian to create a protocol that calls for proper procedures is thus impossible because a veterinarian cannot instruct a lay person to administer medications or follow anesthesia and pain control protocols for an at-home surgery.
4. An individual purposefully inflicting pain on their own animal can be prosecuted for animal cruelty, and there is case law available demonstrating that surgical procedures performed by lay persons to animals they own is punishable by law.
5. ORC 956.03, which regulates high-volume breeders, states in section (A)(7)(b)(v) that breeders must follow "Generally accepted veterinary medical standards and ethical standards established by the American Veterinary Medical Association". The AVMA opposes tail docking when performed solely for cosmetic reasons and encourages the elimination of the requirement for breed standards. If these animals will not be shown or will not perform an activity that requires tail docking, then the procedure is strictly cosmetic and thus unnecessary.
6. ORC 4741.26 (B), which regulates the actions of the Ohio Veterinary Licensing Board, makes it clear that the board, if they determine that **any person** is practicing veterinary medicine without a license, may have the executive director seek an injunction or restraining order against the person through the attorney general. While they only police

veterinarians and veterinary technicians, they do take action against individuals who practice veterinary medicine without a license **regardless of who they are**.

In my opinion, allowing a person without a license to practice veterinary medicine to perform dew claw removals and tail docking surgical procedures affords a financial benefit for the breeder without concern for the wellbeing of the animal. The cost of hiring a veterinarian to care for animals is part of the cost of business for breeding animals, and high-volume breeders must be held to the same standards of animal care as smaller breeding operations, rescues, and pet owners. Performing surgical procedures without proper pain management and sedation or anesthesia is a cruel and inhumane practice, and I urge you to remove the clause allowing dew claw removal and tail docking in puppies between two to five days of age.

Alba M. Gonzalez, DVM, MS

OHIO ANIMAL ADVOCATES

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Testimony Before Ohio's Joint Commission on Agency Rule Review (JCARR)
Carli Frey, Ohio Animal Advocates, Advocacy Assistant

RE: Comments on OAC Proposed Rule 901:1-6-05

Ohio Animal Advocates (OAA) comes before the Joint Commission on Agency Rule Review (JCARR) with the position that the Ohio Department of Agriculture (ODA) proposed rule OAC 901: 1-6-05 violates JCARR's standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3).

Ohio Revised Code (ORC) section 956.031 (V) states that "If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure. Yet, the revised rules that ODA submitted to JCARR in November for consideration at this hearing continue to allow breeders to perform surgeries such as tail docking and dewclaw removal in violation of this statute.

OAC 901: 1-6-05 (e) (ii), requires veterinarians, contracted by the breeders, to develop health care plans including instructions on how to perform tail docking and dewclaw surgeries. No "guide" written by the Ohio Department of Agriculture equates to the veterinary training needed to perform such medical procedures that the regulations would allow. A How-To-Manual showing breeders how to perform surgery cannot replace the years of education and clinical experience a veterinarian is required to have before they perform these surgical procedures. After all – a dog is not a washing machine. These regulations do not fix the underlying issue, that any such surgical procedure not performed by a veterinarian is technically in violation of ORC section 956.031, as well as practicing veterinarian medicine without a license in violation of ORC Section 47412.19-A.

Moreover, how will the regulations on "acceptable instruments, instructions on medication usage, and guidance on after procedure care" be monitored appropriately when the attending veterinarian only inspects the facility once a year; and ODA inspectors, who are not veterinarians or veterinarian technicians, many not even inspect a facility once a year as required considering the lack of funding and labor ODA has at this time? The number of breeders and brokers have quadrupled since the inception of this program, and yet the number of inspectors has decreased – as we have been hearing in the Commercial Dog Breeding Advisory Board Meetings for the last year.

How will these rulings be practically monitored and administered throughout the year to assure breeders will use the proper equipment and sanitize the instruments? Currently that is not being done – hedge clippers, garden shears, knives and rubber bands are being used by breeders in unsterile

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situations as we have seen in videos of Ohio breeders as well as through cruelty cases that have been brought by humane enforcement in this state. You might say we can trust the breeders on a honor system – yet the fact that Ohio is the second worst puppy mill state in the nation, and, according to HSUS's 2021 Horrible Hundred, we had 16 of the nation's worse puppy mills – out of a hundred, shows the honor system does not work! Likely, many animals will continue to be mutilated and die from unsanitary equipment and improper care that will not be recorded.

Lastly, these revised rulings state that puppies under six months may be exempt from veterinarian inspection. Therefore, these puppies will likely never see a veterinarian before being shipped out for sale. And a huge percentage of the dogs that veterinarian should see on the kennel property will not be inspected – the dogs that are being sold to consumers for thousands and even tens of thousands to Ohio consumers. Is this to save breeders money - when they are making thousands on the sale of animals that manage to make it out of Ohio puppy mills? Many of those animals die within a week to a year as records at Med Vet and other veterinarian facilities show, as well as the Better Business Bureau. As consumers grieve the loss of their companion animal, they are still paying veterinarian bills and the loan and interest from the pet store. All because too many of the dogs sold from Ohio puppy mills have not received the care they should.

These regulations continue to introduce loopholes in the current law for breeders to perform botched surgeries on puppies, and are in conflict with the law. OAA stands behind the position that the rule is in violation with JCARR requirements and in conflict with ORC 956.031 (V).

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OHIO ANIMAL ADVOCATES

December 12, 2022

Testimony before Ohio's Joint Commission on Agency Rule Review
Joanna Reen DVM
Ohio Animal Advocates Board Member

RE: Ohio Animal Advocates's Comments on Proposed OAC Rule 901:1-06-05

My name is Joanna Reen, I am an Ohio licensed small animal veterinarian and surgeon, and a board member of Ohio Animal Advocates. I have practiced in Ohio for 30 years. In addition to general practice, I have participated in multiple animal abuse investigations and prosecutions. I wish to come before the Joint Commission on Agency Rule Review to testify that Proposed OAC Rule 901:1-6-05 is invalid.

1) Proposed OAC Rule 901: 1-6-05 violates JCARR's standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3)

OAC Rule 901: 1-6-05 violates ORC 956.031:
The proposed rule allows high volume breeders(breeders) to perform tail amputation and dewclaw amputation surgeries on puppies 3-5 days old. The AVMA has stated that tail amputation and dewclaw amputations on puppies are surgical procedures that cause acute pain and can impact central nervous system development in young puppies. (AVMA Animal Welfare Division studies). These are surgical procedures that require an understanding of surgical technique, maintenance of sterility of instrumentation and surgical field, an understanding of patient development and physiology, and the impact and expression of pain to perform. Veterinarians study for years to learn the information necessary to perform these surgeries correctly, humanely and to minimize complications. ORC 956.031(V) states: If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure. Tail or dewclaw amputation required for breed standards clearly falls under this statute. OAC Rule 901: 1-6-05 allows these surgical procedures to be performed by a breeder with a "how-to" guide provided by the veterinarian (901:1-6-05 (B) (3) (ii)). ORC 956.031(V) shows that the legislature clearly understood the rigorous training necessary to become competent in performing surgery (including tail and dewclaw amputation). Allowing breeders to perform these surgeries clearly violates the word and intent of ORC956.031(V).

OAC Rule 901: 1-6-05 violates ORC956.13:
ORC 956.13 (a) 1 states: (A) No person shall: (1) Torture an animal, deprive one of necessary sustenance, unnecessarily or cruelly beat, needlessly mutilate or kill, or impound or confine an animal without supplying it during such confinement with a sufficient quantity of good wholesome food and water. OAC Rule 901:1 1-6-05 allows breeders to perform surgery on 3-5 day old puppies. I argue that performing this surgery without appropriate training in anatomy, surgical techniques, tissue handling and anesthesia and pain management constitutes animal

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cruelty and mutilation. I personally have treated patients with complications from these surgeries being done by untrained individuals. Many of these patients have suffered chronic pain and infection before being adopted and brought to a veterinarian for identification of the problem and treatment. The lack of training has clearly resulted in mutilation of these patients. These surgeries clearly cause pain. (AVMA Animal Welfare Division studies). There is no way a "how to" manual can adequately inform a lay person on how to administer and monitor appropriate levels of anesthesia or interpret pain levels as expressed by a patient, let alone appropriately respond to it. ODA is correct in stating that they cannot dictate specifics of anesthesia and pain management because each of these need to be tailored to an individual patients need. This is true and exactly why a written instruction manual cannot either. This requires a trained veterinarian monitoring vitals, response to stimuli and patient behavior to understand an individual patient's needs. This is achieved only after years of training. By not being appropriately trained in surgery or the management of pain and complications, the performance of this surgery by a layperson constitutes torture and violates ORC 956.13.

OAC Rule 901: 1-6-05 violates the intent of the legislature:
The legislature clearly intends to protect the welfare of animals thru ORC 956.031and ORC956.13. I believe that OAC Rule 901: 1-6-05 does not protect animal welfare. In addition to the fact that written instructions alone cannot adequately train a surgeon, proposed rule provides no oversite of how well the written instructions are followed and no oversite of the proficiency of the breeder in performing these surgeries after reading the guide. Oversite for Ohio veterinarians is provided by the Ohio Veterinary Licensing Board, ensuring licensed veterinarians are adequately trained and tested and provide proof of continuing education. Concerns about a veterinarian's competency are most often brought to the board by owners of patients that have been hurt by incompetency. In the high volume breeder situation, there is no one to advocate for the patient. All that is necessary to maintain compliance is yearly inspections of the presence of a written health plan. The inspector is not qualified to assess the adequacy of this plan and has no way of knowing the competency of the person performing these surgeries. Since the "owner" is the breeder, there is no one to advocate for the patient and poor outcomes from these procedures will never be reported. Clearly animal welfare is not protected by OAC Rule 901: 1-06-05

OAA strongly believes that Proposed Rule 901: 1-06-05 violates JCARR's standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3). JCARR should negate Proposed Rule 901: 1-06-05 and instruct the Ohio Department of Agriculture to address these concerns in the next proposal.

Sincerely,

Joanna Reen DVM
Board member of Ohio Animal Advocates

THE HUMANE SOCIETY OF THE UNITED STATES

December 12, 2022

Joint Committee on Agency Rule Review
The Ohio General Assembly
77 South High Street
Columbus, OH 43215
Email: jcarr@jcarr.state.oh.us

RE: Refiled Department of Agriculture's Commercial Dog Breeder– Health Rule (OAC 901:1-6-05)

On behalf of the Humane Society of the United States (HSUS) and the Humane Society Veterinary Medical Association (HSVMA), I am writing to urge that the Joint Committee on Agency Rule Review (JCARR) recommend to the General Assembly the invalidation of the Ohio Department of Agriculture's (ODA) Proposed Rule, namely 901:1-6-05(B)(3)(e)(ii), which requires "dew claw removal and tail docking instructions" to be included in a health care plan provided by a veterinarian, and 901:1-6-05(F), which allows high volume breeders to perform tail docking and dew claw removal on dogs without a licensed veterinarian.[1] HSUS and HSVMA also submitted comments during ODA's rulemaking process opposing the previous version of the rule.

Pursuant to Section 106 of the Ohio Revised Code, JCARR is empowered to review the Proposed Rule and to recommend to the Ohio Senate and House of Representatives the adoption of a concurrent resolution to invalidate the Proposed Rule or a part thereof if the rule, among other things, *(a) exceeds the scope of the relevant agency's statutory authority* or *(b) conflicts with the legislative intent of the statute under which the Rule is being proposed.*[2] Because Sections 901:1-6-05(B)(3)(e)(ii) and 901:1-6-05(F) of the Refiled Rule exceed the scope of the Department of Agriculture's statutory authority and conflicts with the intent of Section 956.031(V) of the Ohio Rev. Code, JCARR should recommend that the rule be invalidated.

I. <u>The Proposed Rules Conflicts with the Legislative Intent of Section 956.031(V) of the Ohio Rev. Code</u>.

Section 956.031 of the Code states that "a high volume breeder shall do all of the following with regard to a dog that is kept, housed, and maintained by the breeder:…(V) If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure."[3] In interpreting this provision, JCARR must give effect to the plain meaning of the legislature's

[1] The Proposed Rule states that "Surgical procedures, except between two to five days of age the removal of the dew claw and tail docking, shall only be performed by a licensed veterinarian." Proposed Rule 901:1-6-05(F).
[2] Ohio Rev. Code § 106.021.
[3] Ohio Rev. Code § 956.031(V).

words, just as a court would be required to do.[4] The plain meaning of Section 956.031(V) and the legislature's intent in passing it is clear: it allows for no exceptions to the requirement that breeders "use a veterinarian" to perform any surgical procedures. Therefore, if tail docking and dew claw removal are surgical procedures, then ODA's Proposed Rule – which allows breeders to perform these procedures on their own – is in conflict with the statute and the legislature's intent. As discussed below, it is without question that these procedures are surgical in nature, and the Proposed Rule must be invalidated accordingly.

Tail Docking refers to the amputation of part of a dog's tail.[5] There is consensus in the United States veterinary community that tail docking is a surgical procedure.[6] Foreign veterinary associations, including the Canadian Veterinary Medical Association, the Australian Veterinary Association and the Council of the Royal College of Veterinary Surgeons, also consider tail docking to be a surgical procedure.[7] Dew claw removal is the removal of the dog's first digit located up from the paw on the medial side of the front limbs, and sometimes hind limbs,[8] and involves the use of surgical scissors to cut through the skin, muscle, and bone to remove the

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[4] *See, e.g., Kelly v. Acct. Bd. of Ohio*, 88 Ohio App. 3d 453, 624 N.E.2d 292 (1993) ("A court interpreting a statute must first look to the language of the statute to determine legislative intent, and if that inquiry reveals that the statute conveys meaning which is clear, unequivocal and definite, interpretative effort is at an end, and the statute must be applied accordingly.").

[5] https://www.avma.org/sites/default/files/resources/dogs_tail_docking_bgnd.pdf (referring to tail docking as "the amputation of part of a dog's tail").

[6] *See, e.g.,* *https://glencoeanimalhospital.com/2018/08/25/tail-docking-canine/#:~:text=Tail%20docking%2C%20also%20known%20by,the%20base%20of%20the%20tail* ("Tail docking, also known by the term *caudectomy*, is the surgical removal of a portion of the tail"); http://subvetclinic.net/surgical-procedures ("Tail docking is a surgical procedure done to remove part of the tail"); https://www.bethelvet.com/docking-declaw-puppy/ ("Tail docking is a surgical procedure performed to amputate (remove) a part of a puppy's tail"); https://www.knappvet.com/surgery.pml (categorizing tail docking as surgical); Humane Society Veterinary Medical Association, *HSVMA Policy Statements,* hsvma.org (Nov. 2010) https://www.hsvma.org/policy_statements#cosmeticsurgeries (referring to tail docking as a surgical procedure); American Veterinary Medical Association, *Canine Tail Docking FAQ*, avma.org, https://www.avma.org/about/canine-tail-docking.aspx/canine-tail-docking-faq.

[7] https://www.canadianveterinarians.net/policy-and-outreach/position-statements/statements/elective-and-non-therapeutic-veterinary-procedures-for-cosmetic-or-competitive-purposes-formerly-cosmetic-alteration/ (referring to canine tail docking as a cosmetic surgical procedure); https://www.ava.com.au/policy-advocacy/policies/surgical-medical-and-other-veterinary-procedures-general/cosmetic-surgery-to-alter-the-natural-appearance-of-animals/ (referring to tail docking as a "surgical procedure[] performed on animals"); https://www.rcvs.org.uk/news-and-views/news/rcvs-council-calls-for-ban-on-non-therapeutic-tail-docking-in/ (referencing the Veterinary Surgeons Act of 1966 which notes that "The removal of the whole or part of a dog's tail amounts to the practice of veterinary surgery and therefore can, as a general rule, only be carried out by a veterinary surgeon.")

[8] *Dog Dew Claw Removal*, vetinfo.com, https://www.vetinfo.com/dog-dew-claw-removal.html.

toe.[9] The veterinary community also widely considers dew claw removal to be a surgical procedure.[10]

Moreover, tail docking and dew claw removal both meet the definition of surgery contained in provisions of the Ohio Administrative Code. Although not defined within Chapter 906 of the OAC, Rule 4731-25-01(L) of the OAC defines surgery with respect to humans as:

> the excision or resection, partial or complete, destruction, incision or other structural alteration of human tissue by any means, including through the use of lasers, performed upon the body of a living human being for the purposes of preserving health, diagnosing or curing disease, repairing injury, correcting deformity or defects, prolonging life, relieving suffering, or for aesthetic, reconstructive or cosmetic purposes, to include, but not be limited to: incision or curettage of tissue or an organ; suture or other repair of tissue or organ, including a closed or an open reduction of a fracture; extraction of tissue, including premature extraction of the products of conception from the uterus; and, insertion of natural or artificial implants. Surgery shall not include the suturing of minor lacerations.[11]

The American College of Surgeons similarly defines surgery as, among other things, "structurally altering the human body by incision or destruction of tissues."[12] There is no reason to think that the definition of surgery would be different as applied to animals, and given this definition, both tail docking and dew claw removal are surgery. Removing a dog's tail involves cutting through cartilage and bone, and necessarily includes the structural alteration of tissue. Similarly, as noted above, the removal of dew claws requires a veterinarian to "cut through the skin, muscle, and bone to remove the toe,"[13] involving the structural alteration of tissue. Both, therefore, are surgical procedures by definition.

Indeed, the language of the Proposed Rule makes clear that ODA itself considers tail docking and dew claw removal to be surgical procedures. The Proposed Rule states that "Surgical procedures, *except between two to five days of age the removal of the dew claw and tail docking*, shall only be performed by a licensed veterinarian."[14] If tail docking and dew claw

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[9] Jenny Griffin, *Removing Dew Claws: a Vet's Process – Step by Step*, https://stuff4petz.com/removing-dew-claws/.

[10] *See, e.g.,* https://www.gullpointvet.com/dew-claw-removal.html, (noting that "Dewclaw removal is the surgical excision of the first digit (innermost toe) on a dog's limbs"); https://www.ava.com.au/policy-advocacy/policies/surgical-medical-and-other-veterinary-procedures-general/surgical-alteration-of-companion-animals-natural-functions-for-human-convenience/ (referring to dewclaw removal as a surgical procedure).

[11] Ohio Admin. Code 4731-25-01.

[12] https://www.facs.org/-/media/files/advocacy/state/definition-of-surgery-legislative-toolkit.ashx.

[13] Griffin, *supra* fn. 10.

[14] Proposed Rule 901:1-6-05(F) (emphasis added).

removal were not surgical procedures, there would be no need to exclude them from the general rule applicable to surgical procedures.

Based on the consensus of the veterinary medical community, the Ohio Administrative Code definition of surgery, the broader definition of surgery, the language of ODA's Proposed Rule itself, and the language added to the refiled rule, both tail docking and dew claw removal must be considered surgical procedures. Pursuant to Ohio Rev. Code § 956.031(V), therefore, they must be performed only by a licensed veterinarian. Because ODA's Proposed Rule conflicts with Section 956.031(V), JCARR should recommend that it be invalidated.

II. The Proposed Rule Exceeds ODA's Statutory Authority.

ODA is proposing Rule 901:1-6-05(F) pursuant to its authority under Section 956.03 of the Ohio Revised Code, which empowers and instructs the Director of Agriculture to adopt rules concerning the care of dogs. The statute also specifies certain requirements the agency must adopt, including Ohio Rev. Code § 956.031(V), the provision discussed above that explicitly requires breeders to use a veterinarian for surgical procedures. Administrative agencies are creatures of statute and possess only such rulemaking power as is delegated to them.[15] By proposing a rule that allows breeders to perform surgical procedures without a veterinarian, ODA is exceeding its statutory authority.

Notably, it has been suggested that the legislative intent of House Bill 506 from the 132nd General Assembly was to exempt tail docking and dew claw removal from the requirement that surgical procedures be performed by veterinarians. As a key stakeholder during the formulation of that bill, HSUS can say unequivocally that what was agreed on by all stakeholders is what appears in statute—surgical procedures must be performed by licensed veterinarians.

Based on conversations with ODA, it appears undue weight is being placed on the word "required" in ORC Section 956.031(V) to circumvent the mandate that surgical procedures be performed by a veterinarian. In the absence of a definition of what constitutes a "required" surgical procedure, this interpretation would render the statute effectively meaningless, as breeders always have the choice to approve or reject a surgery, even if it was recommended by a veterinarian. It also invites troubling implications for the requirement that veterinarians perform euthanasia procedures. This is certainly contrary to the intent of House Bill 506 and has the potential to subject dogs to immense cruelty.

In addition, Ohio Rev. Code § 956.03(A)(6)(v) mandates that ODA consider certain factors when promulgating rules for the care of dogs by high volume breeders, including "(v) Generally accepted veterinary medical standards and ethical standards established by the American Veterinary Medical Association."[16] The AVMA states that "tail docking is painful," further noting

[15] Clemmer v. Ohio State Racing Comm., 107 Ohio App. 3d 594, 669 N.E.2d 267 (1995).
[16] Ohio Rev. Code § 956.03(A)(6)(b)(v)-(vi).

that "[p]ainful procedures conducted in the neonatal period when the nervous system is vulnerable can result in negative long-term changes which affect how pain is processed and perceived later in life."[17] Considering this, it is even more clear that such a painful procedure should be conducted under the professional care of a licensed veterinarian with proper sanitation and anesthesia, and not in a breeder's facility. By allowing dog breeders to perform these procedures themselves, dogs are exposed to unnecessary and unjustifiable cruelty and pain that is inconsistent with veterinary ethical standards.[18]

Conclusion

ODA's Refiled Proposed Rule conflicts with the agency's enabling statute and exceeds the agency's authority. Accordingly, HSUS and HSVMA urge JCARR to recommend that the rule be invalidated.

Sincerely,

Mark Finneran

Mark Finneran
Ohio State Director
The Humane Society of the United States
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[17] https://www.avma.org/about/canine-tail-docking.aspx/canine-tail-docking-faq

[18] HSUS' annual Horrible Hundred Reports have detailed horrific abuses that resulted from breeders performing tail docking, rather than having a veterinarian perform the operation. *See* https://www.humanesociety.org/horrible-hundred. For instance, Leslie Ayo/Heaven's Gate Kennels LLC, (Fairburn, GA), was charged with animal cruelty for "inhumanely removing the tails of eight puppies," one of whom later died. According to news reports, she was offered money to dock the tails of the Rottweiler puppies, who were heard to be "screaming excessively" and were later found to be "extremely bloody." https://www.humanesociety.org/sites/default/files/docs/2015-horrible-hundred.pdf.

Ohio Animal Welfare Federation
Helping People Help Animals

December 12, 2022

Testimony Before Ohio's Joint Committee on Agency Rule Review

RE: JCARR Review of the Department of Agriculture's Commercial Dog Breeder-Health Rule (OAC 901:1-6-05)

I am Colleen Evans, the executive director of the Ohio Animal Welfare Federation. We are a membership organization representing 85 organizations across Ohio consisting of county humane societies, county dog shelters, local animal care and control agencies, and rescue groups.

On behalf of our Board of Directors and Members, I urge the Joint Committee on Agency Rule Review (JCARR) to invalidate the Ohio Department of Agriculture's (ODA) most recently proposed revision to OAC Rule 901:1-6-05, which allows high-volume breeders to perform tail docking and dew claw removal on dogs without a licensed veterinarian.

We believe that the proposed rule violates two of the six invalidation standards JCARR considers when reviewing proposed rules. Specifically, we believe this rule 1) exceeds the ODA's statutory authority and 2) conflicts with the statute under which this rule is being proposed, specifically ORC Sec. 956.031(V).

ORC 4741.01 (B)(2) defines the practice of veterinary medicine as a person who "administers to or performs any medical or surgical technique on any animal . . . or performs a surgical procedure on an animal." ORC Sec. 4791.19 (A) states that "[u]nless exempted under this chapter, no person shall practice veterinary medicine . . . without a license." Pertaining to high-volume commercial dog breeders, ORC Sec. 956.031(V) states that "if a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure." There being no exceptions noted, it seems clear that under current law surgical procedures must be performed by a veterinarian.

The ODA refers to both tail docking and dew claw removal as surgical procedures in Proposed Rule 901:1-6-05 (F), which states that, "Surgical procedures, except between two to five days of age the removal of the dew claw and tail docking, shall only be performed by a licensed veterinarian." If ODA did not consider these procedures surgical, they would not have excluded them in Section (F).

Administrative agencies such as the ODA cannot propose rules that extend beyond their authority under statute. In this case, ORC Sec. 956.031(V) requires that surgical procedures be performed by a licensed veterinarian. There is nothing in Ohio law that defines different types of surgeries, so a surgery – even if done for cosmetic – is a surgery. By proposing a rule that allows high-volume breeders to perform two surgical procedures, tail docking and dew claw removal, without a veterinarian, ODA is exceeding its statutory authority. Therefore, JCARR should recommend that this rule be invalidated.

Furthermore, Proposed Rule 901:1-6-05 conflicts with the overall intent of ORC Chapter 956, which is to create standards of care that improve husbandry, conditions and humane treatment of

dogs and their offspring confined in high volume breeding facilities in Ohio. Again, ORC Sec. 956.031(V) states that “if a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure.”

Section (B) of the Proposed Rule calls for a plan written by an attending veterinarian that includes instructions and guidance on dew claw removal and tail docking that covers acceptable instruments, process, pain and clotting control, and cleaning and disinfecting of the instruments. However, a written plan meant to be followed by a layperson still violates ORC Sec. 956.031(V), which requires only vets to perform surgical procedures; therefore, and JCARR should recommend that it be invalidated.

Finally, there is some concern as to whether allowing non-vets to perform surgeries without proper pain management would be in direct opposition to ORC 959.131 (B), which defines animal cruelty, torment and torture in part as “any act by which unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue where there is a reasonable remedy or relief.”

For all of these reasons, we urge JCARR to recommend to the General Assembly the invalidation of proposed OAC Rule 901:1-6-05.

Thank you for your consideration of our comments.

Respectfully submitted,

Colleen Evans, Executive Director
Ohio Animal Welfare Federation

Joint Committee on Agency Rule Review
The Ohio General Assembly
Email: jcarr@jcarr.state.oh.us
CC: JCARR Members & Staff

RE: JCARR Review of the Department of Agriculture's Commercial Dog Breeder-Health Rule (OAC 901:1-6-05)

On behalf of the Cleveland Animal Protective League, the humane society serving Cuyahoga County, I am writing to urge the Joint Committee on Agency Rule Review (JCARR) to recommend the invalidation of the Ohio Department of Agriculture's (ODA) most recently proposed revisions to OAC Rule 901:1-6-05(F) to the General Assembly.

The updated rule change still permits high-volume breeders to perform surgical procedures on puppies two to five days of age in the place of a licensed veterinarian, specifically tail docking and dew claw removal. A revision made since the last hearing pertaining to this issue is the addition of section (B)(3)(ii) that specifies instructions that an "attending," but not present veterinarian must include in the written annual plan so that breeders can perform these surgical procedures. Additionally, in item (ii)(c) of this new section, it states that the attending veterinarian must also provide "*Instructions on medication usage for pain control or clotting,"* however it is unclear if current State of Ohio Board of Pharmacy requirements for obtaining, keeping, and using such medication, specifically controlled substances and other medications that require a prescription.

It is our position that proposed OAC Rule 901:1-6-05(F) violates two of JCARR's six invalidation standards by exceeding the ODA's statutory authority and conflicting with the intent of the legislature when it enacted ORC 956, the statute under which this rule is being proposed, specifically section 956.031(V).

Does the rule exceed the rulemaking agency's statutory authority (Prong 1)?

ORC 4741.01(B) defines the practice of veterinary medicine as "the practice of any person who performs any of the following actions: … (2) Administers to or performs any medical or surgical technique on any animal … or performs a surgical procedure on any animal." ORC 4741.19 (A) states: "Unless exempted under this chapter, no person shall practice veterinary medicine, or any of its branches, without a license or limited license issued by the state veterinary medical licensing board … ."

Clearly, Ohio law requires that surgical procedures of any type be performed only by licensed veterinarians. There are no exceptions made for certain types of surgeries or that are based on the reason why a procedure is being performed, for example surgical procedures that are being performed solely for cosmetic purposes. The ODA even refers to both tail docking and dew claw removal as surgical procedures (F): "Surgical procedures, *except between two to five days of age the removal of the dew claw and tail docking*, shall only be performed by a licensed veterinarian."

It is our position that the ODA does not have the authority to define or redefine what is or isn't a veterinary surgical procedure, is or isn't required, and at what age a procedure is considered surgical.

Permitting this practice under the OAC will create a conflict with ORC 956.031(V) and ORC 4741.19(A) and, therefore, exceeds ODA's statutory authority.

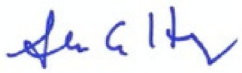
Does the rule conflict with the intent of the legislature in enacting the statue under which the rule is proposed (Prong 3)?

The overall intent of ORC 956 is to create standards of care that improve the husbandry, conditions, and humane treatment of dogs confined in high volume breeding facilities in Ohio and their offspring. ORC 956.031(V), under which the specific rule is proposed, requires that for dogs kept, housed, and maintained by high-volume breeders: "if a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure." There are no exceptions noted. Surgical procedures are to be performed by a veterinarian. Permitting laypersons sever the tails and digits of puppies without direct veterinary oversight is contrary to existing law regarding the performance of surgical procedures.

I implore JCARR to recommend to the General Assembly the invalidation of proposed OAC Rules 901:1-6-05(B)(3)(ii) and (F) due to the violation of two of your invalidation standards as described herein.

Thank you for your consideration of our comments. If you have any questions, please do not hesitate to contact me at sharvey@clevelandapl.org or (216) 377-1618.

Respectfully,



Sharon A. Harvey, President & CEO

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December 12, 2022

Testimony Before Ohio's Joint Commission on Agency Rule Review (JCARR)
Jeanette O'Quin, DVM, MPH, DACVPM, DABVP (Shelter Medicine)
Associate Professor, College of Veterinary Medicine
The Ohio State University

RE: Animal Welfare Institute's Comments on the revised OAC Rule 901:1-6-05 dated 11/29/2022

I am a practicing veterinarian licensed in Ohio for the last 29 years. I have earned board certification in Veterinary Preventive Medicine and Shelter Medicine, both of which focus on the health and welfare of animals housed in populations like animal shelters and commercial dog breeding facilities. My years of work in animal shelters and at the Ohio State University College of Veterinary Medicine has centered around the performance and teaching of elective surgical procedures, investigation of animal cruelty, prevention of infectious diseases, and improvement of animal welfare to ensure a good quality of life. I have authored several textbook chapters on these topics and am co-author of the Association of Shelter Veterinarian's Guidelines for Standards of Care in Animal Shelters which are relevant to cats and dogs housed in any population setting, including commercial dog breeding facilities.

I fully support several changes made during this revision. Specifically, the addition of a Nutritional Plan (b) and a Vaccination and Parasite Control Program (d) to the written annual plan (B)(3) will be beneficial. These are important to maintaining health and welfare within a dog population, especially those with such a high percentage of puppies who are most at risk for infectious diseases and parasites. The addition of grooming requirements (E) will also help prevent skin disease, allow better thermoregulation and improve dog comfort. Restricting euthanasia to veterinarians (H) addresses a humane concern shared by many since these rules were first promulgated, and brings it back into compliance with ORC 956.031 (V) which states "If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure." Requiring that puppies be at least eight weeks of age and weaned (I) prior to transportation, brings these regulations in line with best practices for companion animal transport established by the Association of Shelter Veterinarians (ASV), the American Veterinary Medical Association (AVMA), and the American Association of Animal Welfare Administrators (AAWA). In these areas, the Ohio Department of Agriculture (ODA) has taken valuable steps to guide commercial dog breeders and should be commended.

As a veterinarian, I am strongly opposed to two items in the revised rules which I believe will compromise the health and welfare of many dogs owned by high-volume commercial dog breeders. The first, removing puppies less than six months of age from the annual physical examination requirement (B)(2), is a clear step backwards for the management of breeding dogs. Puppies owned by the public are typically brought to a veterinarian for examination and various treatments several times over the first few months of life starting at less than 48 hours from birth. That's because this is a critical period in canine development and many conditions may not be readily apparent by

observation. Veterinary examination can improve the detection of health conditions needing treatment and the identification of congenital deformities that might make them poor candidates for sale as a pet. Some birth defects, such as abnormalities in the liver vessels lead to subtle changes as the puppy grows and toxins build up in their body. Birth defects in the heart can only be detected through auscultation with a stethoscope. Infectious diseases are more common in the young as well, and symptoms can be more subtle and difficult to detect especially in a population setting where people spend less time with each individual animal compared to pets living with owners. At minimum ALL dogs and puppies, regardless of age should be examined by the veterinarian during the annual visit. I recommend that the original language be kept: “Conduct a physical exam of each adult dog and puppy at the time of the yearly inspection”.

The second, allowing non-veterinarians to perform dew claw and tail amputations between the ages of two and five days (F) can lead to serious harm for the puppies undergoing these surgical procedures, and it violates two ORC sections.

1. ORC Section 956.031 (V) which states in regard to high-volume commercial dog breeders, “If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure.”

2. ORC Section 4741.19 (A) which states in regard to the practice of veterinary medicine, “Unless exempted under this chapter, no person shall practice veterinary medicine, or any of its branches, without a license or limited license issued by the state veterinary medical licensing board pursuant to sections 4741.11 to 4741.13 of the Revised Code, a temporary permit issued pursuant to section 4741.14 of the Revised Code, or a registration certificate issued pursuant to division (C) of this section, or with an inactive, expired, suspended, terminated, or revoked license, temporary permit, or registration.”

The Practice of Veterinary Medicine is defined in ORC Section 4741.01. The relevant portion of this definition reads: “(2) Administers to or performs any medical or surgical technique on any animal that has any disease, illness, pain, deformity, defect, injury, or other physical, mental, or dental condition or performs a surgical procedure on any animal”

During recent meetings with ODA, they shared their belief that ORC Section 4741.20 provided an exemption to practicing veterinary medicine without a license for animal owners citing: “(A) A person who administers to animals, the title to which is vested in the person's self, except when the title is so vested for the purpose of circumventing the provisions of this chapter. No person shall vest title of an animal in the person's self for the purposes of circumventing this chapter.” Reading this I do not understand how this grants pet owners the right to perform surgery or medical procedures on their personal pets. If though, that is the intended meaning of this exemption, I would argue that it still does not apply in this case as allowing commercial dog breeders to perform dew claw and tail amputations on days 2 through 5, is clearly for the purpose of circumventing the provisions of the Veterinary Practice Act (Chapter 4741). Allowing non-veterinarians to perform these surgeries is a convenience for the breeders with no benefit to the animals.

Additionally, Ohio’s animal cruelty statutes may be relevant. ORC 1717.01 (B) defines animal cruelty: “"Cruelty," "torment," and "torture" include every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief”

Dew claw and tail amputation by owners has historically been permitted prior to 5 days of age, because it was believed that neonatal puppies were unable to feel or process pain due to an immature nervous system. While it is true that their nervous systems are still developing, it has been well established that they can and do respond to painful stimuli. This is clearly demonstrated by their vocalizations and efforts to move away from things that cause pain or discomfort. As young neonates they are weak and uncoordinated in their movements and ability to express themselves, this should not be mistaken for a lack of pain perception. Several studies have measured indicators of pain and distress including increases in heart rate, stress associated hormone levels, vocalizations, and efforts to escape.[1] There are no pain medications approved for use in puppies of this age, and due to underdeveloped liver and kidney function it is likely not safe to use these products leaving them without options to reduce pain.

As a result of these findings, the management of these procedures is changing with many veterinarians now using a local anesthetic to numb the area prior to surgery or waiting until they are older and performing these procedures under general anesthesia sometimes at the same time as sterilization surgery. These options are not available to non-veterinarians. In some states like Maryland, dew claw and tail amputation, along with cropping of ears and surgical birthing, are restricted to only veterinarians regardless of the age of the dog. (MD Code, Criminal Law, § 10-624 Surgical restrictions relating to dogs). First offense for a non-veterinarian breaking this law is punishable by up to $1,000 fine or up to 90 days in jail.

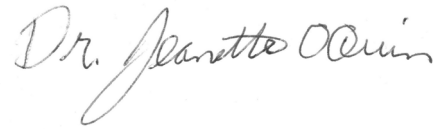
Dew claw removal is the amputation of the first digit (non-weightbearing toe) from the front and rear paws. This involves cutting through the skin, tendons, ligaments, blood vessels and nerves. Sometimes there is a boney attachment that is ideally disarticulated or separated during the amputation; however, a common mistake made by lay staff is to simply cut through the bone with scissors or nail trimmers which can lead to short-term and long-term complications. Tail docking involves removing a portion of a dog's tail, typically by separating the bones of the spinal column which continues into the tail, and cutting through the skin, muscles, tendons, ligaments, blood vessels, and nerves. I have personally trained 100's of veterinary students to perform dew claw and tail amputations, and I do not believe that an instruction manual will be sufficient to prepare a non-veterinarian to perform these surgeries.

Pain is not the only concern. The risk of complications is increased when non-veterinarians perform surgeries, and there are many documented instances of dogs suffering blood loss, nerve damage, infection and even death as a result. As a veterinarian who spent several years assisting in the investigation of animal cruelty, I have personally seen many home attempts at tail docking, dew claw removal, ear cropping, and castration with detrimental outcomes, some of which led to criminal charges. A non-veterinarian may not recognize subtle signs of health status that would make the dog a poor surgical candidate at that time. Issues like dehydration, poor tissue perfusion, inadequate milk intake, and low body temperature could delay healing and further increase the risk of bleeding, infection, shock, or death. One important method of reducing infections is the use of

1. https://www.researchgate.net/publication/325475742_Tail_Docking_of_Canine_Puppies_Reassessment_of_the_Tail%27s_Role_in_Communication_the_Acute_Pain_Caused_by_Docking_and_Interpretation_of_Behavioural_Responses#pf10
https://www.sciencedirect.com/science/article/abs/pii/0168159196010623
https://www.avma.org/about/canine-tail-docking.aspx/canine-tail-docking-faq
https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1751-0813.2003.tb11473.x

sterile surgical instruments on each animal. It is unlikely that non-veterinarians will have a sufficient number of surgical tools, maintained regularly to prevent dulling of the blades which can increase pain and surgery time, or the equipment needed to clean and sterilize them between animals. Liquid sterilants to disinfect instruments are not recommended as they are toxic and can harm to both patient and surgeon.

I encourage keeping the original language for 901:1-6-05 (B)(2) so that puppies six months and under will also receive a physical examination by a veterinarian during the annual visit. This will aid in the detection and remediation of health issues that could otherwise be missed. I also encourage restricting dew claw and tail amputation surgeries to veterinarians regardless of age in 901:1-6-05 (F) as was done in the revisions to 901:1-6-05 (H) by restricting euthanasia to veterinarians. This would bring the rules into compliance with ORC Section 956.031 (V) and ORC Section 4741.19 (A) as cited above, and reduce unnecessary suffering. Thank you for your consideration of these important issues, and please reach out if I can be of further assistance.



Jeanette O'Quin, DVM, MPH, DACVPM, DABVP (Shelter Medicine)
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December 12, 2022
Testimony, Ohio's Joint Commission on Agency Rule Review
RE: OAC Rule 901:1-6-05

My name is Kellie DiFrischia. I have been involved in Ohio's animal welfare arena for 25 years. I was part of the core group involved in negotiations with the initial writing of the Ohio Commercial Dog Breeder's Bill. After seven years of intensive negotiations by interested parties, language was finally accepted by all sides of the dog industry to pass this landmark legislation.

The intent of the original bill was to provide oversight and protect the dogs and puppies that are part of Ohio's billion dollar commercial dog breeding industry. OAC Rule 901:1-6-05 violates JCARR standards as the rule exceeds the rule-making authority of the OH Dept of Agriculture (prong 1 of JCARR standards), conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3 of JCARR standards), and undermines the intention of the original language.

The Ohio Revised Code mandates the use of a veterinarian for surgical procedures. ORC Section 956.031 (V), in regard to high-volume commercial dog breeders, states, "If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure." OAC proposed rule 901:1-6-05 (F) violate the law as it states "Surgical procedures, except between two to five days of age the removal of the dewclaw and tail docking, shall only be performed by a licensed veterinarian."

Another aspect of 901:1-6-05 that will conflict with the intent of the legislation are annual inspections that were meant for all dogs and puppies on the premises at the time of the annual visit. See (B)(2), which eliminates exams for dogs younger than 6 months. An attending veterinarian, may observe a congenital condition in a puppy. These observations won't happen if (B)(2) stays in the rule.

A congenital condition is any bodily abnormality present upon birth. A congenital condition could be an abnormal organ, such as cataracts, or a specific body part that developed abnormally, such as a shorter leg. It's unknown why congenital conditions occur, but many are theorized to happen due to genetics, environmental factors, or a combination of the two. A veterinarian can only make a recommendation on removing a breeding dog from a program if they are aware of the issues with the offspring.

Please also consider the family that purchases an Ohio bred puppy. Congenital conditions can be a lifelong veterinary expense to the consumer. In the preparation of the original legislation, we talked to many dog owners who lost their young dogs purchased from a pet store – from a week to a year from purchase. These consumers not only grieved the loss of their dog/puppy, but the expense of trying to save their dog, and potentially years of paying off a loan with high interest for the original purchase of the dog. The Ohio Attorney General and the Better Business Bureau have registered complaints over decades regarding pet store/high volume breeder dog purchases. Ohio must protect the consumer by keeping the intent of the authors of the language.

This also brings light to the conflict of (E)(1) ensuring a puppies' hair is free of mats, tangles, and debris. Only a hands on exam of each puppy will ensure (E)(1) is being properly addressed.

Allowing a layperson (breeder) with a photocopy explaining removing body parts, defeats the intentions of Senator's Hughes' wish for oversight of the dog breeding industry (Senator Hughes was quoted in the Columbus Dispatch stating "the commercial dog breeder bill was the hardest legislation of my career.") Cutting into the skin of a dog with potentially non sterile cutting instruments is a recipe for infection. This also makes glaring the inappropriateness of (B)(2), eliminating exams of dogs under 6 months of age.

I respectfully ask JCARR to find this rule invalid and in conflict with the intent of the original language.

Kellie DiFrischia
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kdifrischia@gmail.com

December 12, 2022
Testimony Before Ohio's Joint Commission on Agency Rule Review (JCARR)
Andrea Nadolny
The Ohio State University
Ohio Animal Advocates

RE: Comments on OAC Rule 901:1-6-05

As a student at The Ohio State University's John Glenn College of Public Affairs interning with Ohio Animal Advocates, I come before the Joint Commission on Agency Rule Review (JCARR) to testify to the fact that the Ohio Department of Agriculture's (ODA) proposed rule OAC 901:1-6-05 violates JCARR standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3). I am extremely concerned for the safety and wellbeing of commercially bred puppies, and respectfully request the JCARR members to follow the Ohio Revised Code and protect these innocent animals from suffering painful surgeries at the hands of untrained commercial dog breeders.

The Ohio Revised Code (ORC) mandates the use of a veterinarian for surgical procedures. ORC Section 956.031 (V), in regard to high-volume commercial dog breeders, states, "If a surgical or euthanasia procedure is required, use a veterinarian to perform the procedure."

OAC proposed rule 901: 1-6-05 Section (B) states that "the attending veterinarian shall…provide a written annual plan requiring care for the adult dogs and puppies" which, under Subsection (3)(e)(ii)(a)-(e), is to include instructions on dew claw and tail docking, covering acceptable instruments; the process, pain control, and clotting; and cleaning and disinfecting of instruments." No "written plan" can equip commercial dog breeders for performing such surgeries. No "Instructions on medication usage for pain control and clotting" can confer the necessary medical training to use drugs appropriately and safely. And this still leaves the procedures to be conducted without anesthesia as only licensed medical professionals can administer those drugs. None of these plans, guidance, or instructions change the fact that the revised rule violates ORC Section 956.031 (V)'s requirement that only vets perform surgical Procedures.

Dew claw removal and tail docking are surgical procedures that cause acute pain in puppies (AVMA Animal Welfare Division studies). AVMA opposes tail docking when done solely for the purpose of breed standards (https://www.avma.org/resources-tools/avma-policies/ear-cropping-and-tail-docking-dogs). AVMA research has shown that in addition to severe infections and amputation pain, central nervous system development can be impacted in young dogs (https://www.avma.org/resources-tools/literature-reviews/welfare-implications-tail-docking-dogs), Allowing a person to perform these surgical procedures on an animal, regardless of age, without proper pain management and anesthesia would be considered animal cruelty, torture and torment in violation of ORC 959.131-B. In addition, ORC Section 4741.19-A establishes that "[u]nless exempted under this chapter, no person shall practice veterinary

medicine, or any of its branches, without a license or limited license issued by the state veterinary medical licensing board pursuant to ORC sections 4741.11 to 4741.13, a temporary permit issued pursuant to ORC 4741.14."

Since the OAC Rule 901 rule package is before JCARR, it must now address the fact that OAC proposed rule 901: 1-6-05 is in violation of JCARR standards (prong 1 and prong 3) as ORC 956.031 (V) clearly states that a veterinarian is to perform all surgical procedures, and ORC 4791 states "[u]nless exempted under this chapter, no person shall practice veterinary medicine…without a license." In addition, ORC 959.131-B states that performing these surgical procedures without proper pain management and anesthesia would be considered animal cruelty, torture and torment. ODA lacks the authority to enact regulations that allow anyone other than veterinarians to conduct such surgical procedures.

The regulation conflicts with the legislative intent reached through the MOU between the Humane Society of the US (HSUS) and the interested parties (OVMA, sportsmen, and breeders). Representative Brian Hill, HSUS, and the interested parties all agreed on the language in H 506, including ORC Section 956.031 (V), which was the premise for HSUS to end its 2018 ballot initiative.

Even though H 506 was passed in 2018, ODA did not do the 5 year-rule review with JCARR in 2018 and change the rule 901:1-6-05 to meet the change in the law that prohibits commercial dog breeders from performing surgical procedures. By proposing OAC 901:1-6-05, ODA is still trying to circumvent the law and allow breeders to perform these surgical procedures.

Some arguments in favor of the rule have hinged on the existing law's use of the word "required." Because tail docking and dew claw removal are considered by some to be "cosmetic" and therefore not "necessary," it should be noted that those surgeries are required to conform with AKC breed standards. If these surgeries are not being done to conform with AKC standards, then we are left to conclude they are being done simply to mutilate the animals. That is not something to which JCARR, the ODA, or Ohio taxpayers should be a party.

I strongly urge JCARR to find that the ODA's proposed rule 901:1-6-05 violates JCARR's standards as the rule exceeds the rule-making agency's statutory authority (prong 1) and conflicts with the intent of the legislature in enacting the statute under which the rule is proposed (prong 3), and should be invalidated. We must follow the clear mandates of ORC Section 956.031 to protect puppies from barbaric, improper surgeries by amateur breeders. As a member of today's youth, I am extremely disappointed in the lack of enforcement of these critical statues. By ruling against ODA's proposed rule 901:1-6-05, JCARR will save countless puppies from painful surgeries and uphold the integrity of the Ohio Revised Code.

Andrea Nadolny
The Ohio State University
Ohio Animal Advocates
123nadolny@gmail.com

614/302-8611

RE: ODA proposed OAC Rule 901:1-6-05

To Whom It May Concern,

Please know I am herby filing my fervid opposition to OAC Rule 901:1-6-05 for the following reasons: The rule is vague on its face and in opposition to ORC Sec 956.031, hence it is illegal.

ORC Sec 956.031 mandates that all surgical and euthanasia procedures must be performed by a veterinarian.

OAC Rule 901:1-6-05 merely states a vet shall provide a written plan to include surgical instructions for breeders. This is entirely contrary to the intent of the legislature and a gross deviation from standard veterinary ethics and surgical procedures. Proposed OAC Rule 901:1-6-05 must be re-written to clearly state only licensed veterinarians can perform surgical procedures.

Sincerely,
Loren Loving-Vail, J.D.
529 E. Town Street
Columbus, OH 43215

December 6, 2022

The Honorable Theresa Gavarone
Chair, Joint Committee on Agency Rule Review (JCARR)
Senate Building
1 Capitol Square, 2nd Floor
Columbus, OH 43215

RE: OAC 3796:6-3-02

Dear Chair Gavarone,

Thank you for the opportunity to respond to comments (included with this letter) from Mr. Tim Johnson and Cannabis Safety First on proposed amendments to OAC 3796:6-3-02. The rule was put into TBR status and then refiled following a review of Mr. Johnson's comments. It is the Board's understanding that this testimony will be presented to JCARR at the December 12, 2022, hearing.

The proposed rule governs the security requirements for dispensaries operated under the Ohio Medical Marijuana Control Program. In his testimony, Mr. Johnson stated that the requirements of the rule are "unnecessary" and "too restrictive." However, the Board contends that such standards are necessary to prevent the diversion of medical marijuana, a Schedule II controlled substance under Ohio law.

Businesses that are directly impacted by the rule were afforded several opportunities to provide feedback. For example, the Board sent the rule through the Common Sense Initiative Office twice – most recently on 8/24/2022 – to ensure that all impacted stakeholders had the opportunity to comment. During the most recent CSI process, the Board did not receive any negative comments or feedback from regulated entities on the impact of the rule.

Mr. Johnson also shared concerns about security and first responders' inability to access the dispensing floor to render medical assistance or to de-escalate a potential violent incident. The security requirements incorporated into the rule have proven effective at preventing break-ins and other attempts to divert medical marijuana, thus increasing safety and security within dispensaries. Ultimately, it is the Board's responsibility to ensure that licensees create a safe environment for patients to purchase their medication.

While the Board appreciates the comments provided by Mr. Johnson and Cannabis Safety First, it does not believe that OAC 3796:6-3-02 violates any JCARR prong and requests the Committee permit the rule to be final filed. Committee members should also be

aware that Mr. Johnson is not a current holder of a medical marijuana dispensary certificate of operation or a provisional dispensary license.

Thank you again for your time and review of this information. Should you have any questions or concerns, please do not hesitate to reach out to the Board's Director of Policy and Communications, Cameron McNamee (cameron.mcnamee@pharmacy.ohio.gov / 614-466-7322).

Sincerely,

Steven W. Schierholt
Executive Director
State of Ohio Board of Pharmacy

CC: JCARR Committee Members, JCARR Executive Director, JCARR Staff

Tim Johnson
Safety Security Specialist
Cannabis Safety First LLC
614.736.1861
timj.cannabissafetyfirst@gmail.com

JCARR
08.17.2022

Good afternoon, Chairman Gavarone, Vice Chair Callender

My name is Tim Johnson. I am an Air Force veteran and retired Law Enforcement Officer. As a 30yr Safety Security Specialist I created my company, Cannabis Safety First to provide services to stakeholders of the Ohio Medical Cannabis Program and to provide input for the betterment of the program as it grows. I too am a medical cannabis patient and advocate. As a participant in the creation of the program I presented various aspects of appropriate and effective safety and security measures and training methodologies. While I do support appropriate and effective security and safety measures set forth by the regulators in the rulemaking process, I too must question rules that appear to be unnecessary and too restrictive to a business's daily operations. As we see in proposed rule 3796:6-3-02(L)(M)(O) of the ORC, regarding a delivery bay, a day storage room and a man trap. These rules appear to be a concern under ORC 107.52(C)(D) addressing business impact and under true legislative intent. First, the financial burden to the new provisional licensees to comply with these requirements and secondly a safety and security concern for first responder's being hindered from immediate access to the dispensing floor to render medical assistance or to de-escalate a potential violent incident. Further as a participant in creating the program I believe it was the legislative intent to present soft, safe and simple safety and security measures in the program facilities. To note, the current 58 operating dispensaries are grandfathered in under these new rules as if these measures are not warranted for them. We simply have not seen a criminal behavior impact on the program that warrants such measures.

It is apparent the stigma of prohibition still rests within the decision-making process for security and safety protocols for this program. The mere thought that these measures will act as another tool to prevent diversion of cannabis products onto the streets is naive.

Let us remember cannabis was once a valued medicinal product prior to the 1937 Anslinger days of reefer madness/racial disparities and the 1970 Nixon days establishing the CSA placing cannabis as a schedule 1 and employing more racial disparities. With respect it is known both of these dates were highly influenced by corrupt politics, racial disparities and big money.

Never has there been a public safety medical alert on the dangers of cannabis. In fact, to date there is not a recorded death. The stigma fears instilled in society are blatant lies and continue to hinder the progress of research and development of a medicinally valued plant. Certainly, as a Scholar'd and well-educated society, we are above dumbing down our own intelligence to the fallacies of the past and have moved forward with the truths. Let's focus on the lack of such safety and security measures for the alcohol, big pharma and firearms industries that are embedding footprints devastating to our society, families, schools, work places and churches. Why are such measures not employed in these industries?

In respect I ask you to deny adopting these unnecessary measures and to move forward with adopting positive educational awareness public service announcements for the betterment of the program and to ease the worried and confused minds of society as a whole. It is time to end prohibition and share the truths.

Thank you for your time.

In Safety,

Tim Johnson

Tim Johnson
Safety Security Specialist
Cannabis Safety First LLC
614.736.1861
timj.cannabissafetyfirst@gmail.com

JCARR
12.12.2022
Amend the Ohio Medical Cannabis Program safety/security rule 3796:6-3-2

Good afternoon, Chairman Gavarone, Vice Chair Callender

My name is Tim Johnson. I am an Air Force veteran and retired Law Enforcement Officer. As a 30yr Safety Security Specialist I created my company, Cannabis Safety First to provide services to stakeholders of the Ohio Medical Cannabis Program and to provide input for the betterment of the program as it grows. I too am a medical cannabis patient and advocate. As a participant in the creation of the program I presented various aspects of appropriate and effective safety and security measures and training methodologies. While I do support appropriate and effective security and safety measures set forth by the regulators in the rulemaking process, I too must question rules that appear to be unnecessary and too restrictive to a business's daily operations. As we see in proposed rule ORC 3796:6-3-02(L)(M)(O), regarding a delivery bay, a day storage room and a man trap. These rules are of concern under ORC 107.52(C)(D) addressing business impact and under true legislative intent. First, the financial burden to the new provisional licensees to comply with these requirements and secondly a safety and security concern for first responder's being hindered from immediate access to the dispensing floor to render medical assistance or to de-escalate a potential intrusion or confliction incident. Further as a participant in creating the program I believe it was the legislative intent to present soft, safe and simple safety and security measures in the program facilities. To note, the current 59 operating dispensaries are grandfathered in under these new rules as if these measures are not warranted for them. We simply have not seen a criminal behavior impact on the program that warrants such measures.

It is apparent the stigma of prohibition still rests within the decision-making process for security and safety protocols for this program. The mere thought that these measures will act as another tool to prevent diversion of cannabis products onto the streets is

naive. Further the fear of a cash only industry is not relevant as e-cashless based programs have been implemented and are showing successful promise.

Let us remember cannabis was once a valued medicinal product prior to the 1937 Anslinger days of reefer madness/racial disparities and the 1970 Nixon days establishing the CSA placing cannabis as a schedule 1 and employing more criminal and racial disparities. With respect it is known both of these dates were highly influenced by corrupt politics, racial disparities and big money.

Never has there been a public safety medical alert on the dangers of cannabis. In fact, to date there is not a recorded death. The stigma fears instilled in society are blatant lies and continue to hinder the progress of research and development of a medicinally valued plant. Certainly, as a Scholar'd and well-educated society, we are above dumbing down our own intelligence to the fallacies of the past and have moved forward with the truths. Let's focus on the lack of such safety and security measures for the alcohol, big pharma and firearms industries that are embedding footprints devastating to our society, families, schools, work places, government facilities and churches. Why are such measures not employed in these industries? I must share too that these new measures have already been burdened upon the new provisional dispensary licensees prior to JCARR passage.

In respect I ask you to deny adopting these unnecessary measures and to move forward with adopting positive educational awareness public service announcements for the betterment of the program and to ease the worried and confused minds of society as a whole. It is time to end prohibition and share the truths.

Thank you for your time.

In Safety,

Tim Johnson

Tim Johnson
Founder CEO

CANNABIS SAFETY FIRST .com

Testimony of Anya Coverman
Before the Joint Committee on Agency Rule Review
December 12, 2022

Chair Gavarone, Vice-Chair Callender, and Members of the Joint Committee on Agency Rule Review, thank you for the opportunity to testify regarding the Ohio Division of Securities circumvention of the establish JCARR rule making process.

My name is Anya Coverman. I am the President and Chief Executive Officer of the Institute for Portfolio Alternatives. Prior to my role as President & CEO, I served as the IPA's General Counsel. Before that, from 2012 until 2017, I served as the Deputy Director and Associate General Counsel of the National Association of Securities Administrators (NASAA).

The Institute has been in existence for over 35 years. We represent the sponsors and distributors of alternative products, including non-listed real estate investment trusts, or "REITs," and business development companies, or "BDCs."

We also represent sponsors and distributors of interval funds, tender-offer funds, and other public, non-listed and privately placed investments. Our membership includes the sponsors of various types of investment structures, operating under different regimes of the federal securities laws, holding real estate, public and private credit and other assets.

The Institute appreciates the opportunity to testify about the rulemaking activities of the Ohio Securities Division. It is highly unusual for the Institute to testify before a legislative body about the rulemaking activities of a securities regulator. In fact, I don't recall a time that this has occurred. We are here today because the issues raised by this Committee are of critical importance to our members and to Ohio investors.

The Institute supports robust protection of all investors. Consumers of portfolio diversifying products, like the consumers of any investment product, must be protected from fraud and abuse. We strongly support the role of state securities regulators in Ohio and throughout the country of fulfilling this mission and protecting residents from violations of established law.

Today, we are here to address the Division's rulemaking activities outside of the mandatory JCARR process and the impact that has on businesses seeking registration in Ohio and investors seeking portfolio diversification with these products.

I would like to provide brief background on the products we are discussing today. Non-listed REITs are investment funds that hold real estate assets and "BDCs" are business development companies that hold interests and loans to small business. Both structures provide important investment opportunities to individual investors.

These products are subject to vigorous registration review by the United States Securities and Exchange Commission, which is the federal securities regulator. They are also subject to registration in all 50 states. Investment advisers and broker-dealers that distribute these products are also highly regulated. In fact, these are among the most heavily regulated products.

The Institute's support for investor protection is longstanding. In 2015, we worked with FINRA, a federal securities regulator, when it issued a rule that fundamentally transformed the non-listed REIT and BDC industries. FINRA's rule, with our cooperation, spurred the growth of a new type of product, known as "net asset value" or NAV REIT and BDC. NAV REITs and BDCs are virtually the only non-listed REITs and BDCs sold in the market today.

NAV REITs and BDCs have lower fees, more liberal repurchase options, and more rigorous valuation procedures than the variety that predominated before 2015. They are sponsored by some of the largest asset management companies in the world and they are distributed through prominent wire houses, broker-dealers and investment advisers.

In Ohio, the Securities Division imposes some of the most restrictive conditions on NAV REITs and BDCs of any administrator in the country. Significant time and energy are required to clear offerings in Ohio, thus making them available for investment by Ohioans. This creates expenses that are borne by the shareholders.

The informal way that the Division issues its rules concerning NAV REITs and BDCs, without notice or an opportunity for the public to comment, without any economic analysis or rationale, complicates the legal and compliance efforts of the industry and undermines investor protection. JCARR ensures that elected policymakers participate in the development of Ohio regulation. This Division has imposed numerous rules outside of this Committee's oversight.

We were hopeful in September 2021 when the Division committed to then- chairman, Representative Callender, to submit these rules to JCARR. However, when the Division unveiled its proposal in April 2022, it sought to incorporate all 43 NASAA statements of policy and 17 Merit Standards in one fell swoop and did not break out each rule separately for evaluation in compliance with JCARR. Additionally, the proposal would have allowed the Division to incorporate any future NASAA policy as Ohio rule without going through another JCARR review. Finally, the Division gave commenters only 10 calendar days to comment which any reasonable person would agree is a short period of time given the complexity of the issues at hand.

We don't believe this conformed to the rules of JCARR and there has been no further notice from the Division other than to reject the majority of our comments to the Division.

For that reason, the Institute respectfully requests that the Committee require that the Division engage in the formal administrative processes required by JCARR. With this request, the Committee will help ensure that the Division's rules are predictable, transparent and practical, and the administrative process is fair for all market participants.

I will now turn our testimony over to my colleague, Tom Selman.

Testimony of Thomas M. Selman
Before the Joint Committee on Agency Rule Review
December 12, 2022

Chair Gavarone, Vice-Chair Callender, and Members of the Committee, my name is Tom Selman. I am founder of Scopus Financial Group which offers regulatory and compliance support to the financial services industry, including to the Institute for Portfolio Alternatives.

Before 2020, I was the Executive Vice President for Regulatory Policy and Legal Compliance Officer for the Financial Industry Regulatory Authority, or "FINRA." FINRA is the federal regulator of the broker-dealer industry. FINRA itself is regulated by the United States Securities and Exchange Commission.

For much of my career I wrote and interpreted FINRA rules. FINRA, like the SEC, must follow an elaborate process before it can adopt a new rule. Here are the steps that FINRA and the SEC must follow:

FINRA and the SEC must publish any proposed rule. It must provide rule text. It must request public comment. FINRA and the SEC must perform an economic analysis of the effects of the proposed rule. It must respond to comments from the public and explain whether the agency agrees or disagrees with each comment. All of these steps FINRA or the SEC must take before adopting a rule.

Administrative rulemaking is often arduous. It can be time consuming. It may inconvenient for the regulator. Nevertheless, a formal administrative process, like JCARR, is important.

The Ohio Securities Division does not follow a formal rulemaking process like that of FINRA and the SEC. The Division conducts a "merit review" of each NAV REIT and BDC offering. The Division imposes conditions on the registration of a NAV REIT and BDC. Either the sponsor complies with conditions, or the Division will prohibit sale of the product to Ohio investors.

It is important for me to emphasize the following: All NAV REITs and BDCs that are filed with the Division are also being reviewed by the United States Securities and Exchange Commission. Once the SEC declares a registration statement effective, then *under federal law*, it may be sold anywhere in the United States.

In Ohio, however, the fact that a NAV REIT or BDC offering has been registered with the SEC is irrelevant. The Division will impose conditions that the SEC has not imposed. The Division will even impose conditions that conflict with the SEC's position. These conditions are not merely policy interpretations, but requirements that issuers must comply with in a certain manner in order to register and therefore sell a security in Ohio.

The Division imposes these conditions in the form of wide-ranging and unpredictable rules outside of JCARR. The Division imposes merit standards developed by NASAA, incorporates NASAA statements of policy, publishes filing requirements in the Ohio Securities Bulletin, and imposes new registration requirements in comment letters issued to filers.

Section 111.15 of the Ohio Revised Code defines "rule" to include "any standard having a general and uniform operation." The Division's comment letters, merit standards, bulletins, and statements of policy meet this definition of "rule."

The Division issues these rules without any notice, without any opportunity for the public to comment, without any business analysis or consideration of its impact on Ohio investors and the Ohio economy.

When the Division issues a new rule, NAV REIT and BDC sponsors are caught off guard. They must scramble to comply. This leads to an unpredictable and unfair business environment. The JCARR process leads to predictability and an opportunity to revisit regulations after a five-year review.

Imagine being a compliance officer for a NAV REIT or BDC. As compliance officer, you must keep track of all the conditions that the Division places on the registration of your product in Ohio.

You might ask your colleagues at other firms whether the Division has commented on their filings, and, if so, what those comments were and how might they apply to your proposed offering.

You must follow the Division's staff bulletins, pronouncements, merit standards, and references to NASAA guidance. You must do this while you are also trying to comply with federal law and regulation in 49 other states.

The Division's circumvention of JCARR does not protect investors. It wastes compliance resources. The cost is passed along to shareholders, including Ohio investors.

There is no reason for the Division to circumvent JCARR. If the Division believes that a certain proposal, whether it comes from their own thinking or through NASAA, will protect investors, then one would think that the Division would wish to formally memorialize it into Ohio Administrative Code. Administrators typically prefer to secure their new rules into a durable rulebook, transparent for both the investing public and those who wish to do business in Ohio. JCARR thus provides a transparent and predictable regulatory framework and thereby protects the Ohio investor.

JCARR also protects against arbitrary and capricious rulemaking. The public deserves certainty. Members of an industry like ours that spend considerable resources on compliance

with the Division's expectations, deserve fair notice of what those expectations will be and an opportunity to be heard.

JCARR requires a business analysis, which is critical to sound rulemaking. The Division should be required to consider opposing viewpoints, such as whether a restriction on an Ohio investor's ability to purchase a security might harm her prospects for meeting retirement or other investment goals. The Division should consider the impact of its unapproved rules on the Ohio economy.

For these reasons, we respectfully recommend that the Committee require the Division to submit its rules to JCARR.

This request should apply to the rules the Division has issued and currently employs. It should also apply to any and all new rules the Division wishes to pursue in the future. All rules should be individually submitted to JCARR. The Committee's request should be ongoing and permanent.

Second, we respectfully recommend that the Committee require the Division to break out, request comment, and separately evaluate each rule. In April the Division proposed to submit all of its rules *en masse,* without requesting comment on each one.

Finally, we respectfully recommend that the Committee make clear to the Division that it may not implement, enforce or investigate a violation of any of those rules until it has completed the rulemaking processes that Ohio law demands. In April, the Division proposed to continue its enforcement of rules before it had even begun JCARR. If the Division can enforce rules that have not been through JCARR, then JCARR will have little effect.

Chair Gavarone, Vice-Chair Callender, and Members of the Committee, thank you again for the opportunity to testify. We are available for any questions you might have.

OHIO GENERAL ASSEMBLY

JOINT COMMITTEE ON AGENCY RULE REVIEW

December 14, 2022

Additional attachments were provided with the Institute for Portfolio Alternatives testimony and are available upon request by contacting the JCARR Office at 614-466-4086.

77 South High Street, Concourse Level · Columbus, OH 43215 · (614) 466-4086 · Fax (614)752- 8803

December 9, 2022

Senator Theresa Gavarone
1 Capitol Square, 2nd Floor
Columbus, OH 43215

Chair Gavarone,

Thank you for the opportunity to share the Ohio Chamber of Commerce's perspective on the Ohio Department of Commerce's rulemaking process. Specifically, the Ohio Chamber believes the Department should avoid adopting statements of policy developed by the North American Securities Administrators Association without public input and avoid using the Ohio Securities Bulletin to issue policies and regulatory requirements. Instead, in the pursuit of transparency, the Department should endeavor to only make policies and regulatory requirements through the process established under the Ohio Administrative Procedure Act in RC 119.03.

At issue with the current process the Department utilizes in some instances is the lack of opportunities for public input and legislative oversight. Both public input and legislative oversight are key components of assuring Ohio's regulatory state does not hinder economic growth or harm Ohio's business climate, since they give impacted businesses, legislators, and other stakeholders the ability to review a proposed regulation for its impact prior to the regulation going into effect. The Ohio Chamber supports increased avenues for public comments because this opportunity for input is valuable to employers and helps assure the regulated industries can comply with a new regulation or policy.

The notice and comment period prescribed by Ohio's Administrative Procedure Act can also prove beneficial to the administrative agency. When regulators seek feedback from their regulated stakeholders, impacted businesses will share insights on the potential effect of a new or amended regulation. That feedback can assist state agencies in broadening their perspectives of an industry and help them understand how their rules impact Ohio businesses. Likewise, the state agency can use the comments to alter their proposed rule and potentially alleviate issues that were raised by impacted stakeholders. Without a notice and comment period, state agencies do not have the benefit of formal public feedback which may mean regulatory decisions are made after the consideration of limited points of view, and that could result in an outcome that has a deleterious effect on the business community.

Moreover, making policy decisions through the Administrative Procedure Act and the process laid out in RC 119.03 promotes government transparency. The public notice, public hearing, and JCARR hearing are vital tools used by Ohio businesses to provide feedback and suggested edits on regulations that will impact their operations. The increased transparency provided by rulemaking through RC 119.03 is why the Ohio Chamber supported Senate Bill 221 from the 132nd General Assembly and why we believe it is important for all state agencies to avoid regulating through policy letters and statements.

In closing, the Ohio Chamber supports Chair Gavarone's decision to have this policy to rule discussion in accordance with her authority under Senate Bill 221, and we ask for the Committee to recommend the Ohio Department of Commerce utilizes the formal rulemaking process as provided in RC 119.03 whenever it seeks to amend or adopt new regulations, including statements of policy from the North American Securities Administrators Association.

Regards,

Kevin Shimp
General Counsel

Testimony of Ohio Securities Commissioner Andrea Seidt

JCARR HEARING (DECEMBER 12, 2022)

Policy to Rule Discussion (ORC 101.352)

Item #41 Department of Commerce

The suspected policy is incorporation of NASAA statements, creation of requirements in the Ohio Securities Bulletin Publication, and use of registration filing comments.

Chairwoman Gavarone, Vice-Chair Callender, and Members of the JCARR Committee - Thank you for inviting the Department here today and for giving me the opportunity to respond to questions raised in the notice. I would like to start by reading the following statement into the record and then I would be happy to answer any questions that the Committee has.

About the Division

The Division of Securities is the state regulator responsible for oversight of the investment industry. Our four primary functions are to license securities firms and professionals; register securities products; enforce the Ohio Securities Act; and provide investor education. We have over 220,000 licensees and we process thousands of registration filings and prosecute hundreds of fraud investigations. We share regulatory oversight with our state and federal peers.

I've been Securities Commissioner for over 14 years now. During my tenure, I have had little need to propose changes to the Division's rulebook because my predecessors instituted timeless, common-sense rules that Division stakeholders broadly support. I know this because I have brought the entirety of the Division's rulebook to JCARR and all Division stakeholders on three separate occasions and the Institute for Portfolio Alternatives - IPA for short - is the only stakeholder that has ever lodged any objections to the Division's rules during my time.

By way of background, IPA is a trade association from Washington, D.C. that represents sponsors and dealers of non-traded real estate investment trusts (non-traded REITs) and non-traded business development companies (non-traded BDCs). IPA's membership includes about 100 issuers of these products, none of which are headquartered in Ohio. For the most part, these issuers take Ohio investment dollars out of our state and invest them in properties along the coasts and in the south.

Reason for Hearing

I am here today to respond to IPA's concerns regarding the Division's product registration and review rules, which IPA first raised during the Division's five-year rule review last year. The Division responded in writing to IPA's concerns at that time as part of the JCARR process and prepared to engage on these issues with IPA at the two JCARR hearings convened for public comment that summer. IPA did not attend or submit testimony for either JCARR hearing. All of the Division's rules were thereafter reviewed and approved by JCARR last year. IPA turned its attention to other state officials, conducting meetings and writing a variety of letters as part of a larger 2-year IPA engagement focused on state reviews of these products.

Copies of the Division's correspondence with IPA were provided to the Committee last year. The first item we provided was a letter that I wrote in response to a list of questions that our agency Director received from Representative Jean Schmidt. Although slightly dated now, that letter's analysis remains relevant and intact. The other letters are the Division's follow-up responses to IPA's subsequent lobbying efforts with Rep. Schmidt, the Lt. Gov's Office of the Common-Sense Initiative, and, of course, JCARR.

About the Products – Non-traded REITs and Non-traded BDCs

To understand the Division's rules impacting IPA members, it helps to understand the basics about the products they develop and sell. Non-traded REITs and non-traded BDCs are not traditional investment products, they are what we call "alternative" investments. They are more complex, costly, and riskier than traditional investment products. That is not necessarily a bad thing. There are many complex, costly, and risky products in our marketplace that work fine as long as (1) the complexities, costs, and risks are fairly disclosed; (2) the pros and cons are fairly advertised; and (3) the products are carefully matched with the right investors.

These three conditions are not always met with these products. When the complexities, costs, and risks are not fairly explained, investors and brokers misunderstand them, creating confusion and the potential for harm. For example, the products are routinely marketed as providing safe and stable recurring income, but in reality, the investments are speculative and investors have no control over their money once it has been invested. After investment, the REIT and BDC sponsors have complete discretion over those dollars and determine if and when income is shared with investors as well as if and when investors can cash out. I have brought copies of the biggest non-traded REIT deals with me as examples in case anyone wants a closer look.

More recently, IPA members have reformed the deals so that they can keep an investor's money in perpetuity – forever – while giving investors zero guarantee as to distribution (return on investment) or redemption (the ability to get out). Those downside risks are not advertised or promoted to investors. In fact, those risks are typically hidden in fine boilerplate print.

Liquidity restrictions or "lockups" can be a real problem for investors, especially smaller investors who need cash to cover living expenses. Such investors include elderly and retired investors who need cash to cover healthcare expenses, but during the pandemic, we saw investors of all ages face job loss and other economic hardships that forced them to tap into their nest eggs. These are, by the way, hardships that many Ohio families are experiencing today. Regardless of the personal situation giving rise to the hardship, financially distressed investors are devastated when they hear their broker say, sorry, I know that you really need the money right now but you can't access the cash that's locked inside these shares.

Unfortunately, that is the message that investors have received for the past two weeks from brokers who sold them the two largest non-traded REIT products in our country. On December 1, private equity firm Blackstone notified its non-traded REIT investors that it did not fulfill all the

redemption requests that investors made in the month of November.[1] Blackstone's non-traded REIT (called BREIT) is the largest non-traded REIT in the country with approximately $69 billion in assets. Blackstone paid out less than half of the amount investors requested last month, rejecting requests worth $1.7 billion. Blackstone then warned investors that December would be worse and that only 0.3% of its shares would be available for redemption, meaning the November investors hoping to get the rest of their money will not be getting their money this month either. All told, $68.8 billion in non-traded REIT dollars were placed on ice. As the result of this freeze, BREIT investors will not be able to adjust their shares as they tend to their normal year-end portfolio adjustments. Those who want to redirect their investments out of concern regarding the 2023 real estate market will not be able to until Blackstone lifts the freeze.

On December 4, the Division learned that the second largest non-traded REIT sponsor Starwood had also denied redemption requests in November.[2] Starwood's REIT (called SREIT) has $14.6 billion in assets and denied $17.5 million in investor requests. Starwood signaled that it would redeem at most $29 million in December, enough to cover the outstanding requests from November, but likely insufficient to cover new ones. News of these lockups has sent shockwaves throughout the entire real estate sector. My team has asked all non-traded REITs to notify us of any future suspensions so that we can keep an eye on this trend moving forward.

Regulatory Review

Because these products carry high risk, they are registered at both the federal and state level. In Ohio, we have experienced attorneys review these offerings to screen out fraud, temper grossly unfair terms, and shut down deceptive practices. They apply the anti-fraud standard found in R.C. 1707.09(G)(2), which applies, by definition, to registrations by coordination.

The General Assembly drafted R.C. 1707.09 and other anti-fraud provisions of the Ohio Securities Act broadly to prevent harm, rather than redress it afterwards. In the past, folks like IPA have challenged this approach as too paternalistic, but both the Ohio Supreme Court and the U.S. Supreme Court have rejected those arguments.[3] As our high courts recognized, this breadth is necessary to address the far-ranging schemes of unscrupulous promoters and changes in products and the markets as they evolve. By keeping it simple – prohibiting folks from stacking the deck in their favor thorough grossly unfair terms and prohibiting activity that

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[1] Andrew Bary, *Blackstone Just Limited Withdrawals From Its Huge Retail Real Estate Fund*, Barrons (Dec. 1, 2022), https://www.barrons.com/articles/blackstone-reit-51669913002; Robin Wigglesworth, *BREITing Bad*, Financial Times (Dec. 2, 2022), https://www.ft.com/content/23a22e93-89a3-45d7-9cd2-3a67b77267fc; Sridhar Natarajan and Dawn Lim, *Blackstone's $69 Billion Real Estate Fund Hits Redemption Limit*, Bloomberg (Dec. 1, 2022), https://www.bloomberg.com/news/articles/2022-12-01/blackstone-real-estate-fund-tops-limit-for-redemption-requests; Chibuike Oguh and Herbert Lash, *Blackstone's $69 Bln REIT Curbs Redemptions In Blow To Property Empire*, Reuters (Dec. 2, 2022), https://www.reuters.com/business/finance/blackstone-limits-redemptions-69-billion-reit-2022-12-01/; Antoine Gara et al., *How the Gates Closed On Blackstone's Runaway Real Estate Vehicle*, Financial Times (Dec. 5, 2022), https://www.ft.com/content/a0fcd0d2-bc25-467d-bded-d940fa628487.

[2] Andrew Bary, *Starwood REIT Limits Investor Withdrawals After a Surge in Requests*, Globe Street (Dec. 5, 2022), https://www.globest.com/2022/12/05/starwood-reit-limits-investor-withdrawals-after-a-surge-in-requests/.

[3] *In re Columbus Skyline Secs.*, 74 Ohio St. 3d 495, 499 (1996); *Hall v. Geiger-Jones*, 242 U. S. 539 (1917).

would tend to deceive or defraud investors – the General Assembly fashioned common-sense guardrails in the Ohio Securities Act that have withstood the tests of time.

Because these products are sold in all states through common offering documents, my staff tries to align their registration review with their counterparts in other states, by applying something known as NASAA statements of policy (NASAA guidelines for short). NASAA stands for the North American Securities Administrators Association and it is the association of all state securities regulators here in the United States. NASAA statements are informal, non-binding guidelines that help states construe state securities statutes consistently.

If my staff spots any issues during their review, they will issue *comments* to spotlight those issues for the filer. If my staff did not issue these comments, the filer might not understand what is wrong and what they need to fix in order to sell in our state. Through this comment process, the Division clears **95%** of the deals filed by IPA members here in our state. You may be wondering about that remaining 5%. While the Division tries to get to yes on as many deals as possible, we're not going to let anyone bilk our Ohio investors, especially our seniors, out of their hard-earned money. The deals that we have not cleared are deals that contain grossly unfair terms or were being sold in a way that would tend to deceive or defraud investors. In other words, those deals violated our statutory standard.

If you look at our letter to Rep. Schmidt, you will see that we have successfully screened out fraudulent deals that made it past other regulators, including the SEC. Those deals cost investors in *other states* hundreds of millions of dollars of losses. Our Ohio investors were spared due to Ohio's anti-fraud standard and staff review. For the same reason, a majority of Ohio dollars are safeguarded from the recent billion-dollar lockups plaguing the industry.

Issues

In the notice for today's hearing, the Division was asked to explain why it does not have regulatory comments, newsletter articles, and NASAA statements of policy formally adopted as rules in our rulebook. The short answer is because these items are *not rules*. These items are *tools* that we use to educate filers and help get them to yes, without exposing Ohio investors to undue risk. These are the same tools that other regulators use as well, without running them through the rulemaking process.

1. Regulatory Comments

I am going to start with regulatory comments. As I mentioned, when a sponsor registers with us, my staff reviews the filing to make sure it complies with our statutory standard. There can be dozens of comments on a file and my staff probably issues thousands of comments over the course of the year. A comment could be something as simple as my staff telling an issuer that it failed to include updated financials or it could be a comment in the nature of an inquiry, for example, asking an issuer to explain how a questionable piece of advertising complies with our prohibition against practices that "tend to deceive or defraud investors."

The notice for today's hearing does not identify any specific policy of law or any specific comments, the notice just references all comments categorically. In other conversations last

year, IPA cited as an example a comment that my staff previously issued involving issuer distribution of offering proceeds – the practice of paying existing investors back with new investor money (or even their own money). This practice has been frowned upon by regulators for a long time, but my staff thought that the practice conflicted with a new federal rule that recently went effective. IPA disagreed with their analysis and raised the comment with me. I looked at the issue and agreed with IPA. The staff comment was formally withdrawn in under a week.

Ninety-five percent (95%) of the time, comments are resolved just like that and the deal gets cleared. The SEC and other states follow the same process, *without* submitting their comments through APA rulemaking. If comments had to go through rulemaking, registration would come to a standstill. Our attorneys are experts in securities laws and are well-versed in finance. Still, it takes them hours to get through one of these files. If comments went through rulemaking, JCARR staff would need to start reviewing these deals for compliance with Ohio and federal securities laws. When that idea came up last year, everyone with whom I spoke at JCARR and the Committee seemed to agree that it would be impractical and inadvisable to run staff comments through JCARR review.

2. Ohio Securities Bulletin

I will now shift to the next item under consideration, the Division's commentary in the *Ohio Securities Bulletin*. The *Bulletin* is a quarterly newsletter that the Division has issued for nearly fifty years. The *Bulletin* offers commentary on a lot of different issues, but the Division does not promulgate rules *through* the *Bulletin*. As with regulatory comments, the notice for today's hearing does not identify any specific policy of law emanating from any specific *Bulletin* article. In other discussions last year, IPA pointed to two articles from a few years back that discussed advertising. In those articles, staff offered practitioner tips on how to avoid compliance snags.

There was no new rule, legal principle, or formal policy statement articulated in either article. Misleading advertising has always been a violation as it tends to deceive and defraud investors. Commentary reminding issuers to comply with the law (and offering tips on how to comply) does not convert old prohibitions into new rules. The SEC and other state regulators also issue newsletters and alerts along the very same lines. None submits their newsletters to APA rulemaking. As with regulatory comments, everyone that we met with from JCARR and the Committee last year seemed to agree that it would be impractical and inadvisable to run our newsletters through JCARR.

3. Statements of Policy

The third item on the hearing list are NASAA statements of policy. As I mentioned earlier, states work through NASAA to provide greater uniformity and consistency from state to state. NASAA does promulgate model rules that are formal and binding in nature. When the Division adopts NASAA model rules, the Division goes through formal rulemaking. During our five-year rule process last year, the Division did just that and formally adopted a few NASAA model rules –

rules requiring investment advisers to maintain cybersecurity and succession planning policies, for example. No one, not even IPA, objected to those rules.

NASAA statements of policy like the REIT guidelines, on the other hand, are not rules. By design, they are *informal* and *non-binding* interpretive guidelines used to promote consistency from state to state.

When it comes to registration by coordination (the type of registration which most IPA members apply for), states are looking at the same deals and have the same or similar statutes. NASAA guidelines are intended to help issuers by letting issuers know states will interpret their statutes the same way (even if worded slightly differently). Because these guidelines are informal and nonbinding, states can and do waive or modify them on a filing-by-filing basis.

Given their non-binding, flexible nature, the Division has never viewed the NASAA guidelines as hard and fast rules. These guidelines have been applied for decades and no one, not even IPA, has ever suggested they be incorporated into Division rules until now. Moreover, while some states have formally adopted NASAA Statement of Policies into their rulebooks, it is my understanding that most states have not done so. The same is true for the federal regulator, the SEC, and its approach to non-binding compliance and disclosure interpretations ("CD&Is"). The SEC does not incorporate its CD&Is into its rules either.

Policy Incorporation Rule

Considering the informal and non-binding nature of the NASAA guidelines coupled with IPA members' longstanding knowledge and daily use of them, it would not appear that the conditions warranting rulemaking per R.C. 101.352 are present here. The guidelines are already linked on the Division's website and impacted businesses have used them for years as a how-to guide to getting registered all across the country. That said, Vice-Chair Callender and Director Wolpert asked me last year if the Division *could* undertake a rulemaking effort to incorporate the NASAA guidelines into a rule. I said, yes, we could do that if that is the direction that the staff and Committee would like for us to follow. I was advised that a letter memorializing the Division's commitment to undertake a rulemaking review to incorporate the NASAA guidelines would resolve the matter for JCARR's purposes and obviate the need for the hearing. We delivered the requested letter that day.

Following that letter, the Division communicated with stakeholders regarding the incorporation of NASAA Statements of Policy into Division rule and circulated a draft rule to accomplish that objective in April. The draft was modeled after the few rules that do exist, which incorporate NASAA guidelines into rule at the state level. The only stakeholder to provide feedback was IPA. IPA opposed the draft rule because it did not, among other things: (1) direct JCARR review of regulatory comments and newsletters;(2) separately identify NASAA guideline by title and date; or (3) repeat verbatim the full text of the various NASAA guidelines in the Division rule.

The Division responded to IPA's feedback in May, indicating its willingness to tighten up the language identifying the NASAA guidelines with greater specificity, but expressing opposition to folding in regulatory comments and newsletters into the rule *and* declining the request to repeat

the full text of NASAA guidelines in rule. Regarding the latter, the Division pointed to the JCARR Procedure Manual, stating "If an agency references a text or other material into a rule, it is the same as reproducing the entire text or material word for word in the rule." The Division conferred with JCARR staff and confirmed that citation to the reference is sufficient and reproduction of the entire text is not required. In late June, IPA opposed the Division's approach to a revised draft, repeating its demand that the Division's rule sweep in comments, newsletters, and the full text of NASAA guidelines.

For reasons already explained, we do not think it is practical or advisable for the Division to run regulatory comments or newsletters through JCARR. No other federal and state securities regulator does this and no Ohio agency regulating any other industry or profession does it either.

Regarding the NASAA Statements of Policy, however, the Division voluntarily agreed to incorporate these policies into rule and has initiated that process. While the Division's approach may not be the approach preferred by IPA, it is the approach that JCARR encouraged to get this matter resolved. Unless the Committee directs otherwise now, the Division will continue with the approach outlined – moving forward with its draft rule that formally incorporates NASAA Statements of Policy. To confirm, the Division will not submit its staff comments on filings or its quarterly newsletters to JCARR as these items are not policy statements requiring incorporation or adoption into rule.

With that, I thank you for the opportunity to respond on the agency's behalf and would be happy to take your questions at this time.

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December 12, 2022

* * *

Chair Gavarone, Vice-Chair Callender, and Members of the Committee, my name is Tom Geyer. I am an attorney with the Columbus-based law firm Bailey Cavalieri LLC, where I practice in the areas of insurance, corporate, and securities law. Before joining Bailey Cavalieri in 2004, I served in Ohio state government for 10 years as an Enforcement Attorney in the Ohio Division of Securities (the "Division"); the Commissioner of the Division; and Assistant Director of the Ohio Department of Commerce. Before serving in state government, I was a corporate and securities lawyer in private practice for three years.

I am not being compensated for my testimony or for any other work in connection with this matter.

The Ohio Securities Act (the "Act") was enacted in 1913. The constitutionality of the Act was upheld by the United States Supreme Court in 1917 (*see Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917)). Federal securities laws were enacted beginning in 1933 to complement the existing state securities laws and provide for enforcement on an interstate basis.

The twin goals of the Act—and of the Division in administering the Act—are to promote capital formation while providing investor protection. This is accomplished through a three-part regulatory process: (1) the registration, or proper exemption from registration, of all securities products sold in Ohio; (2) the licensure, or proper exception from licensure, of all securities professionals in Ohio; and (3) the prohibition on material misstatements and the omission of material information in all securities activities.

This three-part regulatory process—which is identical to the regulatory process of the other states and the federal Securities and Exchange Commission ("SEC")—is animated by statutory provisions, administrative rules, and other regulatory guidance provided by the Division from time-to-time.

Through the Act, the General Assembly connected prongs (1) and (3) in several places, including R.C. 1707.09(G)(2), which provides the Division the discretion to consider whether the business of an issuer of securities "is not fraudulently conducted, that the proposed offer or disposal of securities is not on grossly unfair terms, that the plan of issuance and sale of the securities referred to in the proposed offer or disposal would not defraud or deceive, or tend to defraud or deceive, purchasers…"

This standard is broad—but is a bulwark provision of the Act. Accordingly, over the years the Division has worked diligently to provide additional guidance to securities issuers, securities attorneys, and other securities professionals, in many ways, including:

- Administrative rules
- The Ohio Securities Bulletin (which dates back to at least 1973)
- The Division's website
- The annual Ohio Securities Conference
- The Advisory Committees to the Division
- Published guidelines
- Comment letters

Additionally, the Ohio securities laws, rules, and guidelines are gathered in the two-volume treatise *Ohio Securities Law and Practice* published by Lexis and updated annually.[1]

There is a well-developed culture among securities attorneys that is built on interaction with regulators on both a formal and informal basis. For example, in addition to the federal securities laws and regulations, the SEC writes comment letters, provides interpretive guidance over the phone, issues no-action letters, and provides additional guidance through speeches by senior officials. Securities practitioners know, understand, and appreciate this culture and access to regulatory guidance.

To require administrative rulemaking for each piece of guidance provided by the Division would bring capital formation in Ohio to a grinding halt, and create unnecessary and burdensome bureaucracy.

The Ohio Supreme Court has stated that the Act consists of statutes that "are remedial in nature, and have been drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers ... In order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed." *In re Columbus Skyline Securities.*, 74 Ohio St. 3d 495, 498 (1996).

The current operations of the Division are faithful to this mandate and consistent with the Act.

Thank you for the opportunity to present these remarks. I would be pleased to answer any questions.

[1] I am the co-author of this publication.