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BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C 20580

COMMISSION APPROVED

June 12, 1987

William H. Van Rensselaer
Executive Director
National Association of State
Boards of Accountancy
545 Fifth Avenue
New York, N.Y. 10017-3698

Dear Mr. Van Rensselaer:

We are pleased to respond to your request for comments on the May 1987 Exposure Draft of the Model Code of Professional Conduct.[1] In this letter, we focus on the proposed rules regarding contingent fees, commissions, forecasts, advertising, solicitation, and firm names.

We support the proposals in the Exposure Draft to eliminate some of the restrictive aspects of the current rules. The proposed changes would permit increased competition and would benefit consumers by permitting accountants to provide services that consumers want. We suggest, however, that some provisions in the proposed rules may harm consumers by restraining price competition among accountants and unnecessarily limiting the dissemination of truthful information about accounting services.

As discussed in more detail below, we urge the National Association of State Boards of Accountancy (NASBA) to amend its proposed new Model Code so that accountants would be able to (1) receive contingent fees and commissions when providing nonattest services to attest clients; (2) vouch for the achievability of forecasts; and (3) use truthful, nondeceptive advertising and solicitation. Adoption by NASBA's constituent state boards of the new Code, including our suggested amendments, would permit accountants to provide more of the services that consumers want without compromising the independence of accountants who provide attest services.

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[1] These comments represent the views of the Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics and not necessarily those of the Commission itself. The Commission has, however, voted to authorize us to submit these comments for your consideration.

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission staff has investigated the effects of restrictions on the business practices of state-licensed professionals, including accountants, dentists, lawyers, physicians, nonphysician health care providers, and others. Our goal has been to identify and recommend the removal of restrictions that prevent professionals from providing services that consumers want if those restrictions do not provide countervailing benefits. We believe that some of the rules in the current Model Code -- and to a lesser extent, some of the proposals in the May 1987 Exposure Draft -- will result in such adverse effects.

Contingent Fees and Commissions Received

Rules 103 and 104 in NASBA's current Model Code[2] prohibit the receipt of virtually all contingent fees and commissions for attest and nonattest services.[3] Thus, a consumer's choice of the method of payment for accounting services is limited to hourly or fixed fees. Consumers are prevented by these rules, for example, from agreeing with an accountant that his fee for preparing a tax return will be a percentage of the refund, if any, or that the only fee for preparing a financial plan will be the commissions received by the accountant if the client decides to purchase any of the recommended investments.

For reasons discussed below, the current restrictions may increase the cost to consumers, decrease the availability, and eliminate an incentive to improve the quality of nonattest accounting services. The restrictions on the use of contingent

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[2] References to the current Model Code rules are to those appearing in Accountancy L. Rep. (CCH) ¶¶ 1201-47 (1987).

[3] A "contingent fee" is defined in the current Code as a fee for professional services that is contingent upon the findings or results of such services.

A "commission" is defined in the current Code to include a payment to obtain a client or the receipt of a payment for a referral to a client of products or services of others. The receipt of such payments, as well as the receipt of profits from his sale of products, is termed "other compensation" in the Exposure Draft. Our discussion of commissions also applies to such profits.

By "attest services" we mean an accountant's report that states or implies assurance of the reliability of any financial statements. Such services include audits and reviews. Nonattest services include tax, management advisory, reimbursement, and financial planning services, among others.

fees and commissions for nonattest services prevent consumers from selecting a payment method under which the accountant would bear a portion of an engagement's risk, in the sense that the amount the accountant received would depend on how successful the accountant is. This may restrict the ability of some consumers to obtain desired accounting services and reduce the incentive of accountants to provide higher quality services. These restrictions may also raise consumers' costs by, for example, eliminating the option of one-stop shopping for accounting services. We have studied the accounting profession for several years[4] and have seen no evidence that these restrictions on nonattest services enhance the quality of accounting services, nor have we found any other persuasive justification for them.

Proposed Rules 101(b)(3) and (4) would be less restrictive than the current rules. They would prohibit the receipt of contingent fees and commissions only with respect to clients for whom the accountant also provides attest services. The proposed rules, if adopted, appear less likely to harm consumers than the current rules, but continue to place unjustified restrictions on accountants' ability to provide services demanded by consumers. We therefore suggest that NASBA eliminate all restrictions on the receipt of contingent fees and commissions for nonattest services.

As suggested above, contingent fees may benefit consumers in a variety of ways. For example, a state government that desires accountant assistance to obtain a Medicare refund from the federal government may want to pay an accountant a percentage of the recovery in return for his services. If the accountant is willing to undertake the project on a contingent fee basis, this informs the state that the accountant is reasonably confident the project will result in a significant refund. This arrangement also shifts to the accountant a portion of the risk of the engagement, because the accountant's fee will depend on the amount recovered. And because the accountant will receive a payment that is dependent on the success of his services, e.g., a greater fee if the claim results in a larger Medicare refund, he has an incentive to provide higher quality services.[5]

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[4] Beginning in the late 1970s, the Commission staff conducted a number of nonpublic investigations of private accounting associations and state accounting boards to determine whether any of them have violated the Federal Trade Commission Act. One of these investigations, involving restraints on advertising and solicitation, resulted in a consent order, Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986). During these investigations, the staff read thousands of documents and interviewed more than one hundred accountants.

[5] Accountants would, of course, remain subject to legal and ethical restraints on engaging in fraud to secure a higher refund.

It may be most efficient for the accounting firm familiar with a client's books and records by virtue of providing attest services also to provide certain nonattest services to the same client. But the benefit of this efficiency is lost if the client insists that the nonattest services be provided on a contingent fee basis. In that event, the current ban on contingent fees would force the client to use less preferred providers who are not accountants to perform services that the client's auditor could provide more efficiently. The duplication of effort is costly, as is the use of less preferred providers, and would be likely to result in a loss in consumer welfare. Eliminating the ban on contingent fees should lead to lower consumer costs, higher quality services, and greater availability of accounting services to consumers.

Similar consumer benefits may result if accountants are allowed to receive commissions, for example, on the sale of financial products to clients. If a consumer desires an accountant's assistance in preparing a financial plan, he may wish to pay for it only if he concludes that it will be useful. If the accountant is willing to undertake preparation of a plan in the expectation of being compensated only through commissions on the sale of investments, the accountant communicates the belief that the plan will be useful to the client. He also shoulders the risk that the client will not be persuaded that the plan is useful. Moreover, the better the financial plan (as measured by the client's decision to implement its recommendations), the more likely it is that the accountant will receive commissions. Thus, the commission arrangement may motivate him to provide higher quality services as well.

If accountants can receive commissions, consumers may have an additional benefit: the option of one-stop shopping for financial planning services. Some clients may prefer to have one professional prepare and implement a financial plan by recommending and purchasing investments, rather than have an accountant prepare a plan that must be implemented by others, such as stockbrokers.[6]

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[6] Currently, accountants engaged in financial planning who are restricted by the commission rule may provide consumers with a financial plan only for a fixed or hourly fee. Such plans generally provide only an outline of the steps to take to achieve the client's goals; the recommendation of particular investments is left to others, such as stockbrokers, who will receive commissions on the client's purchases. To obtain a broker's recommendations most suitable to the plan, the client must familiarize the broker with the details of the client's situation and the plan. As further assurance that the recommendations are appropriate, the client may decide to take the broker's recommendations back to the accountant for his review before

In the course of preparing the plan, the accountant is likely to become intimately familiar with the client's financial situation and risk preferences. In fact, the accountant is likely to be familiar already with the client's financial situation if the accountant has performed other services for the client, such as preparing his tax returns. This familiarization process can require a substantial amount of the client's time and the development of trust in the accountant, and these may be important costs for the client. The benefits to the client of one-stop shopping, the saving of time and effort to establish a knowledgeable, trusting relationship, may be lost if the commission restriction forces consumers to obtain financial planning services either from nonaccountants or from their accountants and one or more additional sellers of financial products.

The Supreme Court and the Federal Trade Commission have held that it is illegal for competitors to agree to eliminate consumer choice among pricing arrangements. The Commission found that the American Medical Association's ethical rule requiring its members to use only the "fee-for-service" method of compensation was unlawful because it restricted competition and lacked any procompetitive justification.[7] The Commission reasoned that the restriction, even without a direct impact on price, precluded the use of other more cost-efficient arrangements.[8] The Court has likewise condemned agreements among competitors to eliminate credit terms,[9] prohibit competitive bidding,[10] and set minimum

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completing purchase of the investments. Some consumers may view this accountant-stockbroker-accountant process as too costly in terms of time and effort.

[7] American Medical Association, 94 F.T.C. 701, 1015 (1979), aff'd, 683 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

[8] Id. at 1016.

[9] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). An agreement among competing wholesalers to eliminate giving credit was "tantamount to an agreement to eliminate discounts which thus falls squarely within the traditional per se rule against price fixing." Id. at 648. The Court noted that it had held in FTC v. Cement Institute, 333 U.S. 683 (1948), that a "horizontal agreement among competitors to use a specific method of quoting prices may be unlawful." 446 U.S. at 647-48.

[10] National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

fees.[11] The principle of consumer sovereignty underlying these decisions implies that the proponents of restrictions on consumer choice should have the burden of showing why they are needed.

Supporters of the restrictions may assert that the rules are necessary to protect investors who may rely upon attest services, but who are not parties to the agreements between accountants and their clients. Their claim is that contingent fees and commissions would impair the accountant's independence or at least the appearance of his independence. We agree that an accountant providing an attest service must be independent when performing that service. We do not believe, however, that there is any evidence that restrictions on contingent fees or commissions for nonattest services provided to attest clients are necessary to preserve such independence.

NASBA apparently recognizes that absolute independence is not necessary to maintain the reliability of attest services. For example, neither the current nor the proposed rules prohibit accountants from providing nonattest services on a regular fee basis for an attest client, regardless of the amount of such services or the magnitude of the fees paid for them. Clearly, however, excessive payments for such services -- or the need to assess their utility in performing an audit[12] -- could appear to undermine independence. Moreover, neither the current nor the proposed rules prohibit accountants from maintaining long-term attest-client relationships that may also undermine the fact or appearance of independence. The lack of necessity for absolute independence is confirmed by the most recent report of the Public Oversight Board, stating that, "there is no evidence that the performance of MAS engagements [a nonattest service] has impaired auditor independence or objectivity."[13]

We do not believe that allowing contingent fees or commissions for nonattest services will impair independence. Assuming that a higher-than-normal fee for nonattest services might motivate an accountant to engage in fraud in auditing a client, the higher fee could be paid as easily under an hourly or

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[11] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[12] For example, the auditor is required to assess the reliability of the firm's financial control system that may have been installed on the recommendation of the auditor's firm while performing a nonattest engagement for the audit client.

[13] Public Oversight Board, 1985-86 Annual Report 16. The Public Oversight Board is an organization established by the American Institute of Certified Public Accountants (AICPA) and relied upon by the SEC to oversee peer review of the auditing procedures of AICPA member firms that audit public corporations.

fixed fee arrangement as under a contingent fee or commission arrangement. Thus, we have no reason to believe that the payment of contingent fees or receipt of commissions for nonattest services would pose any additional risk to investors or others who rely upon accountants' audits.

The proposed rules might also diminish rivalry among accountants for both attest and nonattest business. Accountants who provide attest services might refrain from competing to provide nonattest services for a contingent fee or commission to the same clients, because if they were awarded the engagement, they would have to refrain from performing further attest engagements. For similar reasons, accountants who provide nonattest services for a contingent fee or commission might refrain from competing to provide attest services to the same clients. These losses in rivalry might result in reduced consumer choice among alternative providers and an adverse effect on consumer welfare.

In sum, the proposed contingent fee and commission rules appear less likely to harm consumers than the existing rules. By allowing accountants to provide more information and a broader range of services, they will permit greater competition in the provision of nonattest services. Nonetheless, the proposed rules as presently written appear likely to continue restricting consumer choice and competition among accountants without providing any countervailing benefits.[14] Therefore, we urge NASBA to amend its rules to eliminate all restrictions on commissions and contingent fees for nonattest services.[15]

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[14] We recognize that the proposed Model Code includes a provision permitting accountants to accept commissions or contingent fees without impairing independence when those payments are "immaterial in relation to the aggregate normally-recurring fees charged annually to the client for reports on financial statements during the same time period." This exception to the restriction suggests that contingent fees and commissions do not inherently impair an accountant's independence, but only impair independence if the payments become a material part of the aggregate fees. Yet the proposed Model Code does not prohibit accountants from accepting hourly fees for nonattest services when those fees are material in relation to aggregate fees paid for attest engagements. If the latter does not impair independence, it seems reasonable to conclude that contingent fees and commissions for nonattest services will not impair independence even if they become material in relation to aggregate attest fees.

[15] The proposed Code of Professional Conduct would also delete current Rule 105, "Incompatible Occupations," which proscribes occupations impairing an accountant's independence or

Disclosure of the Receipt of Commissions and the Payment of Referral Fees

Current Rule 103 prohibits accountants from receiving commissions if their clients purchase recommended products and services and from paying commissions to obtain clients. Proposed Rule 103 would permit the receipt of commissions.[16] Proposed Rule 104 would permit the payment of commissions to obtain clients (hereafter termed "referral fees"). Both proposed rules would require accountants to disclose to their clients the receipt of commissions and the payment of referral fees.[17] We support repeal of the current rule, but suggest that disclosure requirements be adopted only if NASBA concludes that, absent disclosure, consumers are likely to be misled about the basis for recommendations or referrals. In addition, we recommend that NASBA avoid imposing unnecessary disclosure costs on accountants and consider whether any disclosure requirement need be permanent.

Referral fees are likely to stimulate referrals, which benefit consumers by making more information available to them and reducing their cost of finding appropriate accountants.[18] Some accountants have proposed paying referral fees to marketing firms as a means of motivating them to disseminate information about the accountants' services. Other accountants have proposed paying referral fees in the form of rebates to their clients in return for referring new clients.

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objectivity. Our investigation indicates that state professional regulatory boards and private professional associations have used an Incompatible Occupations rule to restrict accountants from engaging in those occupations, such as financial planning, in which practitioners normally receive contingent fees or commissions. Because we believe such payment arrangements are generally procompetitive, we support the repeal of the Incompatible Occupations rule.

[16] Proposed Rule 103 uses the term receipt of "other compensation", which includes commissions, payments, and profits for recommending, referring or selling products and services of others. For simplicity, we use the term "commissions."

[17] In these comments, we do not address the requirement that the receipt of other compensation must be disclosed to nonclients, nor do we address the differences in disclosure requirements for those receiving other compensation and those paying commissions.

[18] At pages 4-5, *supra*, we discussed the consumer benefits likely to result if accountants are able to receive commissions on products and services their clients buy.

Supporters of the current prohibitions have argued that the accountant to whom a client is referred will increase the total price charged in order to recoup the referral fee. We do not believe this is a valid concern. First, accountants cannot raise their prices without losing at least some clients who are price-sensitive. Second, the accountant who pays referral fees has evidently decided to incur costs to attract new clients. Prohibiting the payment of referral fees is not likely to prevent the accountant from engaging in alternate forms of marketing that may similarly affect his costs.[19] Third, if an accountant refers a client to another accountant who has greater expertise concerning the accounting project, the total cost of serving the client (referral fee included) may be lower and may result in lower charges to the client.

Supporters of the current ban also assert that the payment of referral fees and the receipt of commissions can motivate accountants to make inappropriate recommendations, referrals and sales. Further, to the extent consumers are unaware that an accountant's recommendation or referral could be influenced by financial considerations, they arguably may be misled about the appropriateness of the suggested course of action.

Consumers may in fact assume that accountants' recommendations are based on objective analysis, uncolored by the receipt of commissions that might influence those recommendations. Accountants now frequently advertise that they do not receive commissions when clients purchase recommended products or services. Consumers might view these recommendations differently if they knew their accountants were receiving commissions on these purchases. As some accountants begin to accept commissions, accountants who do not accept such payments may stress this difference in their advertising. Thus, consumers are likely to learn that some accountants' recommendations may be influenced by the receipt of commissions. Over time, such advertising should lead consumers to inquire whether their accountants accept commissions, if that fact is important.

Nonetheless, until consumers become aware that some accountants accept commissions, there is a possibility of consumer deception. This problem may be solved, as the Exposure Draft proposes, not by prohibiting the receipt of payments but by requiring their disclosure. We believe, however, that a permanent disclosure requirement is unnecessary. NASBA might wish to consider requiring disclosure for a short period until consumers

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[19] Further, if referral fees were less cost efficient than other ways of attracting clients, accountants would be unlikely to use them. A rule that has the effect of requiring substitution of alternative marketing methods is likely to increase the accountant's costs, not reduce them.

become accustomed to the fact that some accountants receive commissions. Further, it is important to minimize any unnecessary costs of this mandated disclosure, and we therefore recommend against the proposed requirement that an accountant disclose the nature, source, and amount of commissions received. A consumer, once alerted to the fact that an accountant will receive commissions, is free to ask for additional information if that is important to the consumer's decision.

Different considerations arise in determining whether to mandate disclosure of the payment or receipt of referral fees. Although current advertising by accountants stresses that they do not receive commissions based on the purchase of products and services, such advertising has not addressed the distinction between those who do and who do not pay or accept referral fees. Thus, if consumers are unaware that some referrals may be based on financial considerations, disclosure might be appropriate to assure that consumers can assess referrals effectively. However, because costs are associated with disclosure requirements, any disclosure mandated by NASBA should be limited to the fact that referral fees are paid or received.

In sum, we support the proposal to repeal the current rule prohibiting accountants from paying referral fees and from receiving commissions. If NASBA determines that disclosure should be required, we suggest that it be limited to the fact that commissions or referral fees are paid or accepted, and that care be taken to avoid imposing any unnecessary costs on accountants. Finally, we suggest that NASBA consider whether any disclosure requirement need be permanent.

Forecasting

The Exposure Draft proposals, if adopted, apparently will continue to prohibit accountants from vouching for the achievability of a forecast.[20] Currently, an accountant's statement that he has examined a forecast prepared by someone else provides some assurance of the forecast's reliability. If accountants were

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[20] A forecast is a financial statement that presents an entity's anticipated financial position, results of operations, and changes in financial position. Although the Exposure Draft proposes deleting current Rule 204, which expressly prohibits accountants from vouching for the achievability of a forecast, the accompanying Comment indicates that no substantive change is being made in the prohibition. Forecasts are included within the new definition of financial statements, and proposed Rule 202 (Auditing Standards) requires attesting accountants to comply with "pronouncements having generally recognized authority." It is our understanding that such "authority" prohibits accountants from vouching for the achievability of a forecast.

allowed to vouch for the achievability of forecasts, some accountants might estimate, for example, the probability that a forecast sales figure will be achieved. This type of vouching might provide additional useful information to consumers who use forecasts in making investment decisions.[21] Thus, we urge NASBA to adopt a rule permitting accountants to state nondeceptively their beliefs about the achievability of forecasts.

Repealing the vouching prohibition appears likely to provide investors with more information about the likelihood of achieving the forecasted outcome, thereby enhancing the value of forecasts to consumers. Because the future always entails some uncertainty, prohibiting claims of 100 percent assurance about the future may serve to eliminate false or misleading statements. The current rule, however, appears to prohibit accountants not only from stating with absolute certainty that a forecast will be achieved, but also from providing truthful, nondeceptive information about the likelihood that a forecast may be achieved. Examples of such information include statements that there is an 80 percent probability that a forecast will be achieved; that all the assumptions in a forecast are sufficiently conservative that an accountant with a reputation for expertise in a particular industry deems it more achievable than most that he has reviewed; or that a part of a forecast, such as one of its assumptions, is likely to be achieved. In the absence of vouching, second best and more costly methods of obtaining such information may have to be used, and decisions are likely to be made on the basis of less information or less reliable information, resulting in a misallocation of society's resources and a loss in consumer welfare.

In the absence of vouching restrictions, accountants might compete more vigorously among themselves by accepting greater responsibility for predicting the achievability of forecasts, thereby enhancing the usefulness of forecasts to consumers. Existing restrictions on vouching may have encouraged accountants to minimize their personal responsibility for the reliability of the forecasts they have reviewed. This lack of responsibility is likely to result in lower quality forecasting and less investor confidence in forecasts examined by accountants. Recognizing the litigation risks and potential damage to their reputations, accountants would have an incentive to accept greater responsibility for a forecast only where the conservativeness of the forecast warranted such risk-taking.

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[21] The current rule prohibits accountants from permitting their names to be used in conjunction with any forecast in a manner that implies to the recipient of such forecasts that the accountant vouches for the achievability of the forecast. We are not aware of any evidence suggesting that the rule has been applied to prohibit an accountant from helping a client assess a company's forecast.

Potential justifications for the current restrictions on forecasting do not appear persuasive. One argument is that forecasts already disclose sufficient information for investors to evaluate achievability on their own, without advice from an accountant or other expert. Accountants who have developed industry expertise by reviewing many forecasts, however, may be in a better position to assess achievability, and should not be prevented from communicating their opinions. Another argument in favor of the restriction might be based on the fear that some accountants would vouch for forecasts that do not warrant much confidence. This might discredit forecasting services, or even all accounting services, in the public's estimation. This, however, does not appear likely because accounting firms would bear substantial costs, including potential litigation losses and a deterioration in their reputations, if they provided unreliable forecasting services.

In sum, we believe that permitting accountants to vouch for the achievability of forecasts is likely to increase the amount of information available to consumers and improve the quality and usefulness of forecasts. Accordingly, we urge NASBA to amend proposed Rule 202 to permit accountants to state nondeceptively their beliefs about the achievability of part or all of a forecast.

Advertising and Solicitation

Proposed Rule 403 would delete the provisions in NASBA's current Rule 403 prohibiting testimonials, laudatory statements, representations as to specialties, and current Rule 404 prohibiting in-person solicitation by accountants. Because truthful, nondeceptive advertising and solicitation benefit consumers, we support the proposed repeal of these restrictions. We urge NASBA to modify its rules further, however, by deleting the restriction on communications using "coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct."[22]

The beneficial effects of advertising and solicitation are widely recognized. Truthful, nondeceptive messages communicate to

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[22] Rule 403 in the Exposure Draft defines "false statements" to include any claim that is likely to create false or unjustified expectations of favorable results. On its face, this provision appears to restrict only false or misleading claims. Other professional self-regulatory entities, however, have interpreted similar provisions broadly to prohibit truthful, nondeceptive advertising of information, such as past results, that may be useful to consumers. We urge NASBA to include in the Comment to this Rule a statement that it should not be so interpreted.

potential purchasers information about individuals or firms offering the services that consumers want. Such information helps consumers make purchase decisions that reflect their preferences and promotes the efficient delivery of services. Empirical evidence suggests that the removal of restrictions on information dissemination will tend to enhance competition and lead to lower prices.[23] Although some have voiced concern that the dissemination of information through advertising or solicitation 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, firms that do not advertise.[24]

Current Rule 403 prohibits the use of testimonials, laudatory statements, and representations as to specialties[25] and Rule 404 prohibits direct solicitation by accountants. All these forms of communication may provide truthful, nondeceptive information to consumers. Advertising by means of testimonials has traditionally been recognized by sellers of goods and services as an effective means of conveying information to consumers and attracting and retaining consumer interest in the advertiser's message. Laudatory statements also can communicate truthful, nondeceptive information to consumers. Even if they are subjective, laudatory statements about a professional's services are useful in suggesting to consumers the attributes of his practice that he considers most important. This may help consumers distinguish among accountants and select one appropriate for their needs. A representation as to one's specialty can convey truthful information about an accountant's skills in a specific area. There are many ways to obtain expertise, and information that an accountant has experience or training in a particular field is clearly useful to consumers. In fact, the truthful use of the terms "specialist" or "practice limited to" may be the most

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[23] 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).

[24] Muris and McChesney, <u>Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics</u>, 1979 Am. B. Found. Research J. 179.

[25] The rule on its face does not appear to prohibit truthful, nondeceptive representations as to specialization. Current Rule 403(F) defines as false a claim that states or implies "that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy, if this is not the case." Some professional self-regulatory entities, however, have interpreted similar rules broadly to prohibit truthful, nondeceptive claims of specialization.

efficient way to communicate this information, and we are aware of no evidence that the truthful use of those terms in accounting is likely to mislead consumers.

Finally, direct solicitation can also be effective in disseminating truthful information to consumers. In-person contacts can convey information about the availability and terms of an accountant's services, and they serve the same function in this respect as print advertising. We recognize that abuses may sometimes result from in-person solicitation by professionals, but that possibility does not justify a prohibition on all such activity. After weighing the possible harms and benefits to consumers of solicitation by physicians, the Federal Trade Commission ordered the AMA to eliminate its blanket ban on solicitation because it was broader than reasonably necessary to prevent any abuses in solicitation.[26]

The Exposure Draft proposes to retain the current restriction on communications using "coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct." We certainly do not endorse abusive conduct, but we are concerned that state boards may interpret these somewhat ambiguous restrictions in an overly broad way to restrict truthful, nondeceptive advertising or solicitation under circumstances that pose no danger of harm to consumers. During our investigations of the accounting profession, we have never found any evidence that accountants have engaged in or are likely to engage in abusive solicitation. It does not appear likely that accountants would find abusive conduct to be an effective marketing device. In the absence of evidence that accountants are likely to rely on coercion, duress, or similar abuses to obtain clients, we suggest that NASBA consider deleting the restriction on abusive communication.

In short, we urge that NASBA repeal the current prohibitions on the use of testimonials, laudatory statements, representations as to specialization, and reconsider the need for a prohibition of abusive communications by accountants. Because false and deceptive communications would still be banned, these modifications would permit prospective clients to obtain more information than the existing rules allow, and should therefore assist consumers in making more informed choices about accounting services.

Firm Names

We support proposed Rule 404 permitting the use of

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[26] 94 F.T.C. at 1008-11, 1037-38.

nondeceptive trade names.[27] Such names can efficiently convey truthful, nondeceptive information about a firm, including its location, fields of practice, and other characteristics that may be useful to consumers. For example, the name "Georgetown Financial Planners" informs consumers that the firm is located in Georgetown and that it specializes in financial planning services. Based on our accountant investigations, we believe that information about a firm's specialty is particularly useful to consumers. We are aware of no justification for prohibiting all trade names.

Supporters of a ban on trade names may argue that they are deceptive. We agree that deception should be prohibited, but trade names are not inherently misleading as to the identity of or services provided by an accounting firm. Like any other name used in trade, an accounting firm name identifies the firm and comes to be associated with the services that the firm offers. As the Comment to the proposed rule states, trade names convey no less information to consumers about the identity of the accountant who will actually provide the services than do firm names that contain the names of deceased partners, such as Arthur Anderson, or firm names that do not list the names of all accounting practitioners within the firm.

The use of a name that informs consumers of a firm's location, specialty, or other characteristics of its practice is a form of advertising. The United States Supreme Court has ruled that regulation of advertising is permissible if the advertising is inherently misleading or the record indicates that the advertising has, in fact, been misleading.[28] On the other hand, the Court has also made clear that states may not absolutely prohibit the dissemination of information merely because it has the potential to be misleading, if it could also be presented in non-misleading ways, and that advertising restrictions "may be no broader than reasonably necessary to prevent deception."[29] The Court observed that, in an earlier decision, it had allowed Texas to prohibit optometrists from practicing under trade names[30] because the record contained evidence of a "considerable history in Texas of deception and abuse" through such names.[31] In the

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[27] By "trade names" we mean firm names other than the names of current or former partners or shareholders. Some state accounting boards refer to such trade names as "fictitious" names.

[28] See, In re R.M.J., 455 U.S. 191, 202-203 (1982).

[29] Id. at 203.

[30] Friedman v. Rogers, 440 U.S. 1 (1979).

[31] 455 U.S. at 202.

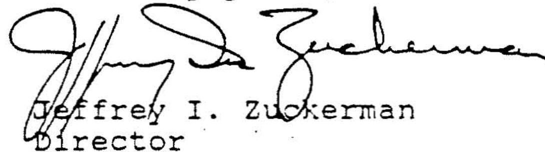
Texas decision, however, the Court did not hold that trade names were inherently misleading. It simply addressed the constitutionality of the Texas law, not whether it was the best means of protecting consumers. We are not aware of any evidence indicating that accountants have used or would be likely to use deceptive names. Thus, we support the Exposure Draft's proposed rule that allows the use of nondeceptive trade names.

Conclusion

The new Model Code of Professional Conduct, if adopted by state accounting boards as set forth in the May 1987 Exposure Draft, would benefit consumers by relaxing restrictions in the current Model Code. Nonetheless, certain provisions appearing in the new Code, if adopted without further revision by the state boards, appear likely to reduce consumers' ability to obtain the accounting services they want. These objectionable provisions impose unnecessary restrictions on price competition and on the dissemination of information about accounting services. We urge NASBA to revise its proposed new Model Code by amending (1) Proposed Rule 101 to permit contingent fees and commissions for nonattest services provided to attest clients, (2) Proposed Rules 103 and 104 to limit disclosure of the receipt of commissions and the payment of referral fees, if any disclosure is deemed necessary, to the fact of receipt or the fact of payment, and (3) Proposed Rule 202 to permit vouching for the achievability of forecasts. We also suggest that NASBA reconsider the need for a prohibition of abusive communications by accountants and that it consider whether any disclosure requirement need be permanent.

We hope that this letter will be of assistance in identifying rules that may restrict competition and limit consumer choice, and we appreciate having had the opportunity to present these views.

Sincerely yours,



Jeffrey I. Zuckerman
Director