

IN THE MATTER OF
AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3297. Complaint, July 26, 1990—Decision, July 26, 1990

This consent order prohibits, among other things, the American Institute of Certified Public Accountants (AICPA) from restricting CPAs from providing professional services for a contingent fee or a disclosed commission to any person for whom the CPA is involved in any particular situation is not also performing an attest service. Respondent also is prohibited from restricting CPAs' use of referral fees that are disclosed and from preventing CPAs' use of truthful, nondeceptive advertising, solicitation, or trade names. In addition, AICPA is required to distribute a copy of the order and any revised ethics rules to its members.

Appearances

For the Commission: *Anthony L. Joseph* and *Michael D. McNeely*.

For the respondent: *Louis A. Craco, Willkie, Farr & Gallagher*,
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the American Institute of Certified Public Accountants, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Institute of Certified Public Accountants ("respondent" or "AICPA") is a corporation formed pursuant to the laws of the District of Columbia. Respondent is a voluntary association of approximately 264,000 certified public accountants ("CPAs"), who comprise approximately three-quarters of the CPAs in the United States. Its principal business office is located at 1211 Avenue of the Americas, New York, New York.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. "*Attest service*" means providing (1) any audit, (2) any review of a financial statement, (3) any compilation of a financial statement when the certified public accountant ("CPA") expects, or reasonably might expect, that a third party will use the compilation and the CPA does not disclose a lack of independence, and (4) any examination of prospective financial information;

B. "*Commission*" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

C. "*Contingent fee*" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service; and

D. "*Referral fee*" means compensation for recommending or referring any service of a CPA to any person.

PAR. 3. Except to the extent competition has been restrained as herein alleged, many of respondent's members in the practice of public accounting have been and are now in competition among themselves and with other CPAs.

PAR. 4. Respondent is a corporation organized for the purpose, among others, of guarding and fostering its members' economic interests, and is engaged in substantial activities that further its members' pecuniary interests. As a result of such purpose and activities, respondent is a "corporation," within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. The acts and practices of AICPA, including those herein alleged, are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Respondent has agreed, combined or conspired with its members or other persons, or has acted as a combination of its members, to restrain competition among CPAs in the United States by, among other things:

A. Restricting the methods CPAs may use to set their fees, including prohibiting the offering or rendering of professional services

for a contingent fee or a commission to a person for whom the CPA is not also performing attest services. Under these restrictions, CPAs are or may be deterred from, among other things, (1) assisting a state government to obtain a Medicare refund from the United States Government pursuant to a contract whereby the CPA receives no fee if the state receives no refund, or (2) assisting a consumer by preparing a financial plan pursuant to a contract under which the CPA will be compensated by receiving commissions from the sellers of any products that are purchased by the consumer;

B. Restricting truthful, nondeceptive advertising by CPAs, including, but not limited to:

1. Self-laudatory or comparative advertising;
2. Testimonial or endorsement advertising; and
3. Advertising not considered by AICPA to be professionally dignified or in good taste.

Under these restrictions, CPAs are or may be deterred from, among other things, truthfully advertising that they are "real tax experts," that they offer "the expertise of a large national firm," or that "John Smith says that their CPA firm was particularly responsive to his needs."

C. Restricting solicitation of clients by CPAs, including, but not limited to, (1) restricting direct solicitation of potential clients, and (2) prohibiting the payment or acceptance of referral fees. Under these restrictions, CPAs are or may be deterred from, among other things, soliciting clients by mail, paying marketing firms to assist in soliciting potential clients, and granting discounts to clients for referring other clients to them; and

D. Restricting the use of nondeceptive trade names by CPAs. Under this restriction, CPAs are or may be deterred from, among other things, using names like "Suburban Computer Services" or "Smith and Jones, CPAs, Tax Services," even when the name truthfully reflects the services provided by the CPAs.

PAR. 7. In furtherance of the agreement, combination, or conspiracy described in paragraph six, AICPA has promulgated, maintained, and enforced a Code of Professional Conduct, including, but not limited to, Rules 302, 502, 503 and 505, and Interpretations 502-1 and 502-2 thereof.

PAR. 8. Respondent's actions described in paragraphs six and seven have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among CPAs with respect to price, quality, and other terms of service;

B. Depriving consumers of information about the availability, price, and quality of CPA services; and

C. Injuring consumers by depriving them of the benefits of free and open competition among CPAs.

PAR. 9. The agreement, combination, or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such agreement, combination or conspiracy, or the effects thereof, is continuing and will continue absent the entry against respondent of appropriate relief.

Commissioners Azcuenaga and Owen dissented.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having duly considered the recommendations of its staff to modify the consent agreement pursuant to the comments

received and the supplemental letter agreement executed by the respondent's counsel, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order, as modified:

1. Respondent American Institute of Certified Public Accountants is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 1211 Avenue of the Americas, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. "AICPA" means American Institute of Certified Public Accountants and its Board of Directors, Council, committees, task forces, officers, representatives, agents, employees, successors, and assigns;

B. "Attest service" means providing (1) any audit, (2) any review of a financial statement, (3) any compilation of a financial statement when the certified public accountant ("CPA") expects, or reasonably might expect, that a third party will use the compilation and the CPA does not disclose a lack of independence, and (4) any examination of prospective financial information;

C. "Audit" means an examination of financial statements of a person by a CPA, conducted in accordance with generally accepted auditing standards, to determine whether, in the CPA's opinion, the statements conform with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting;

D. "Commission" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

E. "Compilation of a financial statement" means presenting in the form of a financial statement information that is the representation of

any other person without the CPA's undertaking to express any assurance on the statement;

F. "*Contingent fee*" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service;

G. "*Disciplinary action*" means revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, probation, constructive comment, or any other penalty or condition;

H. "*Examination of prospective financial information*" means an evaluation by a CPA of (1) a forecast or projection, (2) the support underlying the assumptions in the forecast or projection, (3) whether the presentation of the forecast or projection is in conformity with AICPA presentation guidelines, and (4) whether the assumptions in the forecast or projection provide a reasonable basis for the forecast or projection;

I. "*Forecast*" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects to exist and the course of action it expects to take;

J. "*Person*" means any natural person, corporation, partnership, unincorporated association, or other entity;

K. "*Projection*" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken given such hypothetical assumptions;

L. "*Referral fee*" means compensation for recommending or referring any service of a CPA to any person;

M. "*Review*" means to perform an inquiry and analytical procedures that permit a CPA to determine whether there is a reasonable basis for expressing limited assurance that there are no material modifications that should be made to financial statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting; and

N. "*Trade name*" means a name used to designate a business enterprise.

II.

It is further ordered, That AICPA, directly, indirectly, or through any person or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, advising members against, or interfering with any of the following practices by any CPA:

1. The offering or rendering of professional services for, or the receipt of, a contingent fee by a CPA, provided that AICPA may prohibit the engaging to render or rendering by a CPA for a contingent fee: (a) of professional services for, or the receipt of such a fee from, any person for whom the CPA also performs attest services, during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services; and (b) for the preparation of original or amended tax returns or claims for tax refunds;

2. The offering or rendering of professional services for, or the receipt of, a disclosed commission by a CPA, provided that the engaging to render or rendering of professional services by a CPA for a commission for, or the receipt of a commission from, any person for whom the CPA also performs attest services may be prohibited by the AICPA during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services;

3. The payment or acceptance of any disclosed referral fee;

4. The solicitation of any potential client by any means, including direct solicitation;

5. Advertising, including, but not limited to:

(a) any self-laudatory or comparative claim;

(b) any testimonial or endorsement; and

(c) any advertisement not considered by AICPA to be professionally dignified or in good taste; and

6. The use of any trade name;

Provided, that nothing contained in this order shall prohibit AICPA from formulating, adopting, disseminating, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to solicitation, advertising or trade names, including unsubstantiated representations, that AICPA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act;

B. Taking or threatening to take formal or informal disciplinary action, or conducting any investigation or inquiry, applying standards in violation of this order;

C. Adopting or maintaining any rule, regulation, interpretation, ethical ruling, concept, policy, or course of conduct that is in violation of this order;

D. Inducing, urging, encouraging, or assisting any association of accountants to engage in any act that would violate this order if done by AICPA *provided, however*, that nothing in this order shall prohibit AICPA from soliciting action by any federal, state or local governmental entity; and

E. Applying or interpreting any other language contained in the Code of Professional Conduct or its successors in a manner that would violate this order;

Provided, that this order shall not prohibit AICPA from:

(a) suspending membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as such or to practice public accounting is suspended as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is suspended by the SEC;

iii. a member's registration as a broker-dealer is suspended by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities; or

iv. a member is suspended from practicing before the IRS,

but any such suspension by AICPA shall terminate upon reinstatement of any such certificate, license, permit, registration, or authorization to practice; or

(b) terminating membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as

such or to practice public accounting is revoked, withdrawn or cancelled as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is revoked by the SEC;

iii. a member's registration as a broker-dealer is revoked by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities;

iv. a member is subject to a final judgment of conviction for criminal fraud or for a crime punishable by imprisonment for more than one year; or

v. a member is disbarred from practicing before the IRS.

III.

It is further ordered, That AICPA shall:

A. Distribute a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of this order and said announcement;

B. Distribute by mail a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to each of its members and to each state society of certified public accountants;

C. Publish this order and an announcement in the form shown in Appendix A, within sixty (60) days after this order becomes final, in an issue of the "Journal of Accountancy," AICPA's monthly journal, or in any successor publication, in the same type size normally used for articles which are published in the "Journal of Accountancy" or in any successor publication;

D. Within ninety (90) days after this order becomes final, publish and distribute to all members of AICPA and to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order revised versions of AICPA's Code of Professional Conduct, Bylaws, concepts of professional ethics, interpretations, ethical rulings, or other policy statements or guidelines of AICPA which (1) delete any material that is inconsistent with Part II of this order and (2) otherwise comply with this order;

E. File with the Federal Trade Commission within sixty (60) days after this order becomes final, one (1) year after this order becomes final, and at such other times as the Federal Trade Commission may by written notice to AICPA request, a report in writing setting forth in detail the manner and form in which it has complied and is complying with this order;

F. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Parts II and III of this order, including any written communications and any summaries of oral communications, and any disciplinary action; and

G. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in AICPA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Commissioners Azcuenaga and Owen dissented.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the American Institute of Certified Public Accountants ("AICPA") has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that AICPA may not interfere if its members wish to engage in any of the following activities:

- (1) accepting contingent fees from nonattest clients;
- (2) accepting disclosed commissions for products or services supplied by third parties to nonattest clients;
- (3) engaging in advertising and solicitation;
- (4) making or accepting disclosed payments for referring potential clients to a CPA; or
- (5) using trade names.

The order allows AICPA to prohibit its members from accepting contingent fees for preparing original or amended tax returns or claims for tax refunds.

The order does not prevent AICPA from formulating reasonable ethical guidelines prohibiting solicitation, advertising or trade names that it reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

In particular, without attempting to be all-inclusive, the agreement between AICPA and the Federal Trade Commission means that as long as its members do not engage in falsehood or deception, AICPA cannot prevent or discourage them from engaging in the following practices, among others:

- (a) in-person solicitation of prospective clients;
- (b) self-laudatory advertising;
- (c) comparative advertising;
- (d) testimonial or endorsement advertising;
- (e) advertising that some members may believe is "undignified" or lacking in "good taste";
- (f) assisting any state government that is not an attest client in claiming a Medicare refund pursuant to a contingent fee contract;
- (g) preparing financial plans for nonattest clients for which members will be compensated by commissions from the sellers of products or services that such clients purchase;
- (h) using trade names, such as "Suburban Tax Services";
- (i) paying referral fees to marketing firms that assist members in soliciting potential clients; and
- (j) offering clients a discount for referring a prospective client.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

Philip B. Chenok
President
American Institute of Certified
Public Accountants

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,
CONCURRING IN PART AND DISSENTING IN PART

The Commission today accepts a consent order that, among other things, prevents the American Institute of Certified Public Accountants ("AICPA"), through its Code of Professional Conduct, from requiring that its members refrain from using coercion, overreaching or harassment to solicit clients and from requiring that its members forgo certain fee arrangements that may create conflicts of interest. The Commission challenges provisions in the AICPA code that have no anticompetitive effect, that are far removed from the *per se* category of legal offenses and for which AICPA arguably has good reason.¹ I dissent.

¹ Some of the provisions in AICPA's Code that the Commission challenges can be shown to be anticompetitive and unlawful, and the corresponding remedies imposed by the Commission are appropriate. I agree with the majority that there is reason to believe that AICPA's restrictions on contingent fees (II.A.1) and advertising (II.A.5 and II.A.6) unlawfully restrain competition. I dissent from Paragraphs II.A.2, II.A.3 and II.A.4 of the order.

AICPA's rule on solicitation prohibits "the use of coercion, overreaching or harassing conduct." The rule is not unlawful on its face, nor is there any evidence that the rule has been used improperly, much less unlawfully. The majority invalidates the rule, apparently on the theory that the purpose of the rule is to discourage all forms of solicitation. The Commission lacks even the proverbial shred of evidence to support this theory. The sparse information we have shows instead that AICPA consistently responds to inquiries about the rule by stating unequivocally that it does not prohibit all direct, uninvited solicitation, by advising members to consult the dictionary definitions of "coercion," "overreaching" and "harassment" for general guidance and by offering to analyze particular facts relating to a proposed or questionable solicitation.

AICPA promulgated the rule as an attempt to balance the concerns of its members about certain kinds of direct, uninvited solicitation² with the need for a rule that would not offend the antitrust laws (hardly probative evidence of an unlawful purpose). AICPA's refusal to interpret the solicitation rule except in the context of a specific fact situation also stems from its efforts to comply with the antitrust laws and is not indicative of an unlawful purpose. The implication of the Commission's prohibition is that a professional association may not, under any circumstances, bar its members from engaging in coercion, overreaching or harassment. I cannot join in this unfortunate message.

AICPA has maintained that many of its ethical rules, including the rules against referral fees and commissions, are intended to preserve the fact as well as the appearance of independence and objectivity of its members. This asserted justification has substantial credibility particularly in the context of attest services. The Securities and Exchange Commission prohibits auditors from having joint business arrangements with their audit clients for this reason, and the majority itself partly concedes the validity of AICPA's justification by not challenging AICPA's ban on commissions and contingent fees for attest clients.

Referral fees and commissions pose the same potential harm—a conflict between the financial interests of the CPA and his client. Although consumer search costs may be reduced by permitting these practices, referral fees and commissions do not necessarily lead to

² Compare *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (state may ban in-person solicitation by lawyers for profit).

lower overall costs for consumers. To further their own economic self-interest, CPAs may refer consumers for services they otherwise might not recommend, and any profit-maximizing CPA presumably will pass on the cost of referral fees to consumers. AICPA's rule against third-party commissions does not eliminate price competition or restrict the prices that the CPA charges his or her clients. Instead, the rule prohibits a method of payment that seems to invite a CPA to recommend a financial plan that would serve his own financial interests at least as well as those of his client. *See Vogel v. American Society of Appraisers*, 744 F.2d 598, 602 (7th Cir. 1984) ("[T]he challenged bylaw does not limit the fee [but] it merely outlaws a method of fee setting that seems to invite the appraiser to practice a fraud on his customer . . .").

One-stop financial service is an option that some consumers presumably may want. This service, however, is readily available from other providers and, indeed, from CPAs in those states that permit CPAs to work on commission.³ CPAs who act as independent financial advisers, without an economic interest in their own recommendations, provide a differentiated product in the financial services market.⁴ In its haste to endorse the one-stop financial service concept, the Commission does not pause to consider that it is eliminating the ability of AICPA to create a differentiated service featuring independence and objectivity.

The Commission also does not linger over the possibility that eliminating AICPA's option to promote this market niche in connection with non-attest services may have adverse effects in the market for attest services. We are told that the independence of CPAs is of critical importance in capital formation. When the independence of CPAs is compromised by their involvement with corporate management in non-attest services, public confidence in their independent auditor function may be diminished. *See Report of the Securities and Exchange Commission to Congress On the Accounting Profession and the Commission's Oversight Role* 145-46 (July 1978). If true, this consent order could harm consumers.

Although there may be value in allowing CPAs to work on

³ AICPA is a voluntary association; CPAs who prefer not to observe AICPA's Code of Professional Ethics need not join.

⁴ Dean Williams of the University of Southern California School of Accounting wrote that "[t]he single criterion that sets CPA firms apart from providers of non-audit services (e.g., financial planners, consulting firms, etc.) is the profession's reputation for independence and objectivity. It is in the public's interest that this reputation be perceived as an alternative in the market place. Otherwise, third party reliance on all services, and hence the very essence of capital formation, will be threatened." Letter to FTC staff (July 30, 1986).

commission and to accept referral fees, the argument that the Federal Trade Commission is the appropriate institution to rewrite AICPA's restrictions is substantially less than compelling, particularly in the face of AICPA's concern with maintaining the fact and appearance of independence and objectivity for its members. The Commission does not have the expertise to make that judgment, and the better and wiser course is to let the market sort it out.⁵

This case presents important questions about what constitutes a violation of Section 5 of the Federal Trade Commission Act. The mandate of the Commission is to prevent unfair methods of competition, not to prescribe particular modes of competition in the absence of a violation of law. We should not engage in social engineering under the guise of law enforcement. AICPA's ethical rules reflect longstanding tenets of professionalism and could facilitate procompetitive alternatives in CPA services. The Commission should have attempted to understand the value of those tenets before changing the rules by fiat.

SEPARATE STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

In the consent order accepted today in this matter, the Commission prohibits the American Institute of Certified Public Accountants ("AICPA"), by way of its Code of Professional Conduct, from restricting its members from: (1) adopting certain referral fee and commission arrangements that may create conflicts of interest, and (2) using coercion, overreaching or harassment to solicit clients. I join Commission Azcuenaga in dissenting from this action.¹

The Commission's achievements in protecting the public from anticompetitive restraints imposed by professional associations have earned the justified praise of antitrust observers. These accomplishments are exemplified by the provisions of this order governing restrictions on advertising. The application of antitrust doctrine in changing times necessarily demands some imagination on the part of federal law enforcers. However, this consent illustrates the dangers of going beyond "pushing the envelope" with insufficient evidentiary support.

⁵ To the extent that state laws may inhibit the use of commissions and referral fees by CPAs, the Commission's order has no effect.

¹ Along with Commissioner Azcuenaga, I dissent from Paragraphs II.A.2, II.A.3, and II.A.4 of the order, and concur in the majority holding that AICPA's restrictions on advertising (Paragraphs II.A.5 and II.A.6) and certain contingent fees (Paragraph II.A.1) unlawfully restrain competition.

Referral fees and commissions raise serious potential conflicts of interest between the CPA and his client, which could result in damaging financial consequences. The competitive effects of prohibiting such fees are not clear—either facially or in terms of how the prohibitions actually operate—and good economic evidence as to both is lacking. There are plausible efficiency arguments for such restraints, relating both to the elimination of potentially damaging conflicts of interest, and to preserving public confidence in the integrity and independence of members of the AICPA, in both attest and non-attest functions. The lack of evidence suggesting that these restrictions are anticompetitive stands in marked contrast to the evidence that has been compiled in connection with advertising bans,² and the plethora of evidence in cases like *Detroit Auto Dealers*.³ Accordingly, it has not been demonstrated to my satisfaction that the prohibition of commission and referral fee arrangements by the AICPA is inherently suspect under the Commission's analysis in *Massachusetts Board of Registration in Optometry*, 110 FTC 541 (1988).

The available evidence as to the market power of the AICPA is not compelling. The AICPA is a voluntary association. Membership and adherence to its particular Code are not prerequisites to practice as a CPA. In states that prohibit CPAs from accepting referral fees or commissions, today's order has no effect. In states without such restrictions, it is hard to envision any competitive problem; CPAs are free to undertake actions prohibited by the AICPA ethical standards by simply leaving the organization. In addition, CPAs apparently already face intense competition for non-attest services from non-CPAs, such as non-CPA accountants, tax preparers, and financial planners.⁴ While addressing what may be an illusory competitive problem, this order opens the door to potentially serious conflicts of interest, that may cause substantial consumer injury.

It has been suggested that disclosure of the fee arrangement itself solves the conflict of interest. There are several reasons why this may not be true. First, the relationship between the client and the CPA is of a sensitive, fiduciary nature, in which the trusting client seeks advice in areas where the client is untutored. That relationship may

² See, e.g., Calvani, Langenfeld, & Shuford, *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. 761 (1988).

³ Docket No. 9189, 5 Trade Reg. Rep. (CCH) ¶12,653 (Feb. 22, 1989).

⁴ By contrast, CPAs collectively may have substantial market power for attest services, since only CPAs can offer such services. Ironically, the majority correctly recognizes the efficiency of preventing potential conflicts of interest between CPAs and clients for attest services.

color the client's willingness to accept such a fee arrangement, even after disclosure, possibly to the client's considerable detriment. A client in this situation, because of the trust relationship involved, might not view such a fee arrangement with the same skepticism as disclosure of a similar arrangement from another type of salesman. In fact, it is entirely possible that the client does not view the CPA as a salesman at all. If a CPA discloses to his regular client that the CPA has received a fee for referring the client to another CPA for other services, the client may assume that the fiduciary's motive was to refer him to the best person for the job.⁵ That may not be true. Presumably, the purpose of the referral fee was to generate the referral, whether or not made to the best person for the job.

The fact that many consumers seek out a CPA for various non-attest services, rather than alternate service providers, suggests that the objectivity of the CPA may be a highly important factor in the decision. This objectivity legitimately may be what the AICPA may seek to protect with its ban on referral fees and commissions. The ability to identify a trustworthy, objective service provider through membership in a professional association would plausibly decrease search costs and the risk of an adverse experience for consumers. Regrettably, the order ultimately prevents this alternative; the overriding benefits resulting from such a restriction are not clear.

Second, disclosure of only the fact of a referral fee or commission may prove insufficient to protect consumers, unless they are also informed of other relevant information. For instance, there might be less expensive alternatives where the commission would be smaller, but the return to the client might be the same or greater. While the Commission's order would require the CPA to disclose that he would receive a commission, the CPA would not be required under the order to advise the client of those other alternatives. The information that would have to be disclosed to protect consumers from a conflict of interest would vary from situation to situation, and does not seem amenable to listing exhaustively in a Commission order. However, it does seem that only disclosing the fact that the commission or referral fee is to be paid is insufficient to vitiate the conflict of interest.

The benefits claimed for the consent order provisions on referral fees and commissions do not hold up under close scrutiny. For example, it is suggested that consumers now will be able to do "one-

⁵ Referral fees paid to commercial referral services may present different competitive questions and levels of efficiencies.

stop shopping," *i.e.*, obtain accounting services, as well as other financial services, from the same individual. This alternative was already available, so long as an AICPA member did not violate the Code's restrictions on referral fees and commissions. Consumers could also obtain accounting services from a CPA, not a member of the AICPA, and, in those states that permit it, the CPA could also sell them financial products of any imaginable type, with any fee arrangement. Furthermore, with the lifting of the restrictions on contingent fees for many non-attest services in the instant order, such a fee alternative would be available for clients who might have difficulty affording an hourly rate or set fee up front.

In sum, I have identified several plausible efficiencies stemming from prohibitions against intra-professional referral fees and commissions, that seem at least as likely, if not significantly more likely, to benefit consumers than the proposed remedy. Before agreeing to any consent of this nature, I would need to see more evidence to conclude that prohibiting restrictions on referral fees and commissions is in the public interest.

Finally, the AICPA Code prohibits solicitation through "the use of coercion, overreaching, or harassing conduct." I concur in the opinion of Commissioner Azcuenaga that there is no evidentiary basis for challenging this rule.⁶ The restriction is not unlawful on its face, and, if it were demonstrated that it was enforced in an anticompetitive manner, the appropriate remedy would be to prohibit that offensive conduct, not the restriction itself. This order sends the wrong signal to other organizations that may wish, and indeed should even be encouraged, to adopt a legitimate rule of this nature.

⁶ Paragraph II.A.4 of the order prohibits the AICPA from "[r]estricting, regulating, impeding, declaring unethical, advising members against, or interfering with . . . [t]he solicitation of any potential client by any means, including direct solicitation. . . ."

IN THE MATTER OF

NIPPON SHEET GLASS COMPANY, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3298. Complaint, July 26, 1990—Decision, July 26, 1990*

This consent order requires, among other things, the float glass manufacturers to repeal the challenged portion of the Float Glass Capacity Agreement. In addition, the consent agreement prohibits respondents from entering into any agreement which has the purpose or effect of restraining competition by either limiting float glass manufacturing capacity in North America or restricting imports to North America.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *James C. Egan, Jr.*

For the respondents: *Robert S. Scholsberg* and *Caswell O. Hobbs, III, Morgan, Lewis & Bockius*, Washington, D.C. and *Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glovsky & Popep*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Nippon Sheet Glass Company, Ltd. ("Nippon") and its subsidiary, respondent NSG Holding USA, Inc. ("NSG-USA"), corporations subject to the jurisdiction of the Commission, have pursuant to a Common Stock Purchase Agreement ("Purchase Agreement"), offered to purchase approximately 20% of the stock or voting securities of respondent Libbey-Owens-Ford Co., ("LOF"), a subsidiary of respondent Pilkington plc ("Pilkington") and said Purchase Agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows: