August 22, 2012

The Honorable Rick Perry
Governor
P.O. Box 12428
Austin, TX 78711-2428

Dear Governor Perry:

Please find below the Texas Medical Board’s response to the issues raised by Public Citizen in its letter and report to you dated August 22, 2012. Public Citizen provides neither a complete nor accurate assessment of the Board’s enforcement actions. The Board is always focused, first and foremost, on its mission of public protection. And, while Public Citizen shares the same goal, the public is not well served when complex enforcement and public policy issues are inadequately explained.

Adequate Discipline by the Texas Medical Board

Each year, the Federation of State Medical Boards (FSMB), of which TMB is a member, publishes a summary of medical board actions, assigning each state a “composite action index” based on each state’s ratio of disciplinary actions to physicians. The Federation does not offer rankings and, in fact, actively discourages ranking the states due to the diverse disciplinary options and processes used by the various state medical boards.

Despite this caution by FSMB, Public Citizen applies its own formula to FSMB data and arrives at numerical ratings that it uses to create its own rankings. Public Citizen’s numerical ratings are vastly different than FSMB’s. Specifically, if a ranking of the FSMB numbers were to be done, Texas would be in the top five scoring states in both 2010 and 2011. Public Citizen’s numerical ratings place Texas in the high 30s among the states.

Physicians with Clinical Privilege Sanctions by Hospitals

Public Citizen reports that 438 Texas physicians over almost two decades (September 1990 through December 2009) have had one or more clinical privilege actions reported by a hospital in the National Practitioner Databank (NPDB), but did not have any medical board action against them.

For a more recent time period, 2005-2009, the Board has been proactive in obtaining and reviewing NPDB information on clinical privilege reports, and has found that a total of 147 physicians had a clinical privilege report. Of these only 60 had been reported to TMB by hospitals and the remaining
87 reports had never been received by TMB. Since TMB is a complaint-driven entity, it would not be able to take action unless a report had been sent by a hospital.

Additionally, Public Citizen fails to clarify that not all adverse actions taken by a hospital against a physician would necessarily result in an enforcement action by the Board. For instance, if the underlying action by the physician was not a violation of Board rule or the Texas Medical Practice Act, there would be no enforcement action.

Finally, Public Citizen also neglects to mention that since January 2012, the Board has taken affirmative steps to prevent any problems similar to those described above by opting into a new NPDB system which allows any hospital report that is sent to NPDB to also be automatically sent to the Board.

**TMB Enforcement Resources**

Due to the appropriations and staffing levels granted by the 82nd Legislature in 2011, the Board is not currently facing a backlog of enforcement cases and is able to meet the current volume of complaints. The Board is an effective and efficient state regulatory entity. In 2009-2010, the Board experienced a backlog of enforcement cases as stated in the 2011-2015 Strategic Plan, submitted in June 2010. Earlier in 2010, the board instituted hiring freezes due to mandated budget cuts, in response to the economic climate at the time.

The Public Citizen report refers to, and includes as Addendum B, the Board’s 2011 annual report on the status of investigations that are over one-year old, positing that these indicate a “predictable” backlog of complaints. This is a mischaracterization. A “backlog” implies that there are cases for which no activity has occurred. Nothing could be further from the truth. Of the 454 investigations listed in the report, 139 were consolidated into other cases for a total of 364. Of these, the following 219 had either been resolved or were in a formal litigation proceeding:

- 96 (26%) were resolved by the time the report was turned in,
- 28 (8%) had completed investigations but were pending approval at the next board meeting,
- 13 (4%) were waiting on the outcomes of criminal trials, and
- 82 (23%) were actively being prosecuted in a formal trial procedure at the State Office of Administrative Hearings.

The remaining 145 complaints had all been through some level of Board processing, with the majority (83) processed through a full investigation and set for a hearing in the litigation section or already concluded through a hearing. That leaves a total of 62 complaints that had been initially processed by the Board but had not yet gone through a full investigation, out of the over 6,849 complaints received in fiscal year 2010 (less than 1%). None of the complaints were sitting in a backlog status in which no board action or review had occurred.

There are always cases that require additional time due to whatever unique circumstances surround a case in gathering records, finding two expert reviewers, holding a hearing, etc. Even so, any instance where the Board believes that the licensee poses an immediate threat can go through a temporary suspension process to protect the patient.
Continuous Review and Oversight of the Texas Medical Board

As you know, Texas maintains robust oversight of its state agencies. In addition to regularly scheduled Sunset reviews, agencies submit annual or biennial reports on policy, performance, and appropriations issues through strategic plans, legislative appropriations requests, quarterly performance reports, operating budgets, etc. Also, agencies frequently provide updates to the legislative committees that have jurisdiction over them during the legislative interim as well as during the legislative session.

As noted by Public Citizen, the Board went through the Sunset review process in 2005 and had a limited Sunset performance review in 2009. Public Citizen focuses on the finding that the Board did not meet its target performance in 2008 for the percentage of jurisdictional complaints resulting in disciplinary action – disciplining 14 percent of physicians, as compared to the 18 percent target. However, Public Citizen fails to note more current statistics which show that as of FY 11, the Board has met this target.

In addition to fulfilling all reporting requirements, the Board has had a recent substantive review via an interim charge of the Senate Health & Human Services Committee that resulted in legislation in the 82nd Session. All legislative reviews and subsequent statutory changes have culminated in a more effective and efficient enforcement process that continues the board’s mission of public protection.

On behalf of the Board, I want to express our appreciation for your ongoing support. Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

Irvin Zeitler, D.O.
Board President

cc: Sidney Wolfe, M.D., Director, Public Citizen’s Health Research Group
Mari Robinson, Executive Director, Texas Medical Board
Becky Dean, Office of Budget, Policy, and Planning, Office of the Governor