

IN THE MATTER OF

AMERICAN MEDICAL ASSOCIATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9064. Final Order, Oct. 12, 1979—Modifying Order, Oct. 10, 1991*

This order reopens the proceeding and modifies the Commission's order issued on Oct. 12, 1979 [94 FTC 701], by allowing the respondent to give its member organizations the choice of: supplying the certification originally required; or allowing the AMA to review their codes of ethics and other materials to ensure that they are not restricting truthful advertising, or interfering with the compensation physicians are offered in contracts for their services.

ORDER REOPENING AND MODIFYING ORDER
ISSUED ON OCTOBER 12, 1979

On June 14, 1991, the American Medical Association ("AMA") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act and Rule 2.51 of the Commission's Rules of Practice requesting that the Commission reopen and modify its order in Docket No. 9064. The litigated order,¹ which became final on July 2, 1982, prohibits AMA from restricting truthful, nondeceptive advertising, and from interfering with the amount or form of compensation provided a physician in exchange for his or her professional services in contracts with entities offering physician services to the public. AMA's petition asks the Commission to reopen the order and delete paragraph IV(D), which requires AMA to obtain certifications from its state and local societies that they agree to adhere to the requirements of the order, or, in the alternative, to substitute for it two additional proposed provisions. For the reasons set forth below, the Commission denies AMA's request to modify the order by deleting paragraph IV(D) and grants AMA's alternative request to modify the order by adding the two new provisions proposed by AMA.

I.

The Commission issued its order against AMA after finding that

¹ *American Medical Association*, 94 FTC 701 (1979), *modified*, 638 F.2d 443 (2d Cir. 1980), *affirmed by an equally divided Court*, 452 U.S. 960 (1982).

AMA had violated Section 5 of the Federal Trade Commission Act by, among other things, restricting the ability of its member physicians (1) to engage in truthful, non-deceptive advertising and (2) to freely contract to sell their services. In addition to prohibiting AMA itself from engaging in such conduct, the order contains two provisions designed to ensure that AMA's constituent (state) and component (local) societies also do not illegally restrict physician advertising and contract practices.

The first provision that concerns AMA's affiliates, which is the subject of AMA's petition, is paragraph IV(D) and it provides that AMA is to:

[r]equire as a condition of affiliation with respondent that any constituent or component organization agree by action taken by the constituent or component's governing body to adhere to the provisions of Parts I, II, and III of this order.

The second provision, paragraph IV(E), requires AMA to disaffiliate any of its constituent or component organizations that AMA knows or has reason to know is engaging in conduct that if engaged in by AMA would violate the order.

II.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent makes a satisfactory showing that changed conditions of law or fact require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that those changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

If the Commission determines that a petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of such modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one, given the public interest in the finality of Commission orders. See *Federal Department Stores v. Moitie*, 452

U.S. 394 (1981) (strong public interest considerations support repose and finality).

In addition, Section 5(b) provides that the Commission has discretion to modify an order when, in its opinion, the public interest requires such modification. Accordingly, Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, invites respondents, in petitions to reopen, to show how the public interest warrants the requested modification. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter") (unpublished). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *Damon Letter* at 2.

AMA argues that there have been changes of fact since the order was entered sufficient to render paragraph IV(D) unnecessary. AMA argues that advertising and contract practice by physicians has become commonplace, and that since the order was issued state and local medical societies have come to understand the antitrust laws and generally have ceased restricting truthful advertising and lawful contract practice.

Even assuming that AMA is correct that such changes have occurred, they are not changes that eliminate the need for paragraph IV(D) or make continued application of that provision inequitable or harmful to competition.² The changes cited by AMA—that state and local medical societies have come to understand the antitrust laws, that they generally have ceased restricting truthful advertising and lawful contract practice, and that advertising and contract practice by physicians has become commonplace—were foreseeable at the time the order was issued; they were precisely the changed circumstances the Commission intended to achieve when it issued the order. The fact that an order is having the effect sought by the Commission offers no basis for eliminating one of its provisions.

² The Commission does not necessarily agree with AMA that the physician services market is free of restrictions on advertising and contract practice. While some state and local medical societies may have brought themselves into compliance with the antitrust laws since the *AMA Order*, others have not. For example, in 1987 the Commission issued a consented-to order against the Tarrant County Medical Association prohibiting Tarrant County from restricting truthful, nondeceptive advertising. *Tarrant County Medical Society*, 110 FTC 119. Moreover, AMA has offered no evidence that it has taken any steps to determine whether its affiliates unlawfully are restricting physician advertising or contract practice; thus, its statement that the market is free of such restrictions is not supported.

AMA also argues that because its state and local societies are not bound by AMA policies, and because AMA does not have the power to disaffiliate them—and thus has no power to force them to agree by action taken by their governing bodies to adhere to the order—it is impossible for it to comply with paragraph IV(D). AMA used this argument to challenge both paragraphs IV(D) and IV(E) when this matter was in litigation; this argument, however, has been considered, and rejected, by the Commission and by the Second Circuit,³ and AMA has provided nothing to indicate that anything has occurred since the order was issued that would make its argument any more compelling today. Moreover, AMA's argument is even less persuasive now because since the order was issued AMA has never tried to comply with paragraph IV(D)—it has never asked its affiliates for the assurances required by that provision of the order.

Further, to the extent that AMA's argument is that it cannot comply with paragraph IV(D) because it is impossible for it to disaffiliate a constituent or component, AMA's argument is not persuasive. There is nothing in AMA's Constitution or Bylaws that prevents AMA's House of Delegates—AMA's decision-making body—from refusing to recognize an affiliate that does not adopt the required resolution. Moreover, such a power is acknowledged by Section 6.4014 of AMA's Bylaws, which addresses the issue of a denial of membership in a component or constituent on the basis of "color, creed, race, religion, ethnic origin, national origin, or sex."⁴ The fact is that AMA is its House of Delegates. Therefore, even if AMA believes it currently does not have the power to disaffiliate a constituent society, it could, through its House of Delegates, amend its bylaws specifically to provide for disaffiliation of any constituent organization in the event that the constituent, or one of the constituent's local societies, does not adopt the resolution required by paragraph IV(D). By arguing that "the most that the AMA can do is ask the House of Delegates to adopt a by-law amendment authorizing the House, by a majority vote, to refuse to seat the delegation of a state society that did not adopt the order," AMA seems to suggest that AMA's House of Delegates is some unrelated third-party. AMA

³ The Commission found that "AMA's claim that it does not have the power to disaffiliate state and local medical societies is without merit." 94 FTC at 1031-32. The Second Circuit addressed the disaffiliation issue in the context of AMA's argument that the disaffiliation provision violated AMA's due process rights. The court rejected this argument and expressly affirmed paragraph IV(D), as well as paragraph IV(E). 638 F.2d at 453.

⁴ In the event of repeated discrimination on the basis of "color, creed, race, religion, ethnic origin, national origin, or sex" by an AMA constituent, the AMA House of Delegates may declare the constituent "no longer a constituent member of the American Medical Association."

Memorandum in Support of Petition, at 17. This is not the case. The House of Delegates and AMA are the same entity, and it is within AMA's control to do whatever it has to do to bring itself into compliance with the order.

In support of its impossibility argument, AMA cites two cases, neither of which the Commission finds applicable. In the first case cited by AMA, *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 (9th Cir. 1983), a district court had held Falstaff in contempt for refusing to produce certain documents. The Ninth Circuit reversed, holding that it was impossible for Falstaff to produce the documents since they most likely were lost and therefore no longer within Falstaff's control. In contrast, as discussed above, it is well within AMA's power to require that its constituent and component organizations adopt the required resolution. Similarly, in *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3rd Cir. 1979), the Third Circuit ruled that the district court did not err in modifying a decree where "[d]espite a good faith effort at compliance, circumstances largely beyond the defendants' control and not contemplated by the court or the parties in 1976 put achievement of [court-mandated goals] beyond reach." This case is not applicable because: (1) AMA has made no attempt to comply with paragraph IV(D); (2) the means of complying are within AMA's control; and (3) no circumstances not contemplated by the court or the parties when the order was entered put achievement of compliance with paragraph IV(D) "beyond [AMA's] reach." While an attempt by AMA to disaffiliate a constituent for any reason is likely to provoke some controversy within AMA, Section 6.4014 shows that it is not "impossible."

The Commission is not persuaded either by AMA's argument that changes of fact require the Commission to vacate paragraph IV(D), or by AMA's argument that it is impossible for it to comply with paragraph IV(D), and, thus, that it would be inequitable for the Commission to insist upon compliance with that provision. AMA has not met its burden of demonstrating changed circumstances of fact that require the Commission to reopen the order and vacate paragraph IV(D), and the Commission therefore denies that part of AMA's request.

III.

AMA, in the alternative, requests that the Commission, in the public

interest, reopen and modify the order to add two provisions proposed by AMA. According to AMA's petition, AMA, pursuant to the proposed provisions, would collect information regarding the advertising and contract practices of its affiliates that comprise at least 40% of the total members of its constituents and large components,⁵ review the practices to ensure that the constituents and components are not illegally restricted advertising or contract practice, and, if necessary, work with the constituents and components to correct their practices. The remainder of AMA's constituents and large components would supply the resolutions required by paragraph IV(D). If after two years AMA has fulfilled the obligations imposed upon it by the two proposed provisions, the Commission would consider AMA's obligations satisfied under paragraph IV(D).

As a general rule the Commission will not reopen an order when it has reason to believe that a respondent is in violation of the provision it seeks to modify. *Union Carbide Corporation*, 108 FTC 184, 185 (1986). Circumstances that lead the Commission to make an exception to its *Union Carbide* rule are rare; in most situations the reasons for the policies underlying the *Union Carbide* rule will clearly outweigh any justifications proffered for the requested modification. Although the Commission believes that AMA currently is in violation of paragraph IV(D),⁶ it has determined that the public interest is served by modifying the order as AMA requests. In particular, the Commission finds that the modification AMA proposes furthers the purposes of the order, and the Commission's competition policy, better than does paragraph IV(D), the provision for which AMA seeks modification.

Neither of the two order provisions that affect AMA's constituents and components require AMA to conduct any review of the constituents' or components' advertising or contract practices. Paragraph IV(D) requires only that AMA's constituent and component organizations agree to adhere to the order; paragraph IV(E), while it does require AMA to disaffiliate any of its constituents or components that AMA has reason to believe are engaging in conduct that if engaged in by AMA would violate the order, does not require AMA to make any efforts to determine whether its constituents and components are

⁵ "Large components" are defined by the proposed modification to include AMA's 250 largest components, which comprise approximately 90% of the members of all AMA components.

⁶ AMA's argument that paragraph IV(D) was intended to apply prospectively—that it was intended to apply only to newly affiliated component and constituent organizations—is without merit. Given the unlikely addition of many new state and local medical societies, such an interpretation would render the provision useless.

engaged in such conduct. The modification AMA proposes, however, will encourage AMA to engage in a program of procompetitive self-regulation and to work with its affiliates to bring them into conformance with the AMA order. This expands the reach of the order, furthers the Commission's competition mission, and fosters legitimate, procompetitive self-regulation by AMA consistent with other provisions of the order.⁷

In addition, AMA's proposed modification will further the public interest because it provides that AMA will forward to the Commission copies of all Codes of Ethics that AMA receives from its affiliates. When a professional organization restricts truthful, nondeceptive advertising, its restrictions often are reflected in its Code of Ethics; the Codes AMA is obligated to forward to the Commission, therefore will provide the Commission with valuable information concerning the compliance of state and local medical societies with the antitrust laws. Finally, because substantially all of AMA's constituents and components will submit to AMA either resolutions agreeing to adhere to the requirements of the order, or documents reflecting their advertising and contract practices, substantially all of AMA's constituents and components to one degree or another will be re-evaluating their activities to ensure that they do not illegally restrict physician advertising or contract practice.

IV.

AMA has not demonstrated any changed conditions of fact or law that would require the Commission to reopen and modify the order to eliminate paragraph IV(D). With respect to AMA's alternative request, the Commission finds that the public interest would be served by adding to the order the two provisions proposed by AMA. The Commission therefore grants AMA's alternative request.

Accordingly, *it is ordered*, that the Commission's order in Docket No. 9064 be reopened and modified to append the following two provisions to paragraph IV of the order:

F. (1) Within sixty (60) days of the date of receipt by respondent of

⁷ The Commission modified the original order in this case, entered by the Administrative Law Judge, to permit AMA to adopt and enforce reasonable guidelines with respect to advertising that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, and to disseminate guidelines proscribing uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence. The Commission gave as its reason for so modifying the order that the Commission firmly believed that AMA has a "valuable and unique role" to play with respect to deceptive advertising and oppressive forms of solicitation by physicians. 94 FTC 701, 1029-1030 (1979).

this modified Part IV(F) ("the effective date"), send a letter to each of its constituent organizations ("constituents"), and each of its 250 largest component organizations ("large components"), that gives the constituents and large components the choice of submitting to respondent:

Option 1

a statement adopted by the organization's governing body agreeing to adhere to Parts I, II and III of this Order. -or-

Option 2

a copy of the organization's current Code of Ethics, all other codes of ethics to which the organization adheres, and other documents relating to its position on physician advertising and contract practices. Such other documents shall consist of the following materials adopted or in effect at any time from January 1, 1987, that relate to physician advertising or contract practice:

- (a) resolutions and policies;
- (b) rules, guidelines, and regulations, and any interpretations of its, or of AMA's Code of Ethics;
- (c) formal and informal advice; and
- (d) records of any formal or informal disciplinary proceedings.

(2) Within 180 days of the effective date, file with the Commission:

- (a) a verified statement that the mailing required by subpart F(1) above was completed;
- (b) a list of all constituents and large components that AMA has reason to believe have not provided either the statement required by Option 1 or all documents required by Option 2;
- (c) any resolutions submitted to respondent pursuant to Option 1 and copies of any Codes of Ethics submitted to respondent pursuant to Option 2 in response to the mailing required by subpart F(1) above.

(3) For a period of five [5] years after the effective date, maintain the documents that it receives in response to Option 2.

(4) Within 24 months of the effective date, file with the Commission a report in writing:

- (a) listing all constituents and large components that respondent has reason to believe, from information obtained by respondent in connection with the mailing required by subpart F(1), are engaging

in conduct at the time of the report that if engaged in by respondent would violate Parts I, II, or III of this order;

(b) setting forth the basis for respondent's belief that the constituents and large components identified in subpart (4)(a) are engaging in conduct that if engaged in by respondent would violate Parts I, II or III of this order;

(c) detailing any changes made by constituents and large components in their Codes of Ethics that respondent submitted to the Commission pursuant to subpart (2)(c) above since the time that such Codes were submitted to the Commission; and

(d) stating whether it believes it has satisfied the requirements of subparts (1) and (2) of Part IV(G) below, and detailing its reasons for such belief.

G. Respondent's obligations under Part IV(D) of this order are stayed for a period of 24 months from the effective date. After such 24 months, the Commission will notify respondent that its obligations under Part IV(D) are satisfied if:

(1) Respondent's constituents are large components, to the best of respondent's knowledge, have provided all documents responsive to Option 1 or Option 2 of the letter sent by respondent to such constituents and large components pursuant to subpart (F)(1) above; and

(2) Constituents comprising at least 40% of the total members of respondent's constituents, and large components comprising at least 40% of the total members of all large components have chosen Option 2 in response to the mailing required by subpart (F)(1) above.

Commissioner Azcuenaga dissenting and Commissioner Yao not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the decision of the majority to reopen and modify the order as proposed by the American Medical Association ("AMA"). First, under *Union Carbide Corp.*, 108 FTC 184 (1986), the Commission should deny the petition on the ground that the AMA currently is in violation of the original order. Second, the AMA has failed to show changed conditions of fact or law or public interest considerations that warrant reopening the order. *See, e.g., Canada Cement Lafarge Ltd.*, 111 FTC 590, 591-92 (1989); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5,

1986), at 4. Third, the changes proposed by the AMA and accepted by the majority, while superficially minor, weaken a significant order provision and grant extraordinary and ill-advised concessions to the AMA.

As the Commission concludes and as the AMA admits, AMA is not, and never has been, in compliance with the final order of the Commission issued in 1982. “[G]enerally [the Commission] should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify.” *Union Carbide*, 108 FTC at 185. Certainly, the Commission should refrain from reopening an order that a respondent is currently violating, without articulating good reason for the exception to this principle.

Paragraph IV(D) of the Commission’s 1982 order directs the AMA to require that its constituent and component organizations agree to abide by the order as a condition of affiliation. The AMA vigorously resisted this provision during the litigation, but it was specifically endorsed by the Commission and affirmed by the Court of Appeals. *American Medical Association*, 94 FTC 701, 1031-32 (1979), *modified*, 638 F.2d 443, 453 (2d Cir. 1980), *aff’d by an equally divided Court*, 452 U.S. 960 (1982). Nonetheless, as early as October 1982, the AMA communicated to the Commission its refusal to comply with this paragraph of the order, and it has openly and consistently refused to comply since that time.

Despite the AMA’s longstanding and flagrant violations of the order, the majority creates an exception to the general rule set forth in *Union Carbide*, on the ground that the modification “furtheres the purposes of the Order, and the Commission’s competition policy better than” the existing order. Order of the Commission at page 6. The exception is so broad that it swallows the rule. In *Union Carbide*, the Commission concluded:

The public interest is served by denying a request for reopening and modification of an order provision while compliance issues remain unresolved. This action by the Commission will enhance its ability to ensure compliance with this order and other outstanding orders, enhance the deterrent effect of all orders and of Section 5 itself, and serve to discourage ‘self-help’ order modifications.

108 FTC at 187. The point of *Union Carbide* is that even beneficial and procompetitive modifications should be rejected while the respondent is violating the order.

Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvantage resulting from the order. Absent a showing, there is no justification for revisiting a final order. The majority here states the correct standard but fails to apply it. The AMA does not allege competitive disadvantage and even if we might infer a showing of need from the AMA's petition, the discussion of the majority regarding the AMA's ability to comply with the order indicates that the AMA has not shown need sufficient to justify reopening. *See* Order Reopening and Modifying Order in Docket No. 9064 at 3 and 6. The public interest in repose and the finality of orders is threatened when the decisionmaker is willing to reopen and modify orders without the requisite showing.

The modification that the Commission has granted does not strengthen, but rather seriously weakens, paragraph IV(D), a key part of the order. Indeed, this order modification contains virtually unprecedented concessions to a respondent. The most remarkable concession appears in new paragraph IV(G)(1), which provides that if the AMA satisfies two modest conditions within two years "the Commission will notify [AMA] that its obligations under Part IV(D) are satisfied." In most orders, the respondent is obligated to send compliance reports to the Commission, but this order, for no reason, turns the usual practice on its head and obligates the Commission to report to, and essentially to bless, the AMA.

In this order modification, the Commission relinquishes its order enforcement role to the AMA. In effect, the Commission appoints the AMA guardian of the proverbial chicken coop despite its years of defying the order. The AMA, not the FTC, will be the entity evaluating whether practices violate the order. Paragraph IV(F) of the modified order contemplates that the AMA will undertake a survey of antitrust compliance by some of its constituents and components. Although private efforts to monitor antitrust compliance are to be encouraged, they have not in the past been acceptable substitutes for compliance with Commission orders.

The modified order requires the AMA to obtain certain relevant documents related to advertising regulations from its affiliates, but does not provide for Commission access to these important documents. The AMA is not required to turn these documents over to the Commission or to make them available for inspection by the Commission. Instead of providing all relevant documents, the AMA

will turn over to the Commission only the affiliates' Codes of Ethics, which are widely distributed public documents.

Virtually every order entered by the Commission in recent history has contained a requirement that the respondent make the relevant compliance documents available for inspection during reasonable business hours. The reason for insisting on access to the relevant documents is to enable the Commission to verify compliance. The order, as modified, includes no such provision. The majority provides no explanation of its decision to omit the usual means to verify compliance.

Few possible explanations for the action of the majority present themselves. Has the majority decided implicitly to overrule *Union Carbide* without acknowledging it or explaining why? Has the Commission changed its firm and long-standing commitment to the finality and enforcement of its orders? I have searched in vain for a reason I can understand, regardless of whether I agree with it. Unfortunately, no creditable explanation comes to mind. At best, today's decision is an aberration, not to be repeated. For the sake of the Commission's overall law enforcement program, I can only hope it will be so viewed.

I emphatically dissent.

587

Complaint

IN THE MATTER OF
WAYNE PHILLIPS, ET AL.

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

Docket 9237. Complaint, Feb. 12, 1990—Decision, Oct. 11, 1991

This consent order requires, among other things, that Wayne Phillips, a Scottsdale, Arizona individual and two companies of which he was an officer, cease and desist distributing the "Government Grants" commercial and pay to the Commission consumer redress of \$50,000.

Appearances

For the Commission: *Sylvia J. Kundig and Jeffrey A. Klurfeld.*

For the respondents: *Eric M. Rubin, Rubin, Winston, Diercks & Harris, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Wayne Phillips, individually and as an officer of Accelerated Systems, Inc., and of United States Educational Services, Inc.; Accelerated Systems, Inc., a corporation; and United States Educational Services, Inc., a corporation ("respondents"); have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Wayne Phillips is an individual who has been an officer of Accelerated Systems, Inc., and of United States Educational Services, Inc. At all times material to this case, he has formulated, directed, and controlled the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. He resides at 15608 N. 55th Street, Scottsdale, Arizona, and his principal office or place of business is located at 13610 North Scottsdale Road #10-105, Scottsdale, Arizona.

(b) Respondent Accelerated Systems, Inc., is a corporation organized and doing business under the laws of the territory of the Northern Marianas Islands. Its offices and principal places of business