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Referendum: Background information on proposed amendments to the Code of Professional Ethics, January 30, 1979

American Institute of Certified Public Accountants

Referendum

Background Information on Proposed Amendments to the Code of Professional Ethics

January 30, 1979

AICPA American Institute of Certified Public Accountants

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INTRODUCTION

The Institute's governing Council has authorized a referendum on two proposed AICPA Code of Professional Ethics amendments recommended for adoption by the board of directors. The bylaws provide that such amendments be submitted to all members of the Institute for a vote by mail ballot ninety or more days after Council authorization of the referendum.

This booklet presents a background statement, pro and con arguments applying to the proposals, the board of directors' message to Council prior to the fall 1978 meeting, and an opinion and legal memorandum from the Institute's legal counsel.

In order to become effective, the amendments must be approved by two-thirds of the members voting. Your ballot will be valid and counted only if received by March 31, 1979. Votes will be secret, but can be counted only if the authenticating card is signed and returned with the ballot. Unauthenticated ballots cannot be counted.

Donald J. Schneeman
Secretary

BACKGROUND

Over a year ago, in September 1977, as a part of its overall response to demands from several quarters that the profession update its standards, AICPA Council authorized a mail ballot of the membership to modify the advertising rule that until then had prohibited seeking clients by solicitation or advertising.

The modified rule, as drafted by the AICPA Professional Ethics Executive Committee and presented to Council at the 1977 meeting, provided that "A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive." The committee announced its intention to interpret the rule to prohibit direct uninvited solicitation because it often leads to the making of "false, misleading, or deceptive" statements that cannot be monitored.

Council decided to include the interpretation in the body of the rule and so added to the text drafted by the committee the sentence "A direct uninvited solicitation of a specific potential client is prohibited."

The revised text was submitted to the membership early in 1978 and was adopted by approval of 72.2 percent of the members voting.

Almost immediately, the ethics executive committee was asked whether the prohibition against "direct uninvited solicitation" was limited to "in-person" solicitation or included written solicitation tailormade to the recipient. After extensive consideration, the committee has most recently interpreted the prohibition to apply only to direct uninvited oral or in-person solicitation.

Since May 1977, prior to the 1977 action of Council, the Institute's advertising, solicitation, and encroachment rules have been the subject of an inquiry by the United States Department of Justice. The department seems to agree that the portion of the new advertising rule that pro-

hibits only "false, misleading, or deceptive" advertising conforms to existing law, since it has raised no objection to that portion.

However, the department challenges the legality of both rule 401 (encroachment) and that portion of rule 502 prohibiting direct uninvited solicitation, since neither one is limited by the "false, misleading, or deceptive" standard. Prior to the October 1978 Council meeting, the Justice Department staff had recommended that the department initiate a complaint seeking to have the prohibitions against encroachment and solicitation declared illegal and removed from the code.

Legal counsel for the Institute advised that the rule against encroachment seemed too broad a restraint to survive an antitrust attack and that it was unlikely the ban on direct uninvited oral or in-person solicitation could be successfully defended. In an antitrust case, each rule would be regarded as a restraint on competing CPAs and would be tested for whether or not it would be "reasonable" in the antitrust sense. Recent cases indicate that the rules would have to be shown to *advance* competition to be considered "reasonable." Legal counsel advised that they were not aware of facts that would sustain a defense that the rules were "reasonable."

In the light of these circumstances, Council overwhelmingly authorized a mail ballot to repeal the encroachment rule, and authorized a mail ballot to repeal the prohibition against direct, uninvited solicitation in rule 502 by a vote of 106 to 103. Thereafter, to avoid any implication that Council was recommending a favorable vote of the membership on the proposed change in rule 502, members of Council requested a record of their feelings regarding the rule 502 change. Their vote was recorded as 130 against the proposed change in rule 502 and 69 in favor of the proposal. No similar expression of opinion was requested regarding the proposed repeal of rule 401 (encroachment).

PROPOSED AMENDMENTS

Text of Proposed Change (deletions indicated by strikeover):

Proposal 1: Repeal of Rule 401 (Encroachment)

Text of Rule to Be Repealed:

~~**Rule 401—Encroachment**~~

~~A member shall not endeavor to provide a person or entity with a professional service which is currently provided by another public accountant except—~~

1. ~~He may respond to a request for a proposal to render services and may furnish service to those who request it. However, if an audit client of another independent public accountant requests a member to provide professional advice on accounting or auditing matters in connection with an expression of opinion on financial statements, the member must first consult with the other accountant to ascertain that the member is aware of all the available relevant facts.~~
2. ~~Where a member is required to express an opinion on combined or consolidated financial statements which include a subsidiary, branch, or other component audited by another independent public accountant, he may insist on auditing any such component which in his judgment is necessary to warrant the expression of his opinion.~~

~~A member who receives an engagement for services by referral from another public accountant shall not accept the client's request to extend his service beyond the specific engagement without first notifying the referring accountant, nor shall he seek to obtain any additional engagement from the client.~~

Proposal 2: Repeal of That Portion of Rule 502 Relating to Direct Uninvited Solicitation

Rule 502—Advertising and Other Forms of Solicitation

A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. ~~A direct uninvited solicitation of a specific potential client is prohibited.~~

ARGUMENTS APPLYING TO BOTH PROPOSALS

In Favor of the Proposals

If the rules are voluntarily repealed by the membership, the Institute would be in a position to discourage undesirable forms of solicitation and encroachment, to issue policy statements against such practices as unprofessional, and to urge members' professional discretion in practice development. This would permit flexibility in responding to the needs of the public and the profession.

There are occasions when the Institute must "stand and fight." This is not one of those occasions. The trend of the law in this area is clear, and the present state of the law pertaining to bans on solicitation and encroachment as expressed in the Institute's code is such that the prospects of a successful antitrust defense are, at best, slim. Any vigorous attempt to preserve the challenged bans should be in the legislative, not the judicial, arena.

It is difficult to evaluate how the public would view a "stand and fight" position by the profession. Such a position might be admired by some, but others would see it as a wasteful effort by the profession to preserve rules that interfere with the offering of professional services and that deny the public the perceived benefits of open competition.

Although the focus has been on governmental pressure, a legal challenge to the bans could also come from other quarters, such as from a member disciplined for having solicited or encroached.

In the event a lawsuit is brought under the antitrust laws, even if the court does not order the rules removed from the code, the trend in recent decisions suggests that the court would limit any solicitation or encroachment rule to banning only that which is "false, misleading, or deceptive" and would prohibit the Institute from ad-

vancing any policy against, or making any statements against, other undesirable forms of solicitation or encroachment.

The defense of an antitrust attack on the rules would be costly in terms of both legal fees and the time of those involved.

The proposed changes should be adopted because many practitioners already engage in various forms of solicitation. It would be more honest and fair to all to make the changes and allow practitioners to decide how best to practice their profession.

Adoption of the proposal would still permit the profession to prohibit undesirable practice development activities, since rule 502 would still ban "false, misleading, or deceptive" advertising or solicitation.

Against the Proposals

The time has come for the profession to stand firm before the challenge of ever-increasing governmental interference.

Members should be willing to pay whatever the cost to maintain standards of behavior that have been hallmarks of their profession for many years. It would erode the dignity of the profession to abandon such standards voluntarily.

By making the proposed changes voluntarily, the Institute would invite even more governmental intervention in the profession's affairs.

Some members believe that, while there has been an expression of intent, there is no certainty that the government will, in fact, make a formal antitrust challenge and that the likelihood of such a challenge would decrease if the profession's resolve is clear.

The present rules promote honorable competition, but the amendment would permit all forms of solicitation and encroachment—so long as they are not "false, misleading, or deceptive." This

would not be in the best interests of either the profession or the public.

The Institute's repeal of the bans in question may cause many state CPA societies to adopt their own such bans, thus complicating the joint enforcement program.

ARGUMENTS APPLYING SPECIFICALLY TO REPEAL OF RULE 401 (ENCROACHMENT)

In Favor of the Proposal

The AICPA Professional Ethics Division has long been on record as favoring repeal of rule 401 because it is inconsistent with rule 502, which permits advertising and solicitation unless it is "false, misleading, or deceptive."

The rule has not been enforced because no definition of what constitutes encroachment has been developed, and complaints have usually been brought under the advertising and solicitation rule (rule 502).

The rule in its present form creates a restraint of trade so broad that legal counsel has advised it cannot be successfully defended as "reasonable." Thus, its existence as a rule of conduct invites antitrust attack that could involve other rules.

The elements of the rule that can be defended as "reasonable"—those relating to "shopping for accounting principles" and expressing opinions on consolidated financial statements—are related to the technical standards rules and can be issued more properly as interpretations thereunder.

Against the Proposal

There is no court decision that directly points to a learned profession's encroachment ban as unlawful on antitrust grounds; therefore, the validity of the government's objection to the rule should be tested in the courts, not just accepted through voluntary action by the profession.

Portions of the rule offer useful guidance to members, and that guidance might be less effective if such portions were to be published as a part of the profession's technical literature.

ARGUMENTS APPLYING SPECIFICALLY TO REPEAL OF DIRECT UNINVITED SOLICITATION BAN IN RULE 502

In Favor of the Proposal

The challenged portion of the rule most recently has been interpreted to prohibit only oral or in-person solicitation, and the AICPA Professional Ethics Division intends to amend its published interpretations to reflect this conclusion. This ban is so narrow that little would be lost by giving it up voluntarily, just as little would be gained in a costly fight to preserve it, even in the unlikely event of success.

As a practical matter, the rule is unenforceable. The only parties usually present at a solicitation are the CPA and the prospective client; thus, typically there often is no evidence to support a disciplinary proceeding. Usually, clients do not want to be involved if the solicitation has been unsuccessful; if it has been successful, they will not testify against their accountants.

The only credible public policy argument for retaining the ban would be that, in the view of some, solicitation tends to impair independence. Even if that argument were accepted by a court with respect to audit engagements, it is unlikely that the ban could be justified with respect to other professional services. Thus, a large segment of professional practice would not be covered.

Several state attorneys general have advised state boards of accountancy that, in view of the *Bates* case, it is unconstitutional for a board to have an outright ban on solicitation. While the legal posture of professional associations differs from that of state licensing boards, the rules of conduct governing practice and professional behavior should not be permitted to differ in these respects.

Against the Proposal

Legal counsel has not advised that the solicitation ban cannot be defended. They have advised only that the chance of successful defense against an antitrust challenge is slender. As long as there is any possibility of success, the Institute should advocate the deeply held convictions of its members, regardless of cost.

The fact that the rule now would be interpreted narrowly—banning only oral or in-person solicitation—should strengthen an antitrust defense based on "reasonableness."

The accounting profession is different from other professions in that auditors must be independent. Solicitation may impair an auditor's independence. The reasonableness of having a prohibition against soliciting engagements requiring independence should be demonstrated—in court, if necessary.

APPENDIX

LETTER FROM BOARD OF DIRECTORS TO COUNCIL IN SUPPORT OF PROPOSALS

October 9, 1978

To the Members of Council of the
American Institute of Certified
Public Accountants

At its October 21st meeting Council will consider two resolutions calling for the elimination of rule 401 (Encroachment) and the second sentence of rule 502 (Advertising and Solicitation) of the rules of conduct. Enclosed is a letter and memorandum from our attorneys, Willkie Farr & Gallagher, setting forth their opinion on the prospects of successfully defending the second sentence of rule 502 against an antitrust challenge.

Elimination of Rule 401

The elimination of rule 401 will remove the encroachment ban from the rules of conduct. The portions of the present rule relating to "shopping" for accounting principles and expressing opinions on consolidated financial statements will be retained elsewhere in the technical literature of the profession. In the opinion of the professional ethics division and the board of directors, the encroachment ban was rendered meaningless and unenforceable, as a practical matter, when the membership adopted the Institute's revised rule relating to advertising in March of this year.

Amendment of Rule 502

The second sentence of rule 502 reads as follows:

> A direct uninvited solicitation of a specific potential client is prohibited.

The elimination of this sentence will place all forms of solicitation on the same footing as advertising. Accordingly, only false, misleading, or deceptive solicitation would be prohibited.

The second sentence was added to the present rule 502 during the discussion at the Council meeting on September 17, 1977. The professional ethics executive committee was proposing to issue an interpretation prohibiting direct uninvited solicitation concurrently with adoption of revised rule 502. There was concern on the part of Council that the interpretation exceeded the scope of the proposed new rule 502, which reads as follows:

> A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive.

Thus, the substance of the proposed interpretation was added as a second sentence to the proposed rule 502 by a vote of Council and became effective by vote of the membership in March 1978.

Antitrust Challenge

As you are aware, the antitrust division of the Department of Justice has been carrying on an investigation of the AICPA Rules of Conduct since May 1977. Following adoption of revised rule 502 by our members, the representatives of the antitrust division expressed the view that rule 401 and the second sentence of rule 502 are in violation of the antitrust laws.

Despite vigorous arguments by AICPA representatives and our attorneys in support of these prohibitions, we were informed in early August that recommendations were being made within the Department of Justice to proceed with a complaint against the Institute in federal court for retaining rule 401 and the second sentence of rule 502. During the course of the discussions, we inquired whether such action would be deferred if we submitted a proposal to our board of directors, Council, and membership to eliminate the two prohibitions from our rules of conduct. While no officially binding assurance has been received, a complaint has not been filed to date, and we believe that action

will be deferred pending the outcome of action on the changes we are proposing.

The trend of recent legal decisions gives us scant comfort and considerable doubt that the second sentence of rule 502 can be retained. The *Goldfarb* case made it clear that the professions have no exemption from the antitrust laws. Shortly before the current rule 502 became effective, the Supreme Court decided the *Professional Engineers* case, striking down as violative of the antitrust laws an ethical rule against competitive bidding that the National Society of Professional Engineers had attempted to justify on the ground that by suppressing price competition, it promoted quality and therefore public safety. In June of this year the Supreme Court decided two cases, *Ohralik* and *Primus,* in which state bans on lawyer solicitation were challenged on constitutional grounds. These cases are discussed fully in the legal memorandum attached, and our attorneys have pointed out to us that the decisions will make it more, rather than less, difficult to defend the Institute's encroachment and solicitation bans if they are challenged under the antitrust laws.

Board of Directors' Recommendations

In view of the foregoing developments, the board of directors decided to propose the elimination of both rule 401 and the second sentence of rule 502 to avoid costly litigation that offers little or no prospect of being resolved in the Institute's favor. In reaching this decision, the following factors were considered, not all of which where given equal weight by every member of the board, but which, in the aggregate, impelled a unanimous resolution:

1. In view of legal counsel's opinion, the prospects of a successful defense in litigation were deemed too poor to warrant defending the issues through the courts. The cost of protracted antitrust litigation would be

enormous and would pose potential damage to the posture of the profession in the eyes of Congress and government agencies.

2. The possibility of waiting for a complaint to be filed by the Department of Justice and then seeking to negotiate a consent decree was not an attractive one in the light of the current stringent rules governing antitrust consent decrees and in view of the negative public impression that would be created if the Institute backed down in the face of a complaint. It was also recognized that consent decrees entail legal and administrative burdens of compliance over a period of years.
3. A limited ban against direct uninvited oral solicitation, even if sustained, would be so narrow that its usefulness is open to serious doubt in view of the present permission of advertising and other forms of solicitation. Its value is probably not sufficient to warrant the expenditure of money, time, and effort required to defend it.
4. The prohibitions under question have been virtually unenforceable in the past because of a reluctance on the part of clients to provide corroborating evidence. While it can be argued that the mere existence of a prohibition has a salutary restraining influence, the inability to enforce rules can result in a cynical attitude toward the entire disciplinary process.
5. Taking the initiative to eliminate the prohibitions might avoid the disadvantages of the other alternatives and might also yield some benefit from being seen as a positive step toward enlightened self-regulation.

In recommending that Council authorize a mail ballot to repeal the encroachment

rule and the prohibition against direct uninvited solicitation, the board stresses that it does not favor the behavior the rules were intended to prohibit. The profession years ago adopted in good faith prohibitions against encroachment and solicitation as a measure of protection for the public. But times have changed, public expectations have changed, and the law has changed. Whatever argument for the social and professional desirability of the rule that can be put forward is unlikely to sustain it in an antitrust proceeding, and the adverse consequences of such a result would be substantial. The board of directors urges adoption of the resolutions as submitted.

Sincerely yours,

Stanley J. Scott
Chairman of the Board

OPINION OF LEGAL COUNSEL

October 6, 1978

American Institute of Certified
Public Accountants
1211 Avenue of the Americas
New York, New York 10036

Gentlemen:

You have asked our legal advice as to whether the ban on direct uninvited oral or in-person solicitation, as it appears in the second sentence of Rule 502 of the Rules of Conduct, could be successfully defended if challenged as a violation of the federal antitrust laws.

A categorical opinion cannot be given on the present state of the law and the facts. However, we believe it unlikely the ban on direct uninvited oral or in-person solicitation could be successfully defended. This is based upon: (1) our view that the ban must be analyzed as a restraint of trade under Section 1 of the Sherman Act; (2) the direction and tenor of recent Supreme Court decisions in this unsettled area; and (3) the absence, so far as we are aware, of a credible and persuasive body of facts to sustain an antitrust "rule of reason" defense.

The Supreme Court decision in *Goldfarb v. Virginia State Bar* made it clear that bar associations and other groups of learned professionals are not exempt from the prohibitions of the Sherman Act. Therefore, an agreement, such as an ethical rule, restraining competition among those practicing a profession such as law, medicine or accountancy is a restraint of trade within the meaning of Section 1 of the Sherman Act. The only distinction made between groups of learned professionals and other groups of competitors is that agreements by the former, not directly related to prices, will be tested under the "rule of reason" rather than treated as *per se* violations of the Sherman Act.

Therefore, we believe the solicitation ban in the second sentence of Rule 502, since not directly related to pricing, would be viewed as a restraint of trade and would be tested under the "rule of reason" rather than declared a *per se* violation.

The tenor and direction of recent antitrust and constitutional decisions by the Supreme Court suggest that the justifications of a restraint such as the solicitation ban in the second sentence of Rule 502 that will be deemed "reasonable" are much more limited and difficult to sustain than was thought prior to those decisions. A memorandum discussing the significance of those decisions is attached.

We believe it would be difficult to develop the necessary facts to ground a successful defense of the solicitation ban. At the present time we are not aware of any consistent, credible and persuasive body of facts that would sustain the reasonableness of that ban.

Very truly yours,

Willkie Farr &
Gallagher

MEMORANDUM OF LAW

To: American Institute of Certified Public Accountants

From: Willkie Farr & Gallagher

Re: Blanket Ban on Solicitation—Antitrust Considerations

Dated: October 6, 1978

There are four recent Supreme Court decisions which we believe bear upon the views we have expressed in the letter to which this memorandum is attached. Three of these decisions are under the First and Fourteenth Amendments to the Constitution and deal with state bans on advertising and solicitation by lawyers. The fourth decision is under the federal antitrust laws and limits the scope of a successful "rule of reason" defense.

The direction and tenor of those decisions suggests a reduction in the prospects for a successful defense of an outright solicitation ban. The Antitrust Division of the United States Department of Justice appears to understand this and to have drawn considerable encouragement from those decisions in its deliberations on whether or not to proceed against AICPA. Similarly, we see no reason for AICPA to draw encouragement from those decisions or to undertake a defense of its solicitation ban based on those decisions.

Constitutional Considerations—Advertising

In *Bates v. State Bar of Arizona* the Supreme Court held that a blanket state ban on all lawyer advertising was unconstitutional under the First and Fourteenth Amendments and that the antitrust laws were not applicable to a state. The Supreme Court did not then decide the constitutionality of bans on solicitation or other types of advertising. It did refer specifically to the possible constitutionality of state bans on the type of lawyer solicita-

tion that might occur under circumstances suggesting the existence of undue influence, but the scope of the decision in the *Bates* case was necessarily limited to the particular application of a state's ban on lawyer advertising. As the more recent Supreme Court decisions have made clear, the *Bates* decision did not declare constitutional or lawful any other bans on solicitation or advertising by professionals. It did, however, reject various defense arguments that would likely be rejected with even less hesitation in an antitrust "rule of reason" case.

Antitrust Considerations

The majority opinion in *United States v. National Society of Professional Engineers,* an antitrust case, has been read by one dissenting justice as requiring a successful "rule of reason" defense to show that the challenged restraint is in fact *procompetitive.* The anticompetitive restraint in that case (a competitive bidding ban) could not, in the opinion of the majority, be justified as reasonable on the ground offered—that it was designed to minimize the risk that competition would produce inferior engineering work endangering the public safety. Whether facts could have been developed to support that argument is not clear; in any event, the majority opinion was to the effect that the National Society of Professional Engineers would not be permitted to prove that the public policy behind the Sherman Act was subordinate to the Society's perception of the public policy in favor of engineering safety.

Constitutional Considerations—Solicitation

The two other decisions were in constitutional cases not involving the antitrust laws. In *Ohralik* v. *Ohio State Bar Ass'n* the state ban on lawyer solicitation was upheld as it applied to one of the most egregious and abusive instances of direct uninvited oral solicitation imaginable. (Two minors, injured in an automobile accident,

were solicited by the lawyer in question in the hospital in the case of one girl and at home immediately after discharge from the hospital in the case of the other girl. It is difficult to conceive of a comparably repugnant set of facts occurring in an instance of solicitation by a certified public accountant.) The Supreme Court held a ban on lawyer solicitation constitutional as applied because the interests of the State of Ohio in protecting the public against those aspects of solicitation that might involve fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct were paramount. Conversely, the objectives of the First and Fourteenth Amendments, as they relate to lawyer solicitation for pecuniary gain and where speech is merely a part of the means of such solicitation, were subordinate. In short, the Supreme Court balanced the public interest in protecting free speech against the public interest in preventing the evils of this type of lawyer solicitation and held that the latter outweighed the former in the particular circumstances of that case.

In the companion case of *In re Primus* the Supreme Court held that a ban on lawyer solicitation was unconstitutional as applied to Primus' letter in behalf of an organization whose objective was to preserve civil liberties. The First and Fourteenth Amendment objectives of protecting various forms of free speech were held paramount, and the interests of the State of South Carolina in protecting the public against remote possibilities of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest and lay interference, as well as South Carolina's interests in preventing frivolous or vexatious litigation and minimizing commercialization of the legal profession, were held subordinate on the facts of that case. Thus, the same balance was struck by the Supreme Court in *Ohralik* as in *Primus*, but with an opposite result.

Significance of Decisions

In order to appraise the significance of the *Ohralik* and *Primus* decisions for Rule 502, it is essential to recognize that those decisions involved lawyers, not accountants, and the rules banning lawyer solicitation were promulgated by states, through their courts, and not by private professional organizations such as AICPA. As in the *Bates* case those decisions dealt with the constitutionality of state rules and not with the antitrust legality of rules of private professional organizations. The facts and the law in the two lawyer solicitation cases differ from the facts (as we might best conjure them up) and the law in any antitrust case that might be brought on the application of the second sentence of Rule 502 to certified public accountants. However, the approach of the Supreme Court in balancing state interests does shed some light on the approach that might be taken by the Supreme Court in deciding an antitrust "rule of reason" case. It is reasonable to expect that a state's arguments (defending an advertising or solicitation ban) rejected in a constitutional case would fare no better when advanced by a private professional organization in an antitrust case.

Application of Precedent to AICPA Rules

It should be observed that the narrower the restraint the less difficult it is to justify as reasonable. The converse is also true. Indeed, it is the breadth of the outright or blanket ban on direct uninvited solicitation, under any and all circumstances, even if limited to oral or in-person solicitation, that the Antitrust Division challenges. However, a ban limited to solicitation (including advertising) that is false, misleading or deceptive has been noted with approval by representatives of the Antitrust Division. Hence, their objection to the second sentence of Rule 502 and their

apparent approval of the first sentence. Hence too, our frequently expressed preference for a ban limited to direct uninvited oral or in-person solicitation as opposed to a ban on all solicitation. The former would, of course, be less difficult to defend than the latter. Not surprisingly, the Antitrust Division representatives have questioned the motives of AICPA in desiring to retain a limited ban—and one so easily circumvented. They suspect a broader, less defensible purpose.

The foregoing discussion assumes the threat of a civil proceeding against AICPA by the Antitrust Division seeking to enjoin the retention and enforcement of the direct uninvited solicitation ban. It should be recognized that there are other types of antitrust proceedings which could be brought against AICPA on account of its bans on encroachment and direct uninvited solicitation. For example, the Antitrust Division could bring a criminal proceeding which theoretically could result in fines and imprisonment. The possibility of such a proceeding being brought, or resulting in such penalties if brought, appears extremely remote. There is a further possibility of a civil proceeding by the Antitrust Division seeking damages on behalf of the United States. We are not aware of any basis for damages being sought in such a proceeding and consider the possibility remote. Treble damages and injunctive relief may be sought by private plaintiffs claiming injury to their business or property, and treble damages may also be claimed by state attorneys general on behalf of individual residents sustaining injury to their property by reason of the unlawful solicitation ban. Again, we are not presently aware of facts suggesting the likelihood of such proceedings or of damages that could be established in such proceedings.

In sum, if challenged, the oral solicitation ban would likely be tested under the

"rule of reason" rather than disposed of as a *per se* violation. Related antitrust and constitutional cases suggest lines of defense under the "rule of reason," although the decision in the *Professional Engineers* case may diminish the viability of those lines of defense.

Willkie Farr & Gallagher