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**Federal Trade Commission**

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**COMMISSION  
APPROVED**

March 18, 1987

The Honorable Garrey Carruthers  
Governor of New Mexico  
State Capitol Building  
Santa Fe, New Mexico 87503

Dear Governor Carruthers:

We are pleased to respond to your staff's request for comments on House Bill 371 which would amend certain provisions of the New Mexico Public Accountancy Act of 1947.<sup>1</sup> In this letter we focus on Section 14 of the bill. This section would prohibit accountants from engaging in any form of solicitation which is directed at "persons not known to be seeking public accounting services or by the use of coercion, overreaching, or harassing conduct." We oppose enactment of this law because it would prohibit truthful, nondeceptive communications in circumstances that pose little or no risk of harm to consumers.

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair or deceptive acts or practices. Under this mandate the Commission encourages competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has had an ongoing program examining the competitive effects of public and private restrictions on the business practices of accountants, dentists, optometrists,

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<sup>1</sup> These comments represent the views of the Dallas Regional Office and the Bureaus of Consumer Protection, Competition, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission has, however, voted to authorize their submission.

lawyers, physicians, and other state-licensed professionals. Our goal is to identify and seek the removal of restrictions that impede competition or increase costs without providing countervailing benefits to consumers.

### BENEFITS OF TRUTHFUL COMMUNICATIONS

Truthful, nondeceptive advertising communicates information about the individuals or firms offering services that consumers may wish to purchase. Such information promotes the efficient delivery of services and facilitates purchasing decisions that reflect true consumer preferences. Empirical evidence suggests that removing restrictions on the dissemination of truthful information about professionals will tend to enhance competition and to lower prices.<sup>2</sup> Although some concern has been voiced that advertising may lead to lower quality services, the empirical evidence suggests that the quality of services provided by firms that advertise is at least as high as, if not higher than, that of firms that do not advertise.<sup>3</sup>

Solicitation is in many ways just a more focused form of advertising. Truthful, nondeceptive solicitation may thus also provide useful information to consumers about the availability of accounting services. As currently drafted, however, Section 14 of the bill would prohibit accountants from using letters, telegrams or other written communications to solicit clients.

The FTC staff believes that there is no need to protect consumers from this type of solicitation. Consumers generally benefit from information about pricing and choices of services. In Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968 (7th Cir. 1986), the Seventh Circuit relied on the First Amendment to sustain a preliminary injunction against

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<sup>2</sup> Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

<sup>3</sup> Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

enforcement of an Illinois Bar Association disciplinary rule banning targeted mailings. The court held that the state had no substantial interest in enforcing such a restriction. The court noted that the consumer may simply throw out a letter or may read it several times and reflect on its contents before making a decision. We believe that the Adams opinion is applicable to the accounting profession and provides compelling support for the proposition that letters, telegrams, and other written communications should be treated no differently from other forms of advertising.

Truthful, nondeceptive in-person solicitation also may provide information to consumers that will help them select an accountant. In-person contacts can convey information about the availability and terms of an accountant's or accounting firm's services and serve the same function in this respect as print advertisements.

#### LITTLE DANGER OF ABUSE

We recognize, of course, that abuses may sometimes result from in-person solicitation. Physically ill or emotionally distressed people may be vulnerable to the exercise of undue influence when face to face with a person soliciting their business. We do not believe, however, that this justifies a restriction on in-person solicitation by accountants. Accountants often encounter potential clients at meetings of business organizations and at social events. Indeed, accountants traditionally have built their practices through such contacts. If an accountant discusses his or her services with a potential client under such circumstances, no undue influence is likely to be involved. In such a situation, the potential client need not respond immediately and can subsequently select an accountant should a need for those services arise. The Federal Trade Commission considered these issues when it decided American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). After weighing the possible harms and benefits to consumers of in-person solicitation, the FTC ordered the AMA to proscribe only uninvited, in-person solicitation of persons who, because of their particular circumstances, were vulnerable to undue influence.

Whatever problem undue influence may present in professions such as law or medicine which deal with issues having a greater and more immediate emotional impact, it is not clear that such abuse is likely in the accounting profession. In this agency's lengthy study of the accounting profession, we found no evidence of an accountant exercising undue influence over a prospective client. Thus, there appears to be no demonstrated need for any

regulation of truthful, nondeceptive solicitation by accountants, and there is certainly no basis for barring virtually all solicitation as Section 14 would do.

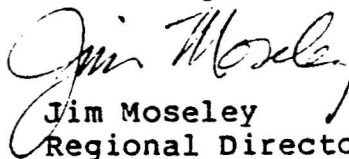
Section 14 of the bill also prohibits solicitation which involves "the use of coercion, overreaching or harassing conduct." Prohibiting solicitation that involves such conduct may be appropriate, depending upon the interpretation of the bill's terms. However, we have found instances where licensing boards and private associations in accounting and other professions have employed such interpretations anticompetitively to ban solicitation that poses no real danger of harm to consumers. For example, a telephone call to a former client at his or her home offering accounting services may be viewed by some as "overreaching." In the absence of any reason to believe that coercion, overreaching or harassment by accountants is likely to be a problem, we suggest that the "coercion, overreaching, or harassing conduct" standard be eliminated.

#### CONCLUSION

In summary, we urge that Section 14 of House Bill 371 be modified to delete the prohibition of "solicitation of persons not known to be seeking public accounting services or by the use of coercion, overreaching or harassing conduct." Such a prohibition is likely to have the effect of impeding competition among accountants, to the ultimate detriment of consumers.

Thank you for considering our comments. We would be happy to supply copies of the studies and materials referenced in this letter if you so desire, or to provide any other assistance.

Sincerely,



Jim Moseley  
Regional Director  
Dallas Regional Office