Approved MAR 6 1991 Gary Blumenthal
Date

MINUTES OF THE House COMMITTEE ON Governmental Organization.

The meeting was called to order by Rep. Gary Blumenthal at
Chairperson

9:00 a.m./~~p.m.~~ on February 26, 1991 in room 522-S of the Capitol.

All members were present except:

Rep. Frank Weimer, excused

Committee staff present:

Carolyn Rampey, Research Dept.
Avis Swartzman, Revisor of Statutes
Nita Shively, Committee Secretary

Conferees appearing before the committee:

Rep. Bob Vancrum
Joseph Kain, Sunflower Asset Mgt.
Leon Logan, Chairman, Board of Accountancy
T.C. Anderson, KS Society of CPA's
Arthur Solis, State Chairman, American GI Forum
Sonny Scroggins, Chairman KS Regional African-American History Month Founder Commission
Fred Phelps, Sr.

Chair opened the meeting by announcing he has assigned HB 2182 to a subcommittee for consideration. The subcommittee will be chaired by Rep. Lahti with Rep. Hamilton and Rep. Ramirez.

HB 2272 - AN ACT concerning certified public accountants; relating to referral of clients for professional investment advice; making certain acts unlawful; amending K.S.A. 1990 Supp. 1-316 and repealing the existing section.

Chair recognized Rep. Vancrum who appeared in support of HB 2272, furnishing written testimony, (Attachment 1). Rep. Vancrum noted the need for clarification regarding the prohibiting of members of the accounting profession accepting commissions and contingent fees, providing full disclosure is made. He feels that it is also a violation of free trade and anti-trust laws.

Joseph Kain testified and presented written testimony in support of HB 2272, (Attachment 2), emphasizing that the Board of Accountancy's position is illegal. Another problem caused by the ban is that some CPA's defy it by accepting kickbacks.

Chair recognized Leon Logan who appeared in opposition to HB 2278, furnishing written testimony, (Attachment 3). He reiterated the Accountancy Board's position that this legislation would not be in the publics' best interest. He requested that this committee at least postpone any action until next year when the Task Force Study is completed; their final recommendation will be made at that time.

T.C. Anderson testified as an opponent and presented written testimony, (Attachment 4), regarding the Accountancy Board's contention that it is not in violation of FTC laws. Restraint of trade is not an issue since there is an execption from the Sherman Act for actions of state legislatures.

Questions were asked and discussion followed after each conferee testified.

HB 2283 - AN ACT establishing the advisory committee on African-American affairs; composition thereof; election of officers; powers and duties.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Governmental Organization,

room 522-S, Statehouse, at 9:00 a.m./p.m. on February 26, 19 91.

Chair recognized Arthur Solis who appeared in support of HB 2283, furnishing written testimony, (Attachment 5). Mr. Solis noted how invaluable the Kansas Advisory Committee on Hispanic Affairs has been to the Hispanic community and the need for a similar commission to benefit the African-American community.

Sonny Scroggins testified and furnished written testimony in support of HB 2283, (Attachment 6), taking exception, however, to the provision that appointments to the advisory committee be made by the Governor alone. He suggested that several appointments be made by the President of the Senate, Senate Minority Leader, Speaker and the Minority Leader of the House. Discussion followed regarding the possibility of establishing the commission this year, but funding the staff next year due to severe budget constraints.

Fred Phelps, Sr. appeared in support of HB 2283, furnish written testimony, (Attachment 7), also citing his desire to have Section 2 amended regarding advisory committee members appointed by the governor.

Chair submitted minutes for February 18 and February 19, 1991 for approval. Motion to approve minutes made by Rep. Bowden, seconded by Rep. McClure, Motion carried.

Meeting adjourned at 10:05 a.m.

GUEST LIST

COMMITTEE: G.O. DATE: 2-26-91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Priscilla Mays	2060 S. Tens	Self
Arthur W. Solis	Olathe	American GI Forum
Thirkelle Howard	Topeka	Self
Sid Snider	Topeka	DHR
William V. Minner	1503 SW Quincy	C.C.B.C.
Pamela Carter	827 SW Tyler	Black American Affairs
Robin WARREN	N. York	DX. Ritchard Staff
Phyllis Whitmore	Topeka, KS 66604 1019 Mac Vicar	Self

STATE OF KANSAS

BOB VANCRUM
REPRESENTATIVE, TWENTY-NINTH DISTRICT
9004 W. 104TH STREET
OVERLAND PARK, KANSAS 66212
(913) 341-2609
STATE CAPITOL, ROOM 112-S
TOPEKA, KANSAS 66612
(913) 296-7698

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: APPROPRIATIONS
JUDICIARY
TAXATION

TESTIMONY TO THE HOUSE GOVERNMENTAL ORGANIZATIONAL COMMITTEE BY REP. BOB VANCRUM

February 26, 1991

Chairman Blumenthal and Honorable Members of the Committee:

HB 2272 was introduced at my request at the urging of several accountants and brokers to clarify the circumstances in which it is legal for members of the accounting profession to engage in a referral fee, fee splitting or commission splitting activities because of their referral of clients and others for investment advice. Currently, the State Board of Accountancy by regulation purports to prohibit CPAs from receiving any compensation in the way of referral fees, splitting of fees or commissions for having referred clients for investment advice. Since I am an attorney specializing in business planning, financial and estate planning and some tax matters, I am aware that accountants and certain other professionals have ocassion from time to time to refer their clients for investment advice. Although I have not asked for nor received referral fees in such a case, I certainly have no quarrel with CPAs being able to do so, if they disclose it to their clients, since in the normal case they will spend a substantial period of time reviewing huge prospectuses with many complicated financial assumptions for their clients. If they choose not to charge separately for the matter, but instead disclose to their client that they have an agreement whereby the securities broker pays them for this service, I see no problem with the arrangement.

More specifically, the Federal Trade Commission in a consent decree entered into on April 4, 1989, specifically barred the American Institute of Public Certified Accountants from prohibiting its members from accepting commissions and contingent fees so long as full disclosure is made with the arrangement and all applicable securities laws are complied with.

Mr. Joseph Kain and others have called to my attention the fact that notwithstanding this action by the FTC, our State Board of Accountancy is persisting in trying to prohibit CPAs from accepting referral fees or entering into fee spliting arrangements. In September, I called this into question with the Board of Accountancy, which held two hearings on the matter, but in January stated its intention to seek legislation to the acceptance of fees. This simply does not comply with the FTC rules, so I introduced HB 2272 to clarify the issue. I now understand that the Board of Accountancy has the matter under study and is asking you to delay until next year any action. I question whether this is wise, since their current prohibition by regulation is clearly unenforceable. At least I have brought the matter to the attention of the appropriate legislative committee. I will stand for questions.

Bob Vancrum

g.o. 2-26-91
attachment 1

Sunflower
Asset
Management
REGISTERED INVESTMENT ADVISERS

STATE COPY

Joseph Kain, CFP
Richard E. Firth, CFP
Tony Moeller, CPA

February 26, 1991

Dear Honorable Kansas State Representative:

This packet of background documentation attempts to provide the necessary information for you to make an informed decision on our proposed legislation.

The "summary outline and dialogue" attempts to summarize as concisely, as feasible, the key points and arguements as to why we felt compelled to introduce legislation.

Sincerely,

Joseph Kain

Joseph Kain

g.o. 2-26-91
Attachment 2

10985 Cody, Suite 130 • Overland Park, Kansas 66210
800-899-9338 • 913-469-9333

February 26, 1991

SUMMARY OUTLINE AND DIALOGUE

For years, Joseph Kain/Sunflower Asset Management, the Kansas Board of Accountancy (KBA), as well as CPA's across the state and nation have been aware of the growing debate involving compensation to CPA's in the area of financial planning investments, etc.

State boards of accountancy have uniformly banned compensation and the issue was brought to a head when the Federal Trade Commission became involved. The FTC's position is that "prohibiting of referral fees, contingent fees and commissions by accountants would not be in the public interest."

The FTC and the American Institute of Certified Public Accountants entered into a settlement which ended the ban against commissions, referral fees, contingent fees. This settlement was finalized last year, yet, the KBA has continued to enforce their state ban in direct defiance to the FTC settlement, Federal Anti-trust and laws to the detriment of the Kansas consumer.

Years of lobbying the KBA by Joseph Kain have been met with delaying tactics, evasion, nebulous arguements about "protecting Kansas consumers," objectivity, conflicts of interest, etc., yet, NO specific arguements supporting their contentions are presented.

Joseph Kain feels the burden of proof is on the KBA to answer said questions such as:

1) How would Kansas consumers be hurt by our proposal?

2) Why has the KBA ignored the unanimous request by the Kansas Society Board of Directors (in Sept. 1988) to come into compliance with the FTC settlement?

G.O. 2-26-91
attachment 2-2

3) Why does the KBA believe the Kansas consumer is incapable of determining the desireability of our proposal, especially since it requires full disclosure?

It is the opinion of Joseph Kain that the KBA has deliberately ignored reasonable lobbying efforts, numerous federal laws, the FTC-AICPA agreement, and their own state societies recommendation. The KBA has a personal bias against this issue, and have improperly used their position of authority in a well conceived effort to further those bias and opinions. The KBA has a right to their personal prejudices, but that right ends when it conflicts with federal law, and deprives Kansas consumers a choice, as well as unfairly restricting trade.

I personally believe the KBA is practicing a form of professional elitism. They have decided in their infinite wisdom that it is beneath the dignity of their profession to be involved in any way with financial planning and investment advice. They are solely interested in posturing and protecting their image as accountants. They know they do not have a legitimate leg to stand on and their only hope is that no one will challenge them, either statutorily or legally.

Now that the bill has been introduced, their only hope is to delay for as long as possible the inevitable, i.e. setting up a task force to "study" the issue. This issue should be resolved now via a vote on our bill, and your support will send the KBA a strong message that Kansasans expect them to operate as an interpretative body of existing regulations, not a policy making board.

g.o. 2-26-91
attachment 2-3

Financial Services Week April 24, 1989

FTC Warns States to End CPA Commission Bans

By GREGORY BRESIGER

WASHINGTON — A Federal Trade Commission official predicts his group will take legal action against some state boards of accountancy if they don't comply with a federally mandated consent agreement that would end a ban on commissions and contingency fees for accountants.

The ban, which had been imposed on members of the American Institute of Certified Public Accountants (AICPA), the profession's largest private association, appears in the process of being lifted, but some state boards question whether an accord between the FTC and a private group would have any bearing on state boards that license CPAs.

"If they (the boards) don't agree with us, the ultimate outcome is probably to go to court," Charles W. Corddry III, deputy assistant director in the FTC's bureau of competition, told Financial Services Week.

"The burden is really on them (the state boards) to explain why they think it's necessary to continue these prohibitions. We think we have heard all of the reasons for these prohibitions — by virtue of our discussions with the AICPA — and we haven't found any that are sufficient to justify them under the antitrust law. If the boards can come up with some new reasons, we'd be glad to hear them, but we haven't heard them yet," Corddry said.

Recently, the FTC voted 4-1 to give preliminary approval to the agreement with the AICPA (FSW, April 10). The agreement is now open for a 60-day public comment period. A final FTC vote on the agreement is expected sometime this summer. FTC commissioners rarely reverse themselves between preliminary and final votes, commission spokesmen said.

FTC staff members had threatened the 284,000 member AICPA with a lawsuit if the ban wasn't removed. The staff contended barring AICPA members from accepting commissions and contingency fees had "violated Section 5 of the Federal Trade Commission Act by restraining competition among CPAs."

However, Corddry added, a state board can be exempted from any new FTC ruling if it follows the example of California and Iowa. In those states, laws make acceptance of commissions by CPAs a misdemeanor. Another exemption from FTC antitrust regulation may be provided under the state action doctrine, Corddry said.

"The U.S. Supreme Court has interpreted the state action doctrine to mean federal antitrust laws do not apply to the actions of a state when it acts as a sovereign for its citizens," Corddry said.

Still, this state action doctrine may or may not include "subordinate state agencies" such as state boards of accountancy. The doctrine can be extended to some state boards if the authority has been delegated by the state legislature to the board [illegible]

...as Bill Eyeing CPA Commission Bans Is Withdrawn

By HAL TAYLOR

WASHINGTON (FNS) — Citing restriction of competition, the Federal Trade Commission staff has testified against a bill before the Texas Senate that would bar accountants from accepting commissions and contingency fees.

A day after hearings, however, the bill's sponsor, Sen. Ike Harris, withdrew the bill from consideration this year, citing too much opposition to it.

The agency's opposition follows last month's settlement between the FTC and the American Institute of Certified Public Accountants, which says the institute cannot restrict accountants from accepting commissions if they are not performing audit work for the same clients. This agreement does not apply to state rules and laws restricting the practice.

Charle Corddry 3d, of the FTC's bureau of competition, said the Texas legislation would not only restrict competition, but restrict the amount of information available to consumers about accounting services, "without providing any countervailing benefits."

Corddry testified April 11 before the Texas Senate Economic Development Committee. The bill would amend the Texas Accountancy Act of 1979 to prohibit accountants' use of referral fees, contingency fees and commissions.

Supporters of the legislation believe that accountants who accept commissions for financial planning investment advice will have a conflict of interest if they also audit a client's books.

Corddry told the committee, however, that the FTC staff opposes the bill because it would reduce competition without providing any benefits for consumers.

"We believe the prohibiting of referral fees, contingent fees and commissions by accountants would not be in the public interest. These prohibitions would be more restrictive of competition than is reasonably necessary to protect consumers against conflicts of interest," he said.

Corddry added, "We believe that the less restrictive alternative of requiring that referral fees and commissions be disclosed is a preferable means of ensuring that consumers have sufficient information to protect themselves against conflicts of interest. And the less restrictive alternative of limiting the use of contingent fees and commissions to nonattest (auditing) clients is a preferable means of ensuring that accountants remain independent when they provide al-

9.0. 2-26-91
Attachment 2-4

AICPA "...e Measure of Excellence"

September 1, 1988
Vol. 68 No. 13

The CPA Letter

A Membership News Report Published by the AICPA

AICPA Approves FTC Agreement

The AICPA's Council, by a vote of 191 to 5 on August 30 in Chicago approved a recommendation of its board of directors that the Institute enter into an agreement with the Federal Trade Commission, resolving an FTC investigation of the Institute's bans on commissions, contingent fees and several other activities.

The settlement, which lawfully resolves the FTC inquiry, which began in 1985, will result in several changes in the AICPA Rules of Professional Conduct. Under the agreement:

1. While the Institute retains its right to prohibit members from taking commissions or contingent fees from any clients for whom the CPA performs audit, review or compilation services, and examinations of prospective financial statements, it may no longer prohibit these practices with regard to clients for whom a member does not perform such services.

2. AICPA retains its right to require that members disclose to clients that they are accepting a referral fee or a commission for products or services of others referred to the client.

3. The rules which prohibit advertising or solicitation by false, misleading or deceptive statements remain in force, but certain interpretations under those rules relating to self-laudatory or comparative claims, testimonials and endorsements, and advertising that lacks professional dignity and good taste will be withdrawn.

Once signed by the AICPA and by the FTC staff, the agreement will be submitted to the Commission for tentative approval, after which it will be open to public comment for sixty days. After that period, the Commission will decide whether to adopt the agreement finally as signed, or to modify it in some way.

According to A. Marvin Strait, chairman of the AICPA board of directors, "We continue to believe that the accounting profession is different from other professions against whom the FTC has taken action. Our requirements of independence and objectivity are crucial to continued public confidence in our work. The agreement leaves untouched our ability to adopt reasonable rules prohibiting commissions and contingent fees in connection with clients for whom we do work that will be relied on by third parties."

"Throughout the 100 years of our existence," said Philip B. Chenok, AICPA president, "our members have practiced under ethical rules designed to serve the public interest. We are pleased to have the investigation behind us on terms that enable us to meet our public responsibilities. A key element of the agreement approved today permits us to require disclosure when a member accepts a commission."

G.O. 2-26-91
attachment 2-5

KANSAS STATE UNIVERSITY
ALUMNI ASSOCIATION

June 23, 1989

Kansas Board of Accountancy
Attn: Glenda Sherman
900 S.W. Jackson, Suite 907
Topeka, KS 66612-1220

Dear Accounting Board Members,

I would like to take this opportunity to express my concern over the Board of Accountancy's apparent reluctance to remove its prohibition on commissions and contingent fees.

Given the AICPA's lifting of its ban on contingent fees and commissions, the KSCPA's concomitant lifting of its ban, the results of the Anderson Report, and actions taken by other States to allow contingent fees and commissions, it would seem that the Board is in somewhat of a minority in continuing (at least purportedly) to enforce Rule 302 and Rule 503 of the Rules of Conduct.

As a member of the Professional Ethics Committee of the KSCPA, and a practicing CPA, I have followed closely the developments relating to Rules 302 and 503. I would have to agree with the findings of the Federal Trade Commission that these rules violate federal antitrust laws. Attempted enforcement of such a rule would not only be a waste of time and resources, but also may serve to subject the enforcing body to potential legal claims.

I would hope that the Board of Accountancy, in the very near future, would re-assess its stance on these rules and come to a conclusion that is based on the legality, relevancy, and enforceability of these rules.

I regret that I was unable to have this letter to the Board prior to the June 22nd Board meeting, but hope that these comments will prove helpful to the Board when it ultimately deals with this problem.

Sincerely,

Douglas A. VonFeldt

Douglas A. VonFeldt, CPA
Director of Business Affairs
Kansas State University Alumni Association

1408 Denison Manhattan, Kansas 66502 913•532•6260

9.0. 2-26-91
Attachment 2-6

KS CPA Newsletter

Vol. 38, Number 2 Kansas Society of Certified Public Accountants and Its Educational Foundation October, 1990

Crum & Forster seeks okay in Kansas for new professional liability policy

Crum & Forster is seeking approval of Kansas Insurance Commissioner Fletcher Bell to offer a new professional liability insurance policy tailored to small practitioners who engage in basic accounting services only.

The insurance, if approved, would be offered by International Insurance Company and marketed by Rollins Burdick Hunter.

The claims made policy would cover tax, write-up, bookkeeping and compilation services, and MAS consultation. It would not cover financial statement preparation, MAS projects or SEC work.

This Basic Accountants coverage is endorsed by the AICPA and will be made available to members of either the AICPA or the Kansas Society if it is approved.

KSCPA members wishing to be notified as soon as the plan is accepted or rejected in Kansas should advise T. C. Anderson at the Society office.

KSCPA Board of Directors hold retreat; Make plans for 1990-91 committee projects

The Kansas Society Board of Directors, committee chairpersons, officers and directors-elect met in Topeka, August 23-24, to plan the 1990-91 KSCPA year.

David Schmidt, Shawnee Mission management consultant, conducted a planning session which resulted in a number of projects to be undertaken by KSCPA committees during the coming year.

During a Board of Directors meeting held in conjunction with the planning session, the Board took the following actions:

- Adopted a Resolution opposing the expansion of the current Kansas sales tax base to include additional services.
- Voted to assess each eligible KSCPA member who failed to serve as a reviewer in the Report Review Program $100.
- Heard request from the CPE Committee that the KSCPA ask the State Board of Accountancy to grant seminar discussion leaders credit for preparation time. Such credit would be measured in terms of two times the number of presentation hours.
- Received an update from the Quality Review Committee and voted to submit to the AICPA for appropriate action the names of two Kansas firms which failed to remit 1989-90 Quality Review fees.
- Reviewed the final Board of Accountancy regulations dealing with firm names.
- Voted to advise the Board of Accountancy of the final AICPA/FTC Consent Order on commissions and reaffirmed its policy that the AICPA and state regulations dealing with commissions and contingent fees should be the same.

Recognition dinner planned for Nov. 14

KSCPA members are encouraged to attend the KSCPA Fall Recognition Dinner, Wednesday evening, November 14, at the Doubletree Hotel, Overland Park, honoring those individuals who passed the May 1990 CPA exam.

Invitations have been sent to the 79 successful candidates inviting them and their guests to attend this special event.

A registration form for the banquet is enclosed with this Newsletter. KSCPA members are encouraged to support their respective successful candidates and submit their reservations as soon as possible.

Representatives of the State Board of Accountancy along with KSCPA officers will be present to honor those who passed the exam.

1990 Kansas Tax Conference brochure sent

A brochure announcing the 40th Annual Kansas Tax Conference scheduled for November 15-16, in Overland Park, was sent to all members last month.

Paul Kapleau, CPA, Shawnee Mission, Tax Conference Chairman, reports nine topics will be covered during the two-day conference.

Included in this year's registration form is a place to register for a Thursday evening dinner theatre musical, "The Lovely Liebowitz Sisters", at Tiffany's Attic.

If you did not receive a copy of the mailing, please contact the Society office at 1-800-222-0452.

Notice of KSCPA Annual Meeting

In accordance with the provisions of Article X, Section 2 of the Bylaws of the Kansas Society of Certified Public Accountants, the annual business meeting will be held Wednesday, November 14, 1990, at 3:30 p.m., at the Doubletree Hotel, Overland Park.

The membership will elect officers and directors for 1990-91. See pages 10-11 for the Report of the Nominations Committees.

H. C. 2-26-91 attachment 2-7

Colo. to Allow Commissions, Fees for CPAs

By GREGORY BRESIGER

DENVER — Colorado has become the latest state to let accountants accept commissions and contingent fees. It is the eighth state to allow accountants to do so, according to a spokesman for H.D. Vest Advisory Services, an Irving, Texas-based firm that is leading the fight for CPA commissions.

Colorado's 5,524 active CPAs are now permitted to accept commissions and contingent fees, according to a spokesman for the state Board of Accountancy here. The state's CPAs are not permitted, however, to accept commissions and contingent fees for attest work, such as auditing and reviewing financial statements, he said.

The state board unanimously approved the policy changes in December. They took effect the beginning of this month, the spokesman said.

CPAs were prohibited from taking commissions and contingent fees by the profession's biggest trade group until recently. Accepting the fees was viewed as going against the profession's code of ethics. But last year the New York-based American Institute for Certified Public Accountants, which has some 490,000 members, changed its rules and guidelines to allow members to accept commissions and contingent fees, except for attest services. The change came after the Federal Trade Commission threatened to take legal action against the AICPA.

A Vest spokesman who monitors state legislative and administrative action governing CPAs claims the trend is moving toward allowing the practice.

"We see a lot of states looking to remove the bans and many others that aren't enforcing the current bans," he said.

Clients Lose With 'Artificial Barriers' on CPAs

To the Editor:

Since when does a CPA's integrity, independence and objectivity hinge on whether to allow or not allow direct uninvited solicitation (Oct. 15, "Judge Reverses Fla. Ban on Cold Calls by CPAs")? In my estimation, freedom of thought and fairness of competition will enhance the above. The public will be the winner by having a choice based on competency and not merely artificial barriers. The state Boards of Public Accountancy and AICPA are very devout organizations — only devoid in common sense.

My CPA compadres remind me of male lions. They walk around "marking" every tree and bush to stake out their territory. The problem is, the biggest and most ferocious are not necessarily the most "cerebral." Their arguments against professionals offering choices in a free and open society are provincial at best and only serve the special interests of all state Boards of Public Accountancy — namely the large firms.

How independent do you think the outside firm handling Exxon, or any other huge multinational corporate account where literally tens if not hundreds of millions of dollars of fees are at stake?

If you want an accurate definition of "hucksterism," just review the number of banks and savings and loans that have gone "belly up." Many of these entities were in such financial disarray that all the public had to do was read the morning newspaper to determine they were hopelessly insolvent. Yet how many were issued clean opinions on their financials by accounting firms? In addition, these firms were all paid on an hourly non-commissioned basis.

CPAs should be allowed to practice in a free and open manner as are other professionals. Good judgment and common sense should prevail. The attempt to codify every act of a professional is tantamount to a "legislated bowel movement."

Integrity, independence and objectivity come naturally to those who put their clients' best interests first and foremost.

Robert P. Chambers, CPA
San Antonio, Texas

Wanted: Opinions

Financial Services Week welcomes opinions and views from readers in the form of guest executive comments or letters to the editor.

Please send your views to: Editor, Financial Services Week, 7 E. 12th St., New York, N.Y. 10003. Only signed letters that include a day phone number and full address will be considered for publication.

g.o. 2-26-91
attachment 2-8

Giving Consumers a Choice

CERTIFIED PUBLIC ACCOUNTANTS AS FINANCIAL PLANNERS

Allowing CPAs to offer financial servics on a commission basis - with full disclosure to the consumer - will give consumers a choice and offer these benefits:

Familiarity: Long-term relationships between the CPA and client have generated trust and an unmatched knowledge of the client's financial situation. No other financial professional knows the client's situation as well as a CPA.

Optional: Using the CPA's skills for financial planning in addition to tax services is completely at the client's option.

Full disclosure: Unlike other financial professionals, CPAs would be required to provide written disclosure of all commissions and fees received as a result of services to the client.

Tax knowledge: Understanding today's complex tax codes and the client's tax returns provides better judgement toward meeting the client's financial needs.

Savings and convenience: CPAs may currently offer financial planning only on a fee basis. Therefore, a client who trusts his CPA for advice must first pay a fee to the CPA and then commissions to outside brokers of financial products and services. Allowing CPAs to provide services on a commission basis means clients receive complete service, from one person, without additional charges.

Full advocacy: Many of the prohibitions on commissions were enacted near the turn of the century, before implementation of the federal income tax and at a time when a CPA's primary function was as an independent auditor. The National Association of State Boards of Accountancy, the Federal Trade Commission, and several states have recognized a major change in the industry: The function of a CPA not involved in audit work is now to be the client's advocate by holding taxes to a minimum and offering sound financial advice.

High Standards: The CPA exam is considered among the most difficult of all professional licensing examinations. CPAs are consistently placed at or near the top among professional groups for ethics, morality and trustworthiness.

G.O. 2-26-91
attachment 2-9

Quotes and Comments

CERTIFIED PUBLIC ACCOUNTANTS AND COMMISSIONS

"We found no compelling public interest reason to regulate compensation outside the attest function. We believe that the interest of the public is served by non-interference in compensation arrangements that are essentially private and the profession's objectivity can be buttressed with a disclosure rule."

— *Robert Billings, Chairman*
Task Force on Ethics
National Association of State Boards of Accountancy

"Fee-based work discriminates against the smaller client. The average client cannot afford to have a financial plan completed by a certified public accountant. But, if that CPA could receive the commission from the product sale, the CPA could afford to offer the necessary advice and assistance."

— *Herb D. Vest*
H.D. Vest Financial Services

"The restrictions on the use of contingent fees and commissions may ... raise consumers' costs by, for example, eliminating the option of one-stop shopping for accounting services. [The Federal Trade Commission has] studied the accounting profession for several years and has seen no evidence that these restrictions on non-attest services enhance the quality of accounting services, nor have we found any other persuasive justification for them."

— *Jeffrey I. Zuckerman, Director*
Bureau of Competition
Federal Trade Commission

"[This] law acts as a disservice to the public. Our clients are informed, intelligent consumers who make smart decisions. If a service can be provided minimizing the cost to them, why prevent it?"

— *Ross Johnson*
Ross A. Johnson & Co.
Certified Public Accountants

G. O. 2-26-91
Attachment 2-10

Discriminating Against Experience

THE ISSUE OF CERTIFIED PUBLIC ACCOUNTANTS AND COMMISSIONS

Financial planning is no longer a simple matter of opening a savings account or buying a few shares of blue-chip stock. Complex tax codes and the need for a well-rounded investment portfolio have led an unprecedented number of consumers to seek professional financial planning assistance.

Virtually excluded from offering this assistance, however, are the very people who are experts in tax opportunities and their clients' financial needs: certified public accountants. Proposed legislation, if enacted, would prevent CPA firms - even if licensed as certified financial planners, securities brokers, or life underwriters - from offering full financial planning services.

* The Board of the National Association of State Boards of Accountancy voted unanimously in 1988 to change the Model Public Accountancy Bill to allow commissions in all but the attest functions.

* The Federal Trade Commission advocates allowing CPAs to offer financial products and services on a commission basis.

* Financial planners, tax attorneys, securities dealers, and other tax professionals already offer similar services and products on a commission basis.

* CPAs may currently give financial planning advice on a fee-basis; however, the consumer must then pay additional commissions directly to stockbrokers and other suppliers, thus increasing costs.

* CPAs are among the top-rated professional groups for ethics and morality, receiving a positive rating of 90% among leadership groups in a 1987 Harris Poll.

* Under a compromise with the Federal Trade Commission the American Institute of Certified Public Accountants would allow CPAs to accept commissions under certain conditions.

* Financial planning services by CPAs would be completely at the option of the client.

* All transactions should require written disclosure to clients of commissions and fees to be received by the CPA; this is not a requirement of other financial planners.

* No commissions should be collected on behalf of clients for whom the CPA performs attest services, when CPAs must remain independent and are working on behalf of the public.

* Similar rules have been enacted in Texas, Maryland, Oklahoma and South Dakota.

G. O. 2-26-91
attachment 2-11

KS CPA Newsletter

Vol. 36 Number 4
December, 1988

Kansas Society of Certified Public Accountants
and Its Educational Foundation

Herb Bevan To Lead Kansas Society of CPAs For 1988-1989

Preparing to receive the oath of office, (left to right) are Thomas Mullane, Kansas City, Secretary-Treasurer; Herbert E. Bevan, Jr., Wichita, President; and Dale L. Birney, Garden City, President-Elect.

Herbert E. Bevan, Jr., CPA, Wichita, has been elected President of the 2,100 member Kansas Society of Certified Public Accountants for 1988-89.

He was elected at the KSCPA's Annual Business Meeting held Wednesday, November 16, in Overland Park.

Bevan is Executive Vice President of SRI, Inc., and succeeds Max V. Snodgrass, CPA, with Snodgrass, Dunlap & Company, Iola.

Other officers elected were Dale L. Birney, CPA, President-Elect, and Thomas J. Mullane, CPA, Secretary-Treasurer. Birney is a partner in Birney and Company, Garden City and Mullane is a partner in the firm of Cudney Ecord McEnroe & Mullane, Kansas City.

Elected to three-year terms on the KSCPA Board of Directors were H.K. (Dick) Dameron, CPA, Wichita; Marian S. George, CPA, Leawood; William H. Jenkins, CPA, Goodland; Jeffrey D. Porter, CPA, Ulysses; and B. Carver Swindoll, CPA, McPherson.

Larry J. Grimsley, CPA, Hays, and Clarence E. Koch, CPA, Wichita, were elected to four-year terms on the KSCPA Educational Foundation's Board of Trustees. Also Phillip R. Dick, CPA, Garden City, was elected to a two-year term.

Elected to head the Foundation for 1988-89 was Marvin R. Klein, CPA, Emporia. Gary Poore, CPA, Wichita, was named Vice Chairman and Clarence Koch, Wichita, Secretary-Treasurer.

KSCPA Board Says Yes To Commission, Contingent Fees

"Kansas CPAs should be permitted to accept commissions and contingent fees under guidelines contained in the agreement between the Federal Trade Commission and the AICPA."

That's the message that will be carried to the State Board of Accountancy following action November 17 by the KSCPA Board of Directors.

Acting upon a request from the Personal Financial Planning Committee, the KSCPA Board, in a nearly unanimous vote, agreed that the State Board rule on commissions and contingent fees should closely parallel that of the AICPA/KSCPA Code of Professional Responsibility. Currently the State Board prohibits the acceptance of commissions and contingent fee arrangements.

The KSCPA Board of Directors' action asks the State Board to amend its rules relative to commissions and contingent fees and call a public hearing to discuss the repeal of the prohibitions as soon as possible following formal FTC approval of the agreement with the AICPA.

No action on the KSCPA request by the State Board is expected until summer or early fall since the FTC has yet to begin a 60-day exposure period required by law on the tentative agreement with the AICPA.

(continued on page 5)

KSCPA to Assist Firms With Quality Assurance

The KSCPA Board of Directors has endorsed a proposal from one of its Task Forces which will permit the Society staff to assist Kansas CPA firms selected to undergo AICPA Quality Assurance Reviews during 1989.

Marian George, chair of the Society's Quality Assurance Review Task Force, asked the Board to permit the Society to help firms secure CPAs to perform the reviews. She also asked that the KSCPA help the AICPA by making sure firm reviews are scheduled during the assigned month and monitor the progress of the reviews through their completion.

Simon to Chair 1989 Kansas Tax Conference

Tom Simon, CPA, Wichita, has been named chairman of the 39th Annual Kansas Tax Conference which will be held November 16-17 at Century II, Wichita.

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November 18, 1988

Letter to State Boards of Accountancy
Discusses current environment in the
accounting profession.

Gentlemen:

On Saturday, September 24th, the NASBA Board unanimously voted to adopt the Task Force on Ethics' proposed model code. This action followed the AICPA vote to change their ethics rules regarding the receipt of commissions, in a Consent Decree with the Federal Trade Commission. In the best interests of the profession, we must maintain uniformity in the rules of professional conduct. It is now up to the individual state boards and state societies to follow the lead of the national organizations. When may I address your state board to more fully present the issues discussed in this letter?

The following is a selected quote taken from a speech given by Mr. Robert Billings, Chairman of the NASBA Task Force on Ethics, at the NASBA meeting in September, 1986:

> "...we found no compelling public interest reason to regulate compensation outside the attest function. We believe that the interest of the public is served by non-interference in compensation arrangements that are essentially private and the profession's objectivity can be buttressed with a disclosure rule. So we adopted one."

H.D. Vest Financial Services is not a passive observer in this critical issue. Our position is as follows:

- Antitrust laws are being violated with respect to current State Board regulations. See Exhibit 1 - a letter from our attorney, Thomas R. Thompson.

- Officers and directors of the various professional societies may be assuming individual civil and criminal liability should they choose to enforce these rules. See Exhibit 2 - a letter from our attorney, Thomas R. Thompson.

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Securities Offered Through
H.D. VEST INVESTMENT SECURITIES, INC., Member:

SIPC Securities Investor Protection Corporation

SIA SECURITIES INDUSTRY ASSOCIATION

NASD National Association of Securities Dealers, Inc.

- Legislation to prohibit commissions, which has been attempted by a few states and is being considered by others, is unconstitutional. See Exhibit 3 - a letter from our attorneys, Jenkens & Gilchrist.

In our opinion, the ethics rules must be held to a higher standard than the mere caprice of members of the profession. One higher standard is the United States Constitution; another is the welfare of the public which the profession purports to serve. (We are prepared to prove in a court of law, if necessary, that the ethics rules prohibiting the acceptance of commissions by accountants are illegal except as they pertain to the attest function.) This is not a question of independence or objectivity, but instead, the basic rights provided to us through the laws of the federal government.

We do not make light of the independence requirements as they relate to the attest function. We at H.D. Vest Financial Services insist that CPAs and other tax professionals associated with us uphold the following five principles:

- The accountant must not violate the independence standard of audit work.
- The accountant must disclose to the client that 1) the accountant will receive a commission for the sale of the product and 2) information obtained from the preparation of the client's tax return may be used to sell him or her a product.
- The accountant must make recommendations based upon the suitability of the investment in relation to the client's needs and objectives.
- The accountant must be duly licensed to sell securities and rigorously adhere to all applicable laws and regulations.
- The accountant must acquire and maintain competency in financial planning and implementation.

Any accountant who has adhered to these five principles will have our full support in any legal action in any state or in any disciplinary action brought by a state board. We will accept no adjudication other than dismissal in a case brought against such accountant.

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There are a number of points which must be considered in contemplation of the commissions issue. CPAs are known for their insight and ability to objectively view situations. After reviewing all the pertinent information, I trust the state boards will have the courage and foresight to revise the code of ethics to reflect the times and the needs of the members and the public.

PUBLIC DEMAND FOR FINANCIAL ADVISORY SERVICES IS GROWING

A wave of public demand for financial advisory services is sweeping the country. Five years from today, the 33% bracket taxpayers will be dealing regularly with their financial planners. In all probability, that financial planning firm will also do compliance tax work. Concomitantly, tax professionals will have added financial planning implementation to the services they offer clients. Tax professionals will be selling investments for IRAs, SEPs, other qualified plans and tax savings. National and regional tax preparation services have already begun to enter the field.

To miss the next five years would be to miss the greatest marketing opportunity of the century. Moreover, if the CPA profession does not resolve the ethics problem soon, the individual practitioner and small partnership will find themselves squeezed out of the compliance tax return market. The fact is that the public will gravitate to the practitioner offering complete financial services.

Owners and employees of smaller firms, which represent a majority of CPAs, have existed for years on "write up" and tax work. Being small, they enjoy a close personal relationship with their clients, usually not present in larger firms. Because of this closeness, the clients of small firms have, over the years, developed a dependency on the advice of their accountant. Since the emergence of financial planning as a profession, the accountant's position as "family financial advisor" has been threatened. Clients began to want more than generic advice, they wanted specific advice about specific problems. Clients want help. We are determined to give it to them.

It is not our desire to be contumacious or contentious. We only wish to assert the right of practitioners to respond positively to the needs and desires of their clients. This is a ubiquitous problem, but because of the independence question is solvable only on the small firm level. For this reason, the entire membership will not be sympathetic to the solution. However, they should recognize the need of their profession to serve the public. If the members of a group fail to subordinate their personal desires to that of the society they serve, that group loses its right to be called a profession.

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FEES ALONE ARE NOT THE SOLUTION

The tax professional encounters client resistance to fee-based planning. The client realizes that after the fee is paid, a commission will still be paid on a particular product. To charge fees high enough to compensate the practitioner for the necessary education to stay current on the different investment alternatives (products) would be difficult at best.

In addition, when a CPA renders investment advice he incurs a potential liability in that he can be held accountable for his advice. An hourly fee does not adequately compensate the CPA for the risk involved. It would be similar to requiring a brain surgeon to operate on a patient on an hourly basis. A one hour operation costs you $100. The surgeon would not operate in such a scenario; the risks are too high and the rewards are non-existent.

THE RULES DISCRIMINATE IN FAVOR OF LARGE CLIENTS

Fee-based work discriminates against the smaller client. The average client cannot afford to have a financial plan completed by a professional. But, if that professional could receive the commission from the product sale, the professional could afford to offer the necessary advice and assistance. When the tax professional gets his securities license, he starts looking for ways to solve problems. Knowing that he will be paid for work that he performs makes him more enthusiastic in finding solutions. We believe that the tax professional's clients deserve that enthusiasm.

VIOLATIONS OF THE TAINTED COMMISSIONS RULES ARE RAMPANT

Pressure by clients for assistance in financial planning has led to widespread violations, not only of the ethics rules, but of the securities laws as well. Believing the rules are illegal, socially and morally unjust, against the public interest and not within the province of professional ethics, many practitioners fulfill their obligation to their clients, in spite of the rules.

We know of a great many violators of these rules; they are wide spread and visible for all to see. Yet, from 1980 when the enforcement division began to this date, the board has only processed a few violators and those received only benign reprimands, indicating that the profession is reluctant to vigorously enforce the rules. Perhaps this reluctance reflects the belief that a legal battle would result in an adverse decision by a court of law. If this is the case, shame on us for having ethics rules of questionable legality.

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VIOLATIONS ARE OFTEN DIRTY

When price controls are in effect, a concomitant black market exists. So it is with our ethics rules. By not allowing CPAs to accept commissions, the profession denies itself and the public the right to define boundaries and constraints.

To maintain anonymity, accountants are wary of sales licenses, consequently many accountants are in the position of having sold a product without the appropriate license. A few unscrupulous product sponsors offer "under the table" fees for recommending their product. When the product sponsor is willing to make an illegal payment to secure a sale, certainly the investment merit of the product comes under question. Furthermore, many accountants are accepting these payments without disclosing them to the client. Transactions such as these are a scourge upon our society and our profession. Yet it is virtually impossible to regulate these activities when we deny practitioners an alternative. Moreover, the general attitude of the profession against product involvement makes the accountant reluctant to reach out for continuing professional education and interpersonal affiliations, thereby denying himself competence.

RULES DISCRIMINATE AGAINST SMALL PRACTITIONERS

The rules prohibiting commissions discriminate unfairly against the small practitioner because partners in large firms are not restricted or encumbered by such rules when they refer business to other partners within their firm. The referring partner does receive, as part of his partnership allocation, his share of the profits that result from the engagement. On the other hand, the small practitioner has no one within his firm to whom he can refer services, consequently he is denied the same compensation that the partner of the larger firm would have received.

LEGISLATIVE ATTEMPTS TO CIRCUMVENT ANTI-TRUST LAWS

A few states have tried to pass legislation to prohibit commissions in an attempt to circumvent the Federal antitrust laws. On August 31, 1988, Governor Deukmejian of California signed Senate Bill 1009, essentially cancelling the effect of a bill passed the prior year, which made it a misdemeanor for persons engaged in the practice of accountancy to accept commissions. The original bill had been "slipped through" that legislature without public hearings, without an opinion from the Attorney General regarding the constitutionality of the legislation, and without consulting with the Federal Trade Commission about the effect the legislation would have upon the

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consumers in the state of California. Additionally, similar legislation was introduced in the state of Washington but was killed in committee once public hearings were held.

There are several reasons such legislation should not be passed: First, legislators are loathe to pass laws that essentially are propagated by an industry or profession to be self-serving and to the detriment of the consumer. Once the Federal Trade Commission advises legislators of the adverse affect upon competition, it is doubtful anyone would sponsor such a bill. Secondly, if such legislation is passed, funds must be allocated for its enforcement in order for it to be effective. This will cost the state an enormous amount of money. The people will not stand for their tax money being spent for such a capricious motive as enforcing a commission rule against accountants. There is no public good to come from the expenditure of funds in this manner.

Furthermore, this legislation would violate several provisions in the United States Constitution. Exhibit 3 is a copy of a letter from our attorneys, Jenkens & Gilchrist, which discusses why such a law violates the United States Constitution.

The First Amendment guarantees the right of a citizen to state the truth. Consequently, the legislation must address whether it will apply to all CPAs or only to those who "hold themselves out" as CPAs. The holding out provision would violate the First Amendment right by penalizing an individual for stating the truth. If you apply it to all CPAs, then the Attorney General will have more business than he can possibly handle because there are thousands of CPAs who receive commissions. If you apply it only to CPAs in public practice, then the term "in public practice" must be defined. If "in public practice" encompasses areas outside of the attest function, such as tax return preparation, management advisory services, and bookkeeping services, then everyone in the state performing these activities must be required to register with the board as accountants.

Additionally, such legislation must be carefully drafted because, in all probability, it will violate the due process clause of the Fifth and Fourteenth Amendments because of the impracticality in defining exactly who is covered, what a commission is, and other definitional problems. The terms "commissions" and "contingent fees" are being used recklessly, i.e.: if you give a referral to products and services of another without receiving monetary compensation, but receive compensation in kind, such as a reciprocal referral from your referred source, then would that be considered a commission? It would seem, without a doubt, it would be. If that is true,

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then the Attorney General will have to prosecute every CPA in the state. If the legislation required the commission to be monetary only, then one could circumvent the law by taking payments in kind, such as reciprocal referrals, TV sets, trips to Hawaii, etc.

Courts in the United States have generally found that state legislators may not pass laws that are essentially arbitrary and capricious. By the same reasoning that the state legislature cannot pass a law which would stipulate that persons whose names begin with the letter "A" cannot be Certified Public Accountants within the state, likewise the legislature cannot carve out CPAs as a separate class and deny them their right to receive commissions when others, engaged in essentially the same business as a CPA, are allowed to receive commissions (i.e., enrolled agents, attorneys, and other tax practitioners).

There are thousands of CPAs who offer commission-based products to their clients. In so doing, they fully disclose to their clients that they will be receiving a commission and have the client sign a document acknowledging the disclosure. The client can elect the service or not. Those accountants and clients, offering and being offered this service, will be highly resentful of anyone who is trying to influence legislation which regulates essentially private transactions which are of no concern to anyone other than the client and the accountant.

In closing, I offer to you the resources of my company as your needs arise in analyzing this issue. Do not hesitate to contact me whenever I can be of assistance. We can and will overcome the prejudices associated with change, thus insuring the successful future of the CPA profession, particularly for the small practitioners who perform such a valued service to thousands of people.

I urge you to follow the lead of the AICPA and NASBA and change your rules to allow the acceptance of commissions. Please notify me of any proposed changes to your rules.

Thank you for your time and consideration.

Yours very sincerely,

HDV

Herb D. Vest

HDV/lc
Enclosures

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Thomas R. Thompson
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Austin, Tx. 78761

Telephone
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September 23, 1988

MEMORANDUM

TO: National Association of State Boards of Accountancy

FROM: Thomas R. Thompson

RE: Model Code of Professional Conduct Commission and Incompatible Occupation Rules

This letter memorandum is written at the request of and on behalf of my client, H.D. Vest Financial Services (Member: National Association of Securities Dealers, Inc.). I have been asked to review and comment on the sections of the Model Code of Professional Conduct previously adopted by the National Association of State Boards of Accountancy (NASBA) relating to Commissions and Incompatible occupations, and to urge your adoption of changes to the Rules of Professional Conduct similar to those adopted by the Texas State Board of Public Accountancy.

The old rules contain a broad prohibition against the acceptance of a commission for a referral to a client of products or services of others and a prohibition against concurrent practice by a CPA in any business or occupation which is incompatible with the practice of public accountancy. The commission prohibition has an anti-competitive effect which raises questions under the federal antitrust laws. In addition, the rules in question impact on constitutionally protected commercial speech in limiting the promotional efforts of certified public accountants who "hold out" as such and provide commission based financial planning services and in some cases are unconstitutionally vague.

ANTITRUST ISSUES

The rule against acceptance of commissions has an anti-competitive effect which restrains trade in apparent violation of federal anti-trust laws. In the absence of the commission rule, individual CPAs would be subject to market forces, creating incentives for them to comply with the demand for a particular professional service: commission based financial

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planning. The rule against acceptance of commissions clearly has an anti-competitive effect in that it discourages the entry of licensees engaged in the practice of public accountancy into commission based financial planning and financial planning in general in view of client resistance to fee based financial planning. At the same time, the rule excludes commission based financial planners from the practice of public accountancy. The refusal to permit licensees to engage in commission based financial planning further results in a form of price fixing in that fee based financial planners must of necessity charge a higher fee to compensate for the time necessary to stay current on investment alternatives (products). The client is then faced with an additional fee, a commission when the product is purchased from a third party.

In FTC v. Indiana Federation of Dentists, ____ U.S. ____, 106 S.Ct. 2009, 90 L. Ed. 2d 445 (1986), the U.S. Supreme Court held that concerted refusal of members of a dental association to provide patients' x-rays to insurance carriers constituted an illegal conspiracy under Section 1 of the Sherman Act. Applying the rule of reason the Court found that a refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, "impairs the ability of the market to advance social welfare be ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 106 S.Ct., at 2018. The Court declared that the Federation of Dentists was "not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand." 106 S.Ct., at 2019. The Court also concluded that alleged noncompetitive "quality of care" considerations did not justify the X-ray policy.

Despite association attitudes that conduct is "unprofessional," rules which eliminate competition between members will not be allowed to stand. See National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) [engineers' cannon against price quotations held in restraint of trade]; United States v. Texas State Board of Public Accountancy, 592 F.2d 919 (5th Cir. 1978) cert. denied 444 U.S.925 (1979) [accountants' rule against competitive bidding held in violation of antitrust laws]; and United States v. AICPA, Inc., 1972 Trade Cas. par. 74,007 (D.D.C. 1972) [consent judgment holding competitive bidding rule void].

A state board's Rules of Professional Conduct are not immune from antitrust scrutiny. A state agency, as a political subdivision of the state, does not enjoy the deference due a state as sovereign and cannot create its own policies. It will be immune from antitrust liability only if it acts as an instrumentality of the state, through which the state has clearly and affirmatively chosen to implement its policies. Community

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Communications Co. v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); City of Lafayette v. La. Power and Light, Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). A state agency, municipality, or other state subdivision claiming state action immunity must first identify a "clearly expressed state policy" that authorizes its actions. The "clear articulation" standard is meet only where it is demonstrated that the legislature contemplated the action complained of and the resulting anticompetitive activities are a foreseeable consequence of the state delegation, Town of Hallie v. City of Eau Claire, 471 U.S. ____, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). The enabling legislation must contain an affirmative showing of intent to authorize the challenged conduct. Southern Motor Carriers Rate Conference v. United States, 471 U.S. ____, 105 U.S. 1721, 85 L.Ed.2d 36 (1985).

In U.S. v. Texas State Board of Public Accountancy, supra., the Fifth Circuit examined the Texas Board's enabling statute, the Public Accountancy Act of 1945, and concluded that, in spite of permissive language allowing adoption of rules appropriate for maintenance of high standards of integrity in the accountancy profession, the anti-competitive conduct was not mandated in the Act by the State as a sovereign, nor was such policy dictated by the State. Compare the following decisions of the Ninth Circuit: Patrick v. Burget, 800 F.2d 1498 (9th Cir. 1986) [Oregon statutory scheme mandates "peer review" of medical practices by competitors]; Grason Elec. v. Sacramento Mun. Utility Dist., 770 F.2d 833 (9th Cir. 1985) [MUD enabling legislation authorized it to fix its rates below cost]; Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985) [statute authorizes Oregon Workers' Compensation Department director to promulgate reasonable rates to be paid for medical services provided pursuant to the act]; Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc. 753 F.2d 790 (9th Cir. 1985) [statute expressly refers to state policy to displace business competition by authorizing public airports to grant exclusive or limited agreements]; Tom Hudson & Associates v. City of Chula Vista, 746 F.2d 1370 (9th Cir. 1984) [California Government Code expressly grants cities authority to provide solid waste handling services by means of partially or wholly exclusive franchise, with or without competitive bidding].

In U.S. v. State Board of Certified Public Accountants of Louisiana, 1987-1 Trade Cases #67,516 (E. Dist. La., 1987), the court held that rules concerning advertising and solicitation adopted by the Louisiana board were exempt from antitrust attack under the state action doctrine where a state statute regulating advertising by professionals including accountants specifically permitted the board to enact rules necessary to prevent false or misleading advertising. In addition, the challenged rules were reviewed by a legislative committee with oversight responsibility over the board, thus making the board's action the actions of the

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legislature itself. The latter holding concerning review by a legislative committee and not the legislature itself is questionable inasmuch as the delegation of authority to a committee in this manner my be considered in violation of the principles of separation of powers under a state constitution. Many states do not have express statutory authority as found in the Louisiana case; rather, there is usually a broad grant of rulemaking authority to adopt rules to establish and maintain high standards of competence and integrity.

Such general rulemaking authority is similar to language that was found wanting in U.S. v. Texas State Board of Public Accountancy, 592 F.2d 919 (5th Cir. 1978) cert. denied 444 U.S. 925 (1979). It cannot be said that such enabling legislation contemplates or clearly articulates the anti-competitive conduct embodied in the rules against commissions and incompatible occupations in the rules of professional conduct outside of the context of the attest function. The resulting anticompetitive activities are not foreseeable consequences of the legislature's delegation of power. Therefore, a state board which adopts a commission rule without express legislative authorization has exceeded its statutory authority in apparent violation of antitrust laws.

Recently in Allied Tube & Conduit Corp. v. Indiana Head, Inc., 48 CCH S.Ct. Bull. p. B2587 (Decided June 13, 1988), the Supreme Court considered and rejected a claim of antitrust immunity under the Noerr doctrine pertaining to valid efforts to influence governmental action. The Court held that the National Fire Protection Association, a private association that includes members representing industry, labor, academia, insurers, organized medicine, fire-fighters, and government, cannot be treated as a "quasi-legislative" body, and that efforts to affect the product standard-setting process of the Association were not protected from antitrust liability simply because the Association's standards are widely adopted into law by state and local governments.

It is beyond debate that nonprofit organizations can be held liable under the antitrust laws. See e.g. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S.Ct. 365, 5 L Ed. 2d 358 (1961); Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). Moreover in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed. 2d 330 (1982) the U.S. Supreme Court held ASME (a private professional standard-setting organization) liable for treble damages for the acts of its agents within their apparent authority in seeking a response from one of ASME's committees to the effect that the plaintiff's device was unsafe. This result obtained notwithstanding a want of ratification by ASME and the nonprofit character of the organization.

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Trade association activities are generally regarded as the activities of individual members. Therefore, association conduct is seen as concerted action and may violate one or more of the antitrust statutes requiring joint conduct as an element. An antitrust action is in the nature of a tort action and defendants are jointly and severally liable, see e.g. Solomon v. Houston Corrugated Box Co., Inc., 526 F.2d 389 (5th Cir. 1979) and Texas Industries v. Radcliff Materials, 608 F. 2d 524 (5th Cir. 1979) aff'd 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed. 2d 500 (1981). Further, an association member who is aware, or should be aware, that the association is engaging in unlawful conduct and continues membership without protest, can not disclaim joint liability for the association's unlawful actions. Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393 (2nd Cir. 1943).

A corporate agent can be held personally liable for tortious acts which he directs or participates in, even though he performed the acts as an agent for the corporation. Leyendecker & Associates, Inc. v. Wechter, 683 S.W.2d 369 (Tex. 1984), Barclay v. Johnson, 686 S.W.2d 334 (Tex. App. 1st Dist. 1985). See also Rohm and Haas Co. v. Dawson Chemical Co., Inc. 557 F.Supp. 739, 818 (S.D. Tex. 1983). The antitrust decisions that have considered this issue have imposed personal liability on the corporate officer or director where he knowingly participated in or approved of unlawful acts. Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F.Supp. 841 (N.D.Ca. 1979) aff'd, 658 F.2d 1256 (9th Cir. 1979), cert. denied 455 U.S. 1018, 102 s.Ct. 1713, 72 L.Ed. 2d 135; Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F.Supp. 476, 482 (E.D.Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966); and Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F.Supp. 728 (W.D.Ky. 1941), aff'd, 136 F.2d 12 (6th Cir. 1943). See also Brown v. Donco Enterprises, Inc., 783 F.2d 644 (6th Cir. 1986).

CONSTITUTIONAL ISSUES

The rules in question limit the promotional efforts of CPA's who "hold out" as such and provide commission based financial planning services by means of a blanket prohibition against acceptance of commissions by CPA's engaged in public practice. Some state rules provide that CPA's who are not otherwise in public practice must observe the rules of conduct (including the commission rule) if they hold themselves out to the public as certified public accountants. Accordingly, the constitutional protection afforded commercial speech would apply to restrictions on certified public accountants who "hold out" as such and promote commission based financial planning.

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In commercial speech cases, where the expression at issue is neither inaccurate and does not relate to unlawful activity, the Supreme Court will subject restrictions to a three-part inquiry and will uphold them only where they (1) seek to implement a substantial governmental interest, (2) which is directly advanced by the challenged regulation, and (3) the regulation of commercial speech is not more extensive than necessary to serve that interest. Central Hudson Gas v. Public Service Com'n of N.Y., 447 US 557, 100 S.Ct. 2343, 65 L.Ed.(2d) 341 (1980).

The standards enunciated in Central Hudson, supra., have been followed in a number of more recent cases. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) the Court invalidated broad restraints against advertising by attorneys which contained legal advise and illustrations. In rejecting the State's argument for a prophylactic rule, the Court insisted that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purpose, citing Central Hudson, supra. See also Parker v. Com. of KY, Board of Dentistry, 818 F.2d 504, at 509 (6th Cir. 1987). Compare the Supreme Court's opinion in Posadas De Puerto Rico Associates v. Tourism Co., _____ U.S._____, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986) where Puerto Rico's restrictions on local advertising of casino gambling addressed to residents was found to directly advance a substantial governmental interest and was no more extensive than necessary to serve the governmental interest.

Further, in Secretary of State of MD v. Joseph H. Munson Co., 104 S.Ct. 2839, 2852-2853 (1984) the Supreme Court struck down a statute which prohibited charitable organizations from paying as expenses more than 25% of the amount raised in fund-raising activities as being too imprecise a tool to achieve the State's interest in preventing mismanagement and fraud. It should be noted that the restrictions involved the compensation agreement between the fund-raiser and its client, the "heart of the business relationship," id. at 2848, as is the case with restrictions on CPA's holding out as such and accepting commissions.

The legislative policy for regulation of certified public accountants and public accountants is not clearly articulated in the general grant of authority to adopt rules of professional conduct in the enabling legislation for many state boards of accountancy. The state interest in regulation of accountants is beyond doubt a legitimate legislative concern. However, the blanket prohibition of acceptance of commissions by CPA's holding out as such appears to be far afield of the state's laudable concern. Outside of the context of the attest function the impact of acceptance of commissions by CPAs upon the fairness or competence of professional services is highly speculative. The governmental interest asserted is not directly advanced by the

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regulation and does not provide a constitutional adequate reason for restricting protected speech.

A second governmental interest which might be asserted as a justification for the restriction on the acceptance of commissions by CPAs holding out as such is that of the public interest in reliance upon financial statements accompanying reports issued by CPAs who are independent with respect to the entity reported on.

Historically, in the accounting profession it has been held that such independence is impaired by having a financial, promotional, managerial relationship, or profit-percentage interest in the financial statements of the entity reported on. However, the blanket prohibition against commissions contained in many state board rules is not limited to circumstances where independence is required in the context of a report upon financial statements; rather, the rule contemplates a blanket prohibition of commissions by CPAs who hold out to the public as such. It is suggested that the prohibitions of acceptance of commissions by CPAs be limited to circumstances where independence is impaired in the context of a report upon financial statements.

A NASBA Task Force recently undertook to study revisions to NASBA's Model Code of Professional Conduct. The commentary to the proposed new rule concerning independence as prepared by Covington & Burling, counsel for the NASBA Task Force, is instructive. It states in pertinent part as follows:

> "Restricting the prohibitions [of commissions and contingent fees] to circumstances where as a matter of legitimate professional standards independence is required ... seems a sensible and defensible way of dealing with attacks that have been mounted on more broadly cast existing rules..."

Concerns about unscrupulous CPA's engaging in commission based financial planning can and are accommodated directly through SEC disclosure and registration requirements and penalties for fraudulent conduct. The narrowly tailored rules adopted by the Texas State Board of Public Accountancy which limit the commission prohibition to circumstances where independence is impaired in the context of audit or review services illustrate that a less restrictive approach is possible to meet the state's interest in protecting public reliance on CPA's reports upon financial statements. To the extent that the commission rule suppresses speech that in no way impairs the public interest in obtaining financial planning services from independent qualified certified public accountants, it violates the First and Fourteenth Amendments and is constitutionally infirm.

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The regulations promulgated by a board must meet the same standards of construction as to certainty required of a statute in order to pass constitutional muster. Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970). A regulation violates due process where the required course of conduct is stated in terms so vague that men of common intelligence must guess at what is required or when there is substantial risk of miscalculation by those whose acts are subject to regulation. Texas Liquor Control Board v. Attic Club, Inc., id,; Browning-Ferris v. Texas Dept. of Health, 625 S.W.2d 764 (Tex. Civ. App.-Austin 1981); Lloyd A. Fry Roofing Co. v. State, 541 S.W.2d 639 (Tex. Civ. App.-Dallas, 1976, writ ref'd). Further, a law fails to meet the standards of due process if it is so vague and standardless as to leave a governing body free to decide, without any legally fixed guidelines, what is prohibited in each particular case. City of Mesquite v. Aladdin's Castle, Inc., 559 S.W.2d 92 (TEX. Civ. App. Dallas 1977); Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L.Ed. 2d 222 (1972).

Some state board rules concerning incompatible occupation prohibit the concurrent practice of public accountancy and "any business or occupation which would create a conflict of interest in rendering professional services." The term "conflict of interest" is often not defined in the board's rules or enabling statute. The definition of the "practice of public accountancy" often is open ended. Such a rule on incompatible occupations is stated in terms so vague that persons of common intelligence and licensees must guess at its meaning and differ as to its application and subjects licensees to substantial risks of miscalculation. Finally, without legally fixed guidelines required by due process, a state board appears free to decide what is prohibited in each particular case. Accordingly, such a rule concerning incompatible occupations is unconstitutionally vague and unenforceable.

Rather than address the constitutional and antitrust issues discussed above in court, my client would prefer to see a narrower restriction adopted by NASBA which permits CPAs holding out as such to accept commissions (with full disclosure to the client) so long as independence is not impaired in the context of audit or review services. The Rules of Professional Conduct (effective, as amended November 1, 1987) adopted by the Texas State Board of Public Accountancy incorporate many of the recommendations of the NASBA Task Force previously referred to and illustrate that a less restrictive alternative to a blanket prohibition against commissions is available. Such a limited prohibition would be consistent with the state interest in public reliance on reports upon financial statements prepared by independent CPAs and at the same time protect the interests of consumers in obtaining commission based financial planning services from qualified CPAs.

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Attachment 2-27

Please contact either myself, Mr. Herb Vest, or Mr. Stephen A. Batman, Vice President and Director of Strategic Services for H.D. Vest Financial Services if you require additional

Jenkens & Gilchrist
A PROFESSIONAL CORPORATION

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AUSTIN, TEXAS 78701
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TELECOPIER (512) 322-3199

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TELEX 73-2595
TWX 910-861-4047

1100 LOUISIANA
SUITE 900
HOUSTON, TEXAS 77002
(713) 951-3300
TELECOPIER (713) 951-3314

T. RICHARD HANDLER
(214) 855-4329

November 17, 1988

National Association of State Boards of Accountancy
545 Fifth Avenue
New York, NY 10017

Re: Constitutionality of state statutes prohibiting payment to or receipt of commissions by certified public accountants

Ladies and Gentlemen:

We are writing to you on behalf of our clients, H.D. Vest, Inc. and Mr. Herb D. Vest, regarding the questionable constitutionality of proposed state legislation that would attempt to prohibit certified public accountants ("CPAs") who hold themselves out as CPAs and perform public accounting services from (a) accepting compensation in connection with the referral of products or services of others to a client or (b) making a payment to obtain a client (a "Commission Statute"), even when there is full disclosure to the client. Such Commission Statutes would be unconstitutional to the extent they violate the First and Fourteenth Amendments of the United States Constitution as well as the Commerce Clause.

I. Commission Statutes Unconstitutionally Inhibit a CPA's Right of Self Expression.

A CPA's use of the "CPA" designation in connection with his or her business constitutes a "commercial expression" for purposes of the First and Fourteenth Amendments of the United States Constitution. See Shapero v. Kentucky Bar Assn., _____ U.S. _____, 108 S. Ct. 1916 (1988). A state is prohibited from restricting a CPA's usage of such a designation unless (i) the usage is false or misleading or concerns unlawful activities, or (ii) the restriction serves a substantial state interest. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

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Where the usage of the "CPA" designation is not false or misleading and does not concern unlawful activities, the state can regulate such usage (i) only if the restriction serves a substantial state interest, and then, (ii) only to the extent of the state's legitimate interest and only through means that directly advance that interest. See Village of Hoffman Estates, 455 U.S. at 494. In other words, a state may ban or regulate truthful and accurate usage of the "CPA" designation in connection with lawful activities only when the law directly advances a substantial state interest and the law is appropriately tailored to that purpose. The Commission Statutes, allegedly intended to provide the public with a high level of professional competence at reasonable fees by independent, qualified persons, violate the First Amendment to the extent they are so broad that they also regulate matters in which no state interest is served by having the CPA be "independent."

More specifically, it is customary for a CPA to hold himself or herself out as a CPA in connection with representation of a client before the United States Tax Court, or in connection with a tax return preparation, management advisory services and bookkeeping services, notwithstanding the fact that a CPA has no obligation to be "independent" in regards to such services. The only area of practice in which a CPA is required to be independent is in the attestation of financial reports. Any Commission Statute regulation going beyond this limited function would be inappropriate and, logically, unconstitutionally broad under the First and Fourteenth Amendments to the extent that it attempts to regulate a CPA's right to hold himself or herself out as a CPA with respect to services other than the attestation of financial statements.

II. Commission Statutes Are Typically Unconstitutionally Vague.

A statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment if the prohibitions of the statute as applied to the person bringing the challenge are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). While the degrees of vagueness which are constitutionally tolerable, as well as the relative importance of fair notice and fair enforcement, depend in part on the nature of the statute, vagueness is least tolerable with respect to penal statutes. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

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A statute imposing criminal penalties is unconstitutionally vague if (i) a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited, and (ii) the statute fails to provide explicit standards for the persons charged with the administration and enforcement of the statute. Id.

Under this analysis, numerous provisions of the typically proposed Commission Statutes are unconstitutionally vague. For example, the meaning of "public accounting services" is unclear because it gives no guidance regarding whether it is intended to include all services that might be offered by a public accountant, including clerical, bookkeeping and financial planning services, or only those services which can legally be performed only by a public accountant. If "public accounting services" is defined broadly, it is also conceivable that many persons who typically are not considered public accountants, such as bookkeepers, enrolled agents and financial planners, would be required to comply with a state's public accounting statute. Alternatively, "public accounting services" should be defined more narrowly, so that only those public accountants who attest financial reports would be prohibited from receiving commissions from their attested clients under the statute.

Similarly, the meaning of "holding oneself out as a CPA" is subject to an infinite number of interpretations, ranging from the mere acknowledgment by a CPA that he or she is licensed as a CPA, to the active solicitation of auditing engagements. Furthermore, it is impossible to ascertain with constitutional precision the meaning of "payment" under the statute because of the vast array of customary business practices in the profession, such as reciprocal referral arrangements. An overzealous court might erroneously characterize as a "payment" many otherwise acceptable practices.

The foregoing examples are typical of the problems which CPAs will face in interpreting the Commission Statutes. Based on even these few simple examples, the proposed Commission Statutes typically do not give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. Furthermore, the Commission Statutes do not provide explicit standards for the persons charged with the administration and enforcement of the statutes and therefore result in such persons receiving an impermissible delegation of basic policy matters for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory applications. Accordingly, the

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in the form of commissions. The practical effect of the Commission Statutes in such a situation is to penalize unfairly the CPA merely for being a CPA. Far from assuring a high level of professional competence by qualified CPAs, the Commission Statutes would in fact discourage persons from seeking or maintaining CPA proficiency. Such a result under the Commission Statutes promotes no valid interest of the state. Accordingly, the arbitrary and unfair classification of CPAs drawn by the Commission Statutes, in our opinion, fails to meet the constitutional standard required by the Equal Protection Clause of the Fourteenth Amendment.

IV. The Commission Statutes Unduly Burden Interstate Commerce.

While the Commerce Clause appears simply to grant to Congress the power "[t]o regulate Commerce . . . among the several States . . .," U.S. Const. Art. I, § 8, cl.3, it has been settled for over a century that the Clause prohibits states from taking certain actions that adversely affect interstate commerce. See, e.g., Cooley v. Board of Wardens, 53 U.S. 299, 13 L.Ed. 996 (1852). A state statute impacting interstate commerce is valid only if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970).

The Commission Statutes, in our opinion, clearly impose an unnecessary burden on interstate commerce. Among other things, if one state prohibits the receipt of commissions while others clearly do not, CPAs in the state where commissions are permissible are effectively prevented from selling financial products to persons in the state where commissions are prohibited. Logically, consumers are deprived of the opportunity to buy their products in a truly competitive market, CPA incomes are lowered and the overall effect on the economic environment of all fifty states is adversely affected. cAdditionally, some of the financial products not sold as a result of the prohibited commissions would undoubtedly consist of mutual funds with investments in national corporations. Thus, the reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. This hindrance to the competitive environment, as well as the inefficient allocation of economic resources, across state lines

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is unduly excessive in relation to the local interests allegedly sought to be served by the Commission Statutes, and therefore is in violation of the Commerce Clause.

V. Conclusion.

Based on the foregoing, a state Commission Statute could successfully be challenged in court as unconstitutional. Moreover, such Commission Statutes may also be inconsistent with state constitutions and antitrust laws. For instance, pursuant to the Texas Constitution, a state may never create a monopoly by virtue of legislation. Any attempted grant of a monopoly, as in the case of a Commission Statute, is not merely ultra vires, but absolutely void as long as the statute creating the monopoly unfairly confers benefits and privileges on some members of a class and not on others.

If attempts to enact such Commission Statutes continue, our client fully intends to seek a declaratory judgment that the typical Commission Statute being recommended unwittingly by those with high sounding principles, or pushed wittingly by those with baser vested interests, is unconstitutional for the reasons asserted above. Additionally, our client will consider pursuing federal antitrust actions individually against any state boards and societies and their controlling persons, to the extent that their attempts to pass Commission Statutes constitute an unreasonable restraint of competition because such attempts appear to be mere "shams" interfering with the ability of individual CPAs to compete with other financial consultants. Therefore, it is our sincere hope that your organization will encourage member state boards and societies to discontinue any lobbying efforts aimed at passing the Commission Statutes which unconstitutionally and illegally deny the rights of individual CPAs.

Sincerely,

Richard Handler

T. Richard Handler
Guy I. Wade, III

TRH:cb

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Attachment 2-32

STATE OF KANSAS

B VANCRUM
REPRESENTATIVE TWENTY NINTH DISTRICT
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OVERLAND PARK KANSAS 66212
(913) 341-2609
STATE CAPITOL ROOM 112-S
TOPEKA KANSAS 66612
(913) 296-7670

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRPERSON LEGISLATIVE EDUCATIONAL PLANNING COMMITTEE
MEMBER APPROPRIATIONS
JUDICIARY
TAXATION

September 4, 1990

Ms. Glenda Sherman
Executive and Board Secretary
State Board of Accountancy
907 Landon State Office Building
900 S.W. Jackson
Topeka, Kansas 66612

Dear Ms. Sherman:

I have recently had a constituent of mine, Mr. Joseph Kain, contact me concerning a problem he was having getting a ruling from the State Board of Accountancy concerning a fee sharing arrangement. Mr. Kain explained he is a certified financial planner and that for his investment advisory only services he is compensated on a straight flat percentage fee with no commissions.

Apparently he made a presentation to your Board in June of last year and even though you did not rule directly on his request for an interpretation, you have issued both written and verbal opinions which seem to prohibit his activity as prohibited commission splitting.

I do not understand why the Board has not directly ruled upon this request. Instead, they have chosen to make oblique references comparing the arrangement to that of splitting commissions, which to my mind is a totally different issue.

If the Board does not feel it has direct authority over fee sharing, it should propose legislation giving it this power. I personally feel there is nothing wrong with the arrangement being proposed, so long as the client is fully informed of the arrangement in advance. It would seem to be a shame to require legislation to clarify that this arrangement is or is not legal, but if the Board will not take a clear stand, I see no alternative.

I will await your early and favorable reply.

Sincerely,

Robert J. Vancrum

cc: Mr. Joseph Kain
Mr. Gerald Farrell

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Attachment 2-33

Sunflower
Asset
Management
REGISTERED INVESTMENT ADVISERS

Joseph Kain, CFP
Richard E. Firth, CFP
Tony Moeller, CPA

November 28, 1990

Robert J. Vancrum
Gage & Tucker
40 Corporate Woods
9401 Indian Creek Parkway
Overland Park, Kansas 66210

Dear Bob:

After considerable reflection on our most recent phone conversation I'd like to add some thoughts, as well as set forth a suggested course of action.

First and foremost, I want to express my appreciation for your interest and support in this issue. Please don't take it personally when I reacted somewhat testily in response to your relaying to me comments of the persons we discussed. The frustration was not intended for you in any way.

As to the board's handling of this matter, I am utterly appalled at how they have conducted themselves in this matter. They have not dealt in good faith, and as I suspected all along they fully intend to introduce legislation contrary to my position if and when the time comes they are defeated. As a collective group with a great deal of responsibility, they should be honest enough to come forth and present their course of action rather than continue to waste everyone's time in an attempt to appear open minded. They know they are clearly in violation of the spirit and intent of the AICPA/FTC settlement, yet they arrogantly continue to arbitrarily decide which rules they will honor and which they will ignore. How can they expect to enjoy any respect from those in their profession when they can take such arbitrary positions based on personal prejudices?

I disagree with the stated contention that there is a lack of interest in the issue based upon only one CPA commenting in writing. The Kansas Society Board has officially encouraged the State Board to come into compliance with the FTC mandate. I believe certain individuals are in a delicate position in respect to the Board. They are simply trying to guard against jeopardizing their rapport with the Board of Accountancy.

I know of no way to deal with subterfuge and hypocrisy then to tackle it head on. The State Board is impervious to appeals of logic, common sense, right or wrong and as a result are denying the citizens of this state the choice of a better method of conducting business. Whether this is due to disproportionate influence by clerical people or the whole board is irrelevant. It must be challenged and stopped. Therefore it is my belief that in effect I've "lost" with the current status quo, the only chance I have to make a change for the better is to introduce

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legislation and force their hand. I am absolutely convinced they will ultimately do so anyway so it would be better if the issue was brought to a head, and resolved once and for all.

A choice between their legislation and mine would at least level the playing field and give me a fighting chance.

It is my belief that out of respect for our existing laws, even when I disagree with them, that the "high road" should be taken by trying to effect change in a positive manner. It would be much less troublesome for me to allow the Board to continue their secrecy and gamesmanship. The Board's contention that CPA's will in effect sell themselves to the highest bidder is ludicrous. The few CPA's who would conduct their business in that manner are <u>already</u> doing it. The effect of the current Board position is to restrict the 99% of honest accountants from earning fair compensation. The ultimate loser is the Kansas consumer of accounting and investment services.

I'm looking forward to your sage counsel and guidance.

Sincerely,

Joe

Joseph Kain

JK/db

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attachment 2-35

Handout by Joseph Kain
To Kansas Board of Accountancy
Basis for Presentation
June 22, 1989

Joseph
Kain and
Associates, Inc.
Registered Investment Advisors

JOSEPH KAIN, CFP

June 22, 1989

Dear Kansas Board Member:

I wish to take this opportunity to thank each of you for allowing me the chance to address your group. As an "outsider," you certainly don't have to listen to me and I appreciate your open-mindedness. I have enclosed an outline of the points I am attempting to relate to you. I sincerely hope my style (frankness) does not offend anyone, and if so, I apologize.

Since I work with and talk to many of your members on an ongoing basis, I am in a position to hear comments and dialogue that may or may not filter back to you. On the other hand, I recognize the difficulties the Board faces in interpreting and enforcing the accounting regulations. I respect and welcome your opinions, and I hope my comments contribute in a small way in assisting you in your position of leadership for your profession. Please accept these comments in the spirit of goodwill in which they are given.

Sincerely,

Joseph Kain

JK:kk

Enclosures

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Registered Representative for Investment Securities with
Value Equities Corporation, Member SIPC

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Attachment 2-3.6

Joseph Kain and Associates, Inc.
Registered Investment Advisors

JOSEPH KAIN, CFP

OUTLINE
of
PROPOSAL TO THE
KANSAS SOCIETY OF CPA's

June 22, 1989

I. Background - *Sunflower Asset Management*

A. Financial Planning Survey:

Fifty-seven percent of the public perceives financial planners as the "most qualified advisors" versus 36% CPA's. This is a travesty, however, a great deal of the blame rests with the accounting profession for not properly marketing themselves. (What good does it do to have Babe Ruth on the bench if you don't get him into the ball game?)

B. Reason:

Integrity of the profession which is one of its greatest strengths is also its greatest weakness. Accountancy Board has the difficult job of finding a proper balance between regulation and giving their membership the tools they need to compete.

C. Joseph Kain's Opinion:

CPA is most qualified to provide financial planning, not Certified Financial Planners. (And Joseph Kain is a CFP!)

D. General public is more and more demanding these services from the accounting profession, and when they aren't getting them, are looking elsewhere.

I'm not suggesting you compromise your principles just because you are losing business; I've never done so myself and I've lost a lot of business as a result. I'm just trying to motivate you to fight back and protect your turf.

It is unrealistic to expect CPA's to become involved <u>unless</u> there is some financial incentive to do so.

II. I would suggest that the public is suffering from the accountants' failure to aggressively market themselves, and lack of involvement. I have a great deal of respect for the CPA profession and that is why I have chosen to work with CPA's. Your members are trying to do things right, as I always have.

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913-469-9333

Registered Representative for Investment Securities with Value Equities Corporation, Member SIPC

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III. In the past, I have asked for and received referrals from CPA's. The only motivation from the CPA's standpoint was purely altruistic (concern for the welfare of their clients)

Joseph Kain could not compensate CPA's for their time.

IV. Accountancy boards across the country (including Kansas, have vehemently opposed payment of commissions.

For the sake of argument, let's assume the Federal Government (FTC) will soon force the ban against commissions to be waived.

V. Is there a better way?

Yes. *Sunflower Asset Management (SAM).*

SAM allows CPA's to:

1) Be compensated for their time on a strictly fee based hourly rate for services rendered. No commission revenue sharing since SAM's only compensation is flat fee income.

2) Retain objectivity and integrity. I want my program to conform to your guidelines because I would never knowingly ask any of your members to violate your regulations.

VI. Arguments raised against receiving compensation include loss of objectivity.

SAM says: Let the client decide! Our experience has been that the client welcomes the CPA's involvement, especially if it is not coming directly out of their pocket.

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SUNFLOWER CONCEPT

1. CPA client seeks investment assistance from CPA.
2. With client's permission, CPA contacts Sunflower Asset Management.
3. Fee only concept is explained to client
   - A. No commissions to SAM or CPA
   - B. Custodian bank holds funds (revocable)
   - C. SAM bills custodial bank semi-annually
   - D. Custodial bank provides semi-annual report
   - E. CPA bills SAM directly for services rendered.
   - F. All arrangements are fully disclosed to client in advance.
   - G. CPA retains his/her traditional function as an objective fee only intermediary working on the client's behalf.

SUMMARY

If commissions are not acceptable, then it is up to CPA's and reputable investment advisors to creatively come up with a better way to address the needs of the public and marketplace. *SAM* presents the framework to allow CPA's to re-establish their pre-eminent position as the "most trusted advisor" to the general public.

I hope my ideas have convinced you to seriously consider supporting this concept as a variable alternative to the commission route. The Accountancy Board has told their membership what they are against; now the Board has the opportunity to tell them what they are for!

I believe the SAM concept presents a progressive opportunity for your profession to move forward and change a negative into a positive!

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PRESENTATION TO THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION CONCERNING H.B. 2272 ON FEBRUARY 26, 1991

Chairman Blumenthal, Ladies and Gentlemen of the Committee. My name is Leon Logan. I'm a practicing CPA in Kansas City, Kansas and am presently serving as Chairman of the Kansas Board of Accountancy.

The Board is opposed to H.B. 2272. The issue of CPAs accepting commissions, contingent and referral fees has been the topic of discussion in the profession for the last couple of years since the FTC challenged the AICPAs right to prohibit CPAs from accepting or paying such fees. The American Institute of CPAs is, however, only a voluntary membership organization of CPAs and as such has no regulatory power or authority over CPAs in any state. The final FTC Order and agreement with the AICPA was only made in August, 1990, rather than April 1989 as referenced in the proposed bill. As a result of that agreement, at least eight states, including California and Florida, have enacted legislation to prohibit CPAs from accepting such fees, having determined to allow such would not be in the public's best interest. A smaller number of states have modified their regulations to allow acceptance of fees under certain circumstances. The remainder of the states, including Kansas, still have administrative regulations prohibiting CPAs from accepting commissions, referral or other fees and for paying commissions or fees.

The Board presently does not believe that it is in the public's best interest for CPAs to be allowed to accept fees of any kind, regardless of what they are called, for referring clients to other persons or businesses for services or products. A recent poll conducted by Louis Harris and Associates concluded that the public is opposed to the performance of services by CPAs which would impair (or be perceived to impair) objectivity. It concluded that the consumer

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attachment 3

does not want to be faced with the conflict that may arise when independence and objectivity are influenced by consideration of a fee or commission. Any impairment of objectivity and independence erodes public confidence and trust in CPAs and the profession. This could have a profound negative impact on the conduct of business and in the perceived and actual abilities of CPAs to perform at the highest level of independence and objectivity. Clients would naturally assume that their CPA was referring them to the best service or product when in fact CPAs may refer clients to the service or product which pays them the highest commission or fee. The Board believes this would be a possibility whether or not a disclosure has been made to the client that a fee is being paid to the CPA.

Because of the complexity of the issue, and the far reaching ramifications to the general public, the Board appointed a Task Force in December, 1990 to review and study the matter. This Task Force is comprised of three members from the Board and three members from the Kansas Society of CPAs and Executive Directors of both the Board and the Society. They have already met twice and have obtained input from representatives from the state Securities Commissioners' office and CPAs from the Personal Financial Planning Committee of the AICPA. The Task Force still has much information to gather and review before making their final recommendations to the Board as to what would be in the best interest of the public in general, and the citizens of Kansas specifically. The Board was hopeful that no legislation would be introduced before that study was completed, and therefore is opposed to the proposed legislation in H.B. 2272 which concerns only a small area of the overall issue presently being studied in Kansas.

The Board respectfully requests that this bill be defeated or at least held over until next session. After the Task Force has completed its research and made recommendations to the Board, it may wish to modify its existing regulations or to seek legislation of its own. Thank you for this opportunity to present the Board's concerns and opposition to H.B. 2272. Your consideration will be appreciated.

H.B. 2-26-91 Attachment 3-2

Kansas Society of
Certified Public Accountants

400 CROIX / P.O. BOX 5654 / TOPEKA, KANSAS 66605-0654 / 913-267-6460 / FAX 913-267-9278

Testimony on

House Bill 2272

Presented to the

House Governmental Organization

Committee

by

T. C. Anderson

Executive Director

February 26, 1991

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Chairman Blumenthal and members of the House Governmental Organization Committee.

I am T. C. Anderson, Executive Director of the Kansas Society of Certified Public Accountants. I appear today on behalf of our 2,300 member organization in opposition to HB 2272 which would allow Kansas CPAs to receive compensation for the referral of any client to someone who provides professional investment advice.

After several years of investigation and negotiations, the American Institute of CPAs entered into a proposed consent agreement with the staff of the Federal Trade Commission last March. On a 3 to 2 vote the Federal Trade Commission finally approved the consent agreement in August of 1990. That was just six months ago.

The agreement permits a CPA to accept commissions or contingent fees from clients for whom no "attest services" are performed. Those services are defined as 1.) any audit; 2.) any review of a financial statement when the 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 a prospective financial statement. A practitioner would be allowed to pay or accept referral fees for all services. However, the AICPA would not be precluded from requiring a CPA to disclose any commissions or referral fees to the clients.

HB 2272 addresses only a small portion of this consent order. It would prohibit a CPA from accepting a commission by selling securities out right and bypassing those who provide professional financial advice.

However, that is not the question we are here today to discuss. We are here to discuss the CPA profession in Kansas and how, if at all, the consent agreement should affect Kansas law.

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attachment 4-2

The AICPA and the Kansas Society are voluntary professional organizations. The FTC contended a prohibition on members accepting commissions by such organizations was a violation of the Sherman Anti-Trust Act because it was an unreasonable restraint of trade.

The State Board of Accountancy is the regulatory arm of the State of Kansas which oversees the accounting profession and protection of the public. Unreasonable restraint of trade is not an issue here because there is an exemption from the Sherman Act for actions of State Legislatures. The Kansas Legislature approved K.A.R. 74-5-103 Commissions and K.A.R. 74-5-104 Contingent Fees in 1978.

The role of certified public accountants brings some unusual ethical consideration into play. Clients, investors, attorneys, bankers, governments, employers, the business and financial community and others rely on the integrity, objectivity and independence of certified public accountants to maintain the free and orderly flow of financial information.

Integrity is the quality on which public trust is based and requires a CPA to be honest and candid within the constraints of client confidentiality. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle.

Objectivity is a distinguishing feature of the CPA profession. It is a state of mind, a quality that lends value to CPA services. Objectivity imposes on a CPA the obligation to be impartial, intellectually honest and free of conflicts of interest.

g.o. 2-26-91
attachment #3

Independence, a requirement for CPAs preparing audit or review reports, precludes relationships that may appear to impair the CPA's objectivity. This calls for a continuing assessment by the CPA of client relationships and public responsibility.

Members of the Kansas Society of CPAs assume an obligation of self-discipline above and beyond the requirements of laws and regulations. Not only have members agreed to carry out their responsibilities with a high regard for integrity, objectivity and independence, but also they have made a commitment to quality unprecedented in any other profession.

To measure the support for Kansas CPAs accepting commissions and referral fees, the KSCPA asked its members in early June of 1989 to write the Board of Accountancy and urge a change in their rules prohibiting commissions.

The response was underwhelming. I received a copy of one letter. The State Board advises they received a total of three letters including one from a Missouri firm.

Only five states permit CPAs to receive commissions.

The Kansas Society Board of Directors had urged the State Board to consider amending its rules on Commissions and Contingent Fees to more closely parallel the AICPA/FTC agreement. The KSCPA Board thought such action might result in less confusion within the profession.

However, with the poor response from members who would support such a change, the KSCPA Board jumped at the opportunity to have a Task Force study the issue. That Task Force of State Board members and practicing CPAs has met twice and its report is expected in the fall.

J.O. 2-26-90
attachment 4-4

Short of recommending HB 2272 unfavorable for passage the KSCPA respectfully requests it be held over until next year. At that time we may ask you to expand the scope of HB 2272 to include commissions and contingent fees or present you compelling arguments as to why Kansas should have a statutory prohibition on CPA acceptance of commissions, referral fees and contingent fees.

Thank you for your time and I'll be happy to stand for questions.

g.o. 2-26-91
attachment 4-5

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of American Institute of Certified Public Accountants, a corporation.	FILE NO. 851 0020 AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The Federal Trade Commission having initiated an investigation of certain acts and practices of the American Institute of Certified Public Accountants, a corporation, hereinafter sometimes referred to as "AICPA" or proposed respondent, and it now appearing that AICPA is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

IT IS HEREBY AGREED by and between AICPA, by its duly authorized officer and its attorney, and counsel for the Federal Trade Commission that:

1. AICPA 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 10036-8775.

2. AICPA admits all of the jurisdictional facts set forth in the draft complaint here attached.

3. AICPA waives:

(a) Any further procedural steps;

(b) The requirement that the Federal Trade Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or consent the validity of the order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Federal Trade Commission. If this agreement is accepted by the Federal Trade Commission, it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Federal Trade Commission thereafter may either withdraw its acceptance of this agreement and so notify AICPA, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by AICPA that the law has been violated as alleged in the attached draft complaint.

6. This agreement contemplates that, if it is accepted by the Federal Trade Commission, and if such acceptance is not subsequently withdrawn by the Federal Trade Commission pursuant to the provisions of § 2.34 of the Federal Trade Commission's Rules of Practice, the Federal Trade Commission may, without further notice to AICPA, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to AICPA's address stated in this agreement shall constitute service. AICPA waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order has been issued, AICPA will be required to file one or more compliance reports showing that it has fully complied with the order. It further understands that AICPA may be liable for civil penalties in the amount provided by law for each violation of the order after the order becomes final.

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attachment 4-6

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 the offering or rendering by a CPA for a contingent fee of professional

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services for, receipt of such a fee from, any person for , 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;

2. The offering or rendering of professional services for, or the receipt of, a commission by a CPA, provided that the offering or rendering of professional services by a CPA for a commission for 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, and provided further that nothing contained in this order shall prohibit AICPA from imposing a requirement that any AICPA member who has been paid or expects to be paid a commission shall disclose that fact to any person to whom the CPA recommends or refers a product or service to which the commission relates;
3. The payment or acceptance of any referral fee, provided that nothing contained in this order shall prohibit AICPA from imposing a requirement that any AICPA member (a) who accepts a referral fee shall disclose that fact to the member's client or (b) who pays a referral fee to obtain a client shall disclose that fact to the client;
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 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;

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attachment 4-8

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 communication, 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.

Signed this 8th day of September, 1988.

AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS,
a corporation

By _____
Philip B. Chenok, President
American Institute of
Certified Public Accountants
1211 Avenue of the Americas
New York, New York 10036-8775

APPROVED:

_____
Charles W. Corddry, III,
Deputy Assistant Director
Bureau of Competition

_____
Michael D. McNeely, Assistant Director
Bureau of Competition

_____
Walter T. Winslow, Deputy Director
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_____
Anthony Low Joseph, Counsel for the
Federal Trade Commission

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attachment 4-9

COPING

CPA commissions bemoaned

JANE BRYANT QUINN

Pretty soon there may be no source of impartial advice on financial planning. The last bastion — your accountant — appears to be falling. Once that happens, everyone you talk to is likely to have something to sell.

For years, I've advised cautious investors to think of accountants as a source of help with their financial plans. Under their codes of ethics, as well as state licensing laws, certified public accountants have not been allowed to accept commissions for selling tax shelters, limited partnerships and other financial products.

They charge by the hour, or by fixed fee, and sell only their opinions. So their judgment isn't colored by the hope of earning extra money if you buy a partnership or mutual fund they recommend.

Besides doing your tax planning, such an accountant can: help with your budgeting; show you how to save more money; advise on the tax aspects of loans; help allocate your assets among different types of investments; and evaluate limited partnerships.

For such services as insurance and investment advice, they may send you to specialists who do earn commissions on what they sell you. But the accountants have not been allowed to accept fees for referring clients. Accountants who follow these rules are clean.

But along comes the Federal Trade Commission, declaring that these arrangements restrict competition. You'd be better off, the FTC says, if your accountant were able to earn commissions, because he or she could then sell insurance and investments in a single package with tax advice. If the accounting profession refuses to accept this change of rule, the government might sue.

At least two states — Texas and Oklahoma — recently freed accountants to earn commissions by selling financial products to their customers. They require only that customers be told about it, in writing, including who's paying the commission and how much.

The National Association of State Boards of Accountancy has proposed a new model code of ethics that states might adopt which also allows commissions (except in certain situations, such as company audits).

"A commission may or may not influence an accountant's objectivity. ... The client can make his own judgment," said Jim Dunn, chairman of the Texas board of accountancy.

My judgment is that commissions do affect objectivity. For example, it is no secret that paying larger commissions on financial products generates larger sales. Even if a salesperson isn't fixed on a particular product, he or she is at least interested in selling you something.

Taking a stand at the pass is the American Institute of Certified Public Accountants.

The FTC asked the AICPA to accept a consent decree, changing its code of ethics (which AICPA members have to follow). Among other things, the change would allow commissions from product sales, as well as commissions on the referral of clients. So even if a CPA didn't sell you a limited partnership himself, he could earn money by referring you to someone who did.

The AICPA plans to fight. "One thing a CPA should offer is objectivity and that's why we objected to the FTC's consent order," Donald Schneeman, the institute's general counsel, told my associate, Virginia Wilson. "We're willing even to go to court."

In the meantime, here's where you stand with your CPA:

- The AICPA won't enforce its no-commission rules during this period of debate with the FTC. So that opens the door for members to sell. If it wins, the AICPA says, it will enforce the rules retroactively. For the time being, then, you can expect many accountants to follow the traditional, no-commission rules.
- Some accountants have been taking commissions already, either in violation of state and AICPA rules or by finding loopholes. So even now, you can't always assume that the opinions of a CPA, who aggressively pushes certain partnerships, are free of conflict of interest.

Jane Bryant Quinn is a syndicated columnist.

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Florida Institute of CPAs

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Attachment 4-10

It will be a sad day when accountants get commissions

Jane Bryant Quinn

A sales commission is an awesome thing.

It can motivate men and women to high arts of persuasion. It can blind them to the faults in a product. It can diminish their judgment. When a person makes money by selling you products, you can never be sure whether any given recommendation is the very best for you or the very best for the seller.

In the world of financial advice, only one profession has been virtually free of this conflict of interest — the green-eyeshade people, the accountants. They charge by the hour or the job, so their livelihood does not depend on whether you buy something. That means their opinions can be more objective.

Sad to say, sales commissions are starting to creep into their world.

Some accountants have long wanted to earn commission dollars. A majority in the profession is opposed. But the Federal Trade Commission took up arms against the majority by attacking the profession's code of ethics, which prohibits commission sales.

The FTC said that the ban was anti-competitive. If financial planners can make big bucks by selling limited partnerships, why shouldn't accountants be able to do the same? In its peculiar view of the world, the FTC calls its position "pro-consumer."

Under strong pressure from the FTC staff, the American Institute of Certified Public Accountants, the profession's national trade association, capitulated last August. It agreed to change its rules of conduct.

The proposed changes still have to be confirmed by the FTC. After that, state boards of accountancy have to consider whether to change their own rules or whether to resist. So in theory, accountants are still charging hourly fees in the traditional manner.

But the old code is falling, and everyone knows it.

Five states already let accountants accept sales commissions — Maryland, Oklahoma, South Dakota, Texas and West Virginia. The National Association of State Boards of Accountancy has proposed a new model code, for other states to adopt, that permits commissions.

When formally accepted, the new rules are likely to look like this:

- Your accountant can charge a sales commission on products he advises you to buy.
- If your accountant sends you to another adviser, like a stockbroker, he can accept a referral fee from the broker.
- If an accountant advises your small business to buy, say, IBM computers, he can accept a commission from the IBM distributor (unless he has IBM as an audit client).
- You have to be told in writing that your accountant is collecting commissions and referral fees.

These new rules are likely to change the recommendations that many accountants make.

Typically, their advice has been conservative. They tell clients to stay liquid and avoid debt, reports the New York State Society of Certified Public Accountants, after polling its members who offer personal financial planning.

The financial instruments they suggest the most often are tax-exempt bonds, Treasury securities, real estate and money-market funds. Except for real estate, these investments generally carry low or no sales commissions.

Please see QUINN, 4B

Quinn

From 1B

But their advice will probably get more aggressive when sales commissions are on the table. The highest commissions are paid by the riskiest investments, and you can expect more accountants to start recommending them.

Even after the rules change, many individual accountants won't take sales commissions because they think it will hurt their objectivity. At the urging of its Board of Accountancy, California recently passed a law prohibiting accountants from commissions and referral fees — and state law can't be attacked by the FTC. New York's Society of Certified Public Accountants hopes that its code of ethics, which has links with state law, will be similarly protected, a spokesman told my associate, Virginia Wilson.

But starting now, ask wh your CPA is taking commissio plans to, and judge the advice yo accountant provides accordingl

Jane Bryant Quinn writes about finances for the Washington Post Writers Group.

P.O. 2-26-91 attachment #-11

ed, Ep82-27, Dec. 22, 1981; amended May 1, 1982; revoked May 1, 1985.)

74-5-2. Definitions. The following definitions are applicable wherever such terminology is used in the rules of conduct: (a) "Board" means the Kansas state board of accountancy.

(b) "Certified public accountant" means a holder of a Kansas certificate as a certified public accountant and firms registered with the board to practice public accountancy.

(c) "Client" means any person or persons or any entity that retains a certified public accountant, or a registered firm for the performance of professional services.

(d) "Enterprise" means any person or persons or entity, whether organized for profit or not, for which a certified public accountant provides services.

(e) "Firm" means a proprietorship, partnership or professional corporation or association engaged in the practice of public accounting.

(f) "Financial statements" means:

(1) Statements and related footnotes that purport to show financial position at a particular point in time, or changes in financial position over a period of time;

(2) Statements which use a cash or other incomplete basis of accounting; and

(3) Balance sheets, statements of income, statements of retained earnings, statements of changes in financial position, and statements of changes in owners' equity. Incidental financial data included in management advisory services reports to support recommendations to a client, and tax returns and supporting schedules do not, for this purpose, constitute financial statements. The required affidavit or signature on tax returns prepared by a certified public accountant shall not constitute an opinion regarding financial statements.

(g) "Practice of public accountancy" means offering to perform, or performing for a client, one or more types of services involving the use of accounting or auditing skills, or one or more types of management advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters, while holding oneself out in such a manner as to state or imply that one is a certified public accountant. Use of the term "public accountant" or "public accountants" shall not be interpreted as implying that one is a certified public accountant.

(h) "Professional services" means any services performed or offered to be performed by a certified public accountant in the course of the practice of public accountancy.

(i) "Public communication" means a communication made in identical form to multiple persons or to the world at large, as by television, radio, motion picture, newspaper, pamphlet, mass mailing, letterhead, business card or directory.

(j) "Licensed municipal public accountant" means a holder of a permit to practice as a municipal public accountant issued under the laws of Kansas. (Authorized by and implementing K.S.A. 1-202(c)(1), K.S.A. 1983 Supp. 75-1119(a); effective Jan. 1, 1974; amended May 1, 1978; amended May 1, 1979; amended May 1, 1985.)

74-5-3 to 74-5-100. Reserved.

74-5-101. Independence. A certified public accountant or a licensed municipal public accountant shall not express an opinion on financial statements of an enterprise in such a manner as to imply that the accountant is acting as an independent certified public accountant or licensed municipal public accountant with respect thereto if the independence of that accountant is impaired in any of the following respects:

(a) During the period of the professional engagement, or at the time of expressing the opinion, the accountant or the accountant's firm: (1) (A) had or was committed to acquire any direct or material indirect financial interest in the enterprise; or

(B) was a trustee of any trust or executor or administrator of any estate that had or was committed to acquire any direct or material indirect financial interest in the enterprise; or

(2) had any joint closely-held business investment with the enterprise or any officer, director or principal stockholder thereof which was material in relation to the net worth of either the accountant or the accountant's firm or of the enterprise; or

(3) had any loan to or from the enterprise or any officer, director or principal stockholder thereof, other than loans of the following kinds made by a financial institution under normal lending procedures, terms and requirements: (A) loans obtained by a certified public accountant or the accountant's firm which are not material in relation to the net worth of such borrower;

(B) home mortgages; and

(C) other secured loans, except those secured solely by a guarantee of the certified public accountant;

(b) During the period covered by the financial statements, during the period of the professional engagement or at the time of expressing an opinion, the accountant or the accountant's firm: (1) was connected with the enterprise as a promoter, underwriter or voting trustee, a director or officer or in any capacity equivalent to that of a member of management or of an employee; or

(2) was a trustee for any pension or profit-sharing trust of the enterprise; or

(c) Any other circumstance, relationship or activity which the board determines would impair the independence of that accountant. (Authorized by and implementing K.S.A. 1-202(c)(1), K.S.A. 1983 Supp. 75-1119(a); effective Jan. 1, 1966; amended Jan. 1, 1972; amended Jan. 1, 1974; amended May 1, 1978; amended May 1, 1985.)

74-5-102. Integrity and objectivity. In the performance of professional services, a certified public accountant or a licensed municipal public accountant shall not knowingly misrepresent facts, nor subordinate that accountant's judgment to others. In tax practice, a certified public accountant or a licensed municipal public accountant may resolve doubt in favor of the client as long as there is reasonable support for that position. (Authorized by and implementing K.S.A. 1-202(c)(1), K.S.A. 1983 Supp. 75-1119(a); effective Jan. 1, 1966; amended Jan. 1, 1974; amended May 1, 1978; amended May 1, 1985.)

74-5-103. Commissions. A certified public accountant shall not pay a commission to obtain a client, nor accept a commission for a referral to a client of products or services of others. This rule does not prohibit payments for the purchase of all, or a material part, of an accounting practice, or retirement payments to persons formerly engaged in the practice of public accountancy, or payments to the heirs or estates of such persons. (Authorized by K.S.A. 1-202; effective May 1, 1978.)

74-5-104. Contingent fees. A certified public accountant shall not offer or perform professional services for a fee which is contingent upon the finding or results of such services; provided, however, that this rule does not apply to professional services involving federal, state, or other taxes in which the findings are those of the tax authorities and not those of the certified public accountant, nor does it apply to professional services for which the fees are to be fixed by courts or other public authorities, and which are therefore indeterminate in amount at the time the professional services are undertaken. (Authorized by K.S.A. 1-202; effective May 1, 1978.)

74-5-105. Incompatible occupations. A certified public accountant shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his or her independence or objectivity in rendering professional services. (Authorized by K.S.A. 1-202; effective May 1, 1978.)

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Attachment 4-12

KS CPA Newsletter

Vol. 36 Number 10
June, 1989

Kansas Society of Certified Public Accountants
and Its Educational Foundation

Oler To Chair Board of Accountancy


Richard A. Oler

Richard A. Oler, CPA, Pittsburg, has been named chairman of the State Board of Accountancy following the resignation of Gene Robben, CPA, Topeka.

Robben left public accounting recently to become Inspector General of the Kansas Department of Transportation.


Leon C. Logan

Leon C. Logan, CPA, Kansas City, was elected to replace Oler as vice chairman of the Board.

Both terms will run through July of 1990.

KSCPA Board Urges Letters on Commissions

The State Board of Accountancy's reluctance to consider removing its prohibitions on contingent fees and commissions has prompted the KSCPA Board of Directors to urge Kansas CPA firms to write the State Board on the issue.

Meeting in Wichita, May 3-4, the Society Board of Directors was told that not one Kansas CPA firm had asked the State Board to change its policies relative to commissions and contingent fees. The Society Directors voted last November to support amendments to the current rules and regulations so that they would conform to language contained in the agreement between the AICPA and the Federal Trade Commission. Related story on page 12.

Firms wishing to have their views known should write the State Board of Accountancy, Attn: Glenda Sherman, 900 SW Jackson, Suite 907, Topeka, KS 66612-1220, prior to June 22 when the Board is scheduled to meet.

In other action, the KSCPA Board of Directors:

•Approved a change in the boundaries of the Northwest and Central Chapters. Phillips, Rooks and Ellis Counties are now in the Northwest Chapter.

•Authorized the appointment of three special task forces to study the KSCPA Bylaws, legislation which would enact a state RICO law in Kansas, and study the impact of the AICPA Plan to Restructure Professional Standards on Society members not in public practice.

(continued on page 3)

Bills Affecting CPAs Pass 1989 Session

Several bills of interest to CPAs and their clients passed the 1989 session of the Kansas Legislature and have been signed into law by Governor Hayden.

Following is a brief summary of the major pieces of legislation affecting Kansas CPAs. See insert enclosed with this Newsletter from John Luttjohann, Director of Taxation, Ks. Department of Revenue for more information on the tax legislation.

Kansas Accountancy Law

HB 2384 - Temporary Practice for out-of-state CPAs. Effective July 1, 1989. Requires permit prior to beginning any engagement in Kansas which is not incident to practice in another state.

HB 2090 - Would have eased resident manager requirements for Kansas CPA firms. Tabled by House Committee. Board of Accountancy will hold public hearing on June 22 on amendments to K.A.R. 74-6-2 which, if adopted, would allow each Kansas CPA firm to have one office which does not meet the resident manager requirements. (See April Newsletter for full text of proposed rule.)

SB 242 - Amended professional corporation act. Permits professionals to incorporate under the General Corporate Code. It also clarifies that a professional practicing in a professional corporation is liable for only his or her malpractice, not for the negligence of others. Becomes effective July 1.

SB 47 - Related to the liability of officers and directors of financial institutions. Tabled in House committee. Would have fully protected any officer or director from a claim who relied in good faith on the audit by a certified public accountant.

(continued on page 14)

Invitation To Serve On KSCPA Committee Enclosed With This Newsletter

Your invitation to serve on a 1989-90 KSCPA Committee is enclosed with this Newsletter mailing. Members are urged to select their committee assignment preferences and return the card to the KSCPA office as soon as possible.

If your invitation was not included in the mailing, please call the KSCPA office and one will be sent to you.

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American G I Forum Of Kansas
NATIONAL VETERANS FAMILY ORGANIZATION

"Education Is Our Freedom, and Freedom Should Be Everybody's Business"

Arthur W. Solis
Kansas State Chairman

215 NORTH NORMANDY
OLATHE, KANSAS 66061
[913] 782-1613

W R I T T E N S T A T E M E N T

February 26, 1991

TO: Committee on Governmental Organization

FROM: Arthur W. Solis, State Chairman
AMERICAN G I FORUM OF KANSAS

RE: House Bill No. 2283
An Act establishing the advisory committee on African-American affairs

The **AMERICAN G I FORUM OF KANSAS** is a State chapter of the American G I Forum of the United States, a national Hispanic veterans family organization. The American G I Forum is one of the oldest and largest Hispanic organizations in the United States. The Kansas G I Forum consists of various local forums, including Kansas City, Kansas; Topeka; Wichita; Hutchinson; Dodge City; Garden City; and Ulysses. In accordance with its national and state constitutions, the American G I Forum is non-partisan in its activities.

The Kansas G I Forum was instrumental in the establishment of the Kansas Advisory Committee on Hispanic (formerly Mexican American) Affairs and unequivocally supports the statutory mandate of the office. Consistent with its founding principles of equality of opportunity and advocacy of the rights of others, the American G I Forum of Kansas lends its support for HB No. 2283, an act establishing the advisory committee on African-American affairs.

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African-American History Month Founder's Commission

A Permanent Programme Unit of the Panamerican/Panafrican Association, Inc.*

(Established in Memoriam to Mrs. Josephine Bruce, Originator, Negro History Day [1893] and Dr. Carter G. Woodson, Founder, Negro History Week [1926])

"Applecrest" • 14 Sunset Terrace • P.O. Box 143 • Baldwinsville, NY 13027 • Tel.: (315) 638-7379 • Fax: (315) 638-0778

obert Starling Pritchard
ounder, 1965, Black History Month

ntoine Jean Polgar
ogramme Director

embers of the A.-A.H.M.
ounder's Commission
artial Listing)

on. J. Emmanuel Bowier (Liberia)
inister of Information, Culture & Tourism
public of Liberia

inie Burrows (U.S.A.)
ress; NGO Permanent Representative to the U.N.
omen's International Democratic Federation

nuping Coapoge (South Africa)
bserver Mission of the African National Congress
the United Nations

on. Fritz Day (Haiti)
plomat

lton Fax (U.S.A.)
ist, Author

r. Dolores Harris (U.S.A.)
esident, National Association of Colored Women's Clubs

frika Hayes (U.S.A.)
ric Soprano; Daughter of History's First Black
oncert Singer, the late Roland Hayes (1887-1976)

oyce Jones (U.S.A.)
reat-great-grandniece of Harriet Tubman (1823-1913),
eroine of the Underground Railroad

lon. Viola W. Jones (U.S.A.)
layor, City of Langston, Oklahoma, "The only
istinctly African-American City in America"

William Kunstler (U.S.A.)
ttorney

Dr. Francisco Curt Lange (Uruguay)
ioneer Researcher on 18th Century Guilds of the
fro-Brazilian Minas Gerais Ecclesiastical Composers

ylvia Lee (U.S.A.)
ormerly First Black Staff Member of the
etropolitan Opera; Teacher of Vocal Interpretation,
urtis Institute of Music

. Timothy Moore (U.S.A.)
ssistant Professor, Department of Panafrican Studies,
ent State University

Julian Clyde Perry, Jr., M.D. (U.S.A.)
rt of the African Diaspora Collection

Prof. Cleofe Person de Mattos (Brazil)
Researcher-Editor of Black Brazilian Ecclesiastical
Composer, Padre Jose Mauricio Nunes-Garcia (1767-1830)

J.O. Plinton, Jr. (U.S.A.)
Airline Executive (ret.); Executive Director of the
Metropolitan Fellowship of Churches, Inc. of
South East Florida

Henri-Georges Polgar (U.S.A.)
Pianist

Hazel Johnson Reed (U.S.A.)
Educator

Morris Winding Reed (U.S.A.)
Attorney

C.E. "Sonny" Scroggins (U.S.A.)
Founder/Chairman, Kansas Fever Committee

Hon. C.N. Sello (Lesotho)
First Secretary, Embassy of the Kingdom of Lesotho
to the United States

H.E. Mr. W.T. Van Tonder (Lesotho)
Ambassador of the Kingdom of Lesotho
to the United States

Baron Alexander Von Wuthenau (Mexico)
Archaeological Researcher on Pre-Columbian
Black Presence in Central America

26 February 1991

Mr. Chairman ~~Speaker~~,

Distinguished Members of the House of Representatives of the State of Kansas,

Fellow Citizens of our African-American Community,

And Fellow Citizens of our State's Multi-Ethnic and Multi-Cultural Community-at-Large:

My name is Clarence E. Scroggins, known to many of you as "Sonny" Scroggins. I am proud to appear before you today in my capacity as Chairman of the Kansas Regional African-American History Month Founder's Commission. We are part of a national network of community organizational coalitions uniting business, civic, cultural, education and religious leaders, scholars, and African-American community grass-roots leadership. Together with other concerned citizens representing the multi-ethnic mosaic of our country's poly-ethnic/poly-cultural population, we are committed to address that same particular set of unsolved social, political and economic concerns of the African-American community in the nation as is being manifested by the House of Representatives this morning in its hearings on the subject of an Enabling Act addressing those same concerns of our State's African-American Community.

I congratulate this august body for the

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initiative it has taken to come to grips with a set of social, political and economic problems that, in being traditionally inadequately addressed by our State's body politic, has consigned our state's African-American Communities to a pace of growth and development that has historically fallen far short of the majority community and even one of our State's other communities-of-colour.

Further, I welcome this morning's opportunity to express our Statewide organization's unequivocal support for House Bill No. 2283 introduced by Representatives Gomez, Cribbs, Hensley, Jones and Watson, calling for the formation of a State Advisory Committee on African-American Affairs.

We and our fellow members of our State's African-American History Month Founder's Commission, know that we do not have to remind you that, for more than a century, African-Americans have played a vital role in the growth of our Territory and State. We are an integral part of the State's educational, cultural, governmental and political establishment. At the same time, it must be recognized that the African-American community has, for equally well-known historical reasons, been short-changed in its enjoyment of the promise of full equality which is the goal of all Americans who cherish the ideal of a democratic society. While that society has, for the 128 years since the Emancipation Proclamation, offered the hope of "equal opportunity" to its African-American citizens, denied to our forefathers and foremothers during the period of our captivity and enslavement of 244 years, it is today reassuring to find in both the text and the spirit of House Bill No. 2283 an Enabling Act which provides for official support for African-American community level initiatives to address not only the problem of equality of opportunity for Black citizens of our State, but quite frankly, the more

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fundamental and historically neglected criteria of equality of access to equal opportunity.

Our African-American community requires a vehicle such as the Advisory Committee on African-American Affairs at the level of State Government which can advise appropriate and concerned sectors of State Government on those special concerns of the African-American Community as they relate to its concerns in the areas of culture, education, employment, health, housing, criminal justice, welfare and recreation. These concerns must be addressed by the State if we are to narrow the gap which exists between African-Americans and whites in Kansas in terms of social and economic justice before the end of this century. Such Commissions exist in other states such as New York and Louisiana where they represent an effective channel to address the special needs of the African-American Communities of those states.

We also most strongly support the statutory provision that the Advisory Committee should be a bipartisan one and further recommend that, in order to avoid politicizing the appointments process, that appointments of Committee members be made in a manner that is consistent with the preceent set by the Public Disclosure Commission. We therefore respectfully oppose the provision that these sensitive appointments be made by the Governor alone, and rather recommend that in following the precedent set by the Public Disclosure Commission, that several appointments be made by the President of the Senate, the Senate Minority Leader, the Speaker of the House and the Minority Leader of the House, in addition to the Governor. In this manner, or in some other manner, the State Legislature would be appropriately responsive to our State's African-American Community's concern that such sensitive appointments not be subject to the politicization process. Such processes have all

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too often undermined the attempts of lawmakers like yourselves to support with pragmatic legislation, the longings of citizens of the African-American Community to at long last gain equal access to equal opportunity to the full enjoyment of life as an equal American citizen. History will surely record that the Kansas State Legislature of this term did, in addressing the needs and concerns of our State's African-American Community, well-serve the interests of our State's community-at-large.

I thank you for this opportunity to address an issue of major concern to our State's African-American Community. It is on behalf of our State's African-American History Month Founder's Commission that I congratulate and commend you for the political courage you have shown in bearing witness to your commitment to the goals of racial harmony and racial equity in our State. Through the introduction of House Bill 2283, which you are this morning presenting the citizens of this State in a Public Hearing, all citizens will have the opportunity to contribute to an enabling act, I might add, being appropriately debated this morning during these last few days of African-American History Month.

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FRED W. PHELPS
3701 W. 12TH - P. O. BOX 1886 - TOPEKA, KS. 66601

February 26, 1991

913 273-0338

BEFORE THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION

OF

THE KANSAS HOUSE OF REPRESENTATIVES

Testimony of Fred Phelps

Mr. Chairman and Members of the Committee:

My name is Fred Phelps, and I appreciate the opportunity to appear before this distinguished Committee, in support of HB 2283, AN ACT establishing the advisory committee on African-American affairs.

Last Saturday, the front page of *The Topeka Capital-Journal* carried a headline, "FINNEY ACCUSED OF RACISM, CHAUVINISM," because Kansas was the only state in the Union refusing to officially proclaim and honor African-American History Month for Feb. 1991. I am a member of the State of Kansas African-American History Month Founder's Commission, and as such spent three hours yesterday with Dr. R.S. Pritchard, Founder of African-American History Month (1965).

This bill is needed especially at this time to offset some of the damage Gov. Finney has done, and is continuing to do, to the good name of Kansas in the area of race relations. Last Friday the Kansas Senate honored Dr. Pritchard, but Gov. Finney angrily insulted him afresh Sat. morning in the Atrium of the Downtown Ramada Inn in the midst of Washington Day activities, details of which appear in a 7-page Feb. 24 press release, titled, "Gov. Joan Finney and A-AHM Founder Dr. Robert S. Pritchard Meet, Pritchard Intensifies Charges of Racialism/Chauvinism While Governor Finally Attempts A Defense."

Until Gov. Finney issues a public apology to Dr. Pritchard and the diplomats from two African nations she officially spurned Jan. 31, this matter threatens to snowball into an international incident, of the dimensions triggered in Arizona by former Gov. Meacham under conditions similar to those we are now facing. This bill deserves passage on its merits, but it takes on added importance in light of present circumstances.

Only one advisory committee member should be appointed by the governor, following the pattern of the Kansas Public Disclosure Commission.

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Finney accused of racism, chauvinism

Topeka Capital-Journal, Saturday, February 23, 1991

By HAL LOCKARD
The Capital-Journal

The founder of African-American History Month on Friday accused Kansas Gov. Joan Finney of being racist and a chauvinist.

"There's something terribly wrong here and that word begins with a big 'R,' " said concert pianist Robert Starling Pritchard.

Pritchard's appearance in Topeka had been rescheduled after disagreements between Finney's staff and Pritchard's staff over preparations for a prior visit. Pritchard canceled the visit once and demanded, but never received, an apology from Finney.

Friday, an irritated Pritchard launched news conference criticism at the governor because she didn't apologize, and because she "gave enthusiastic support to a holiday celebrating white Americans" when she accepted the role of grand marshal for a St. Patrick's Day parade in Topeka.

The fact she would embrace the Irish-American celebration and abort black history month celebrations reflects chauvinism and distaste, he said.

Following the noon news conference Pritchard visited Finney during an open house in her office. He said Finney didn't apologize, nor did he expect her to.

"The governor is the victim of a highly incompetent group of subalterns," he said.

She stands to be judged on that basis, he added.

Contacted later, Martha Walker, Finney's press secretary, declined to respond to Pritchard's statements.

"I don't think the governor's office is responding to press conferences. There's been a number of them and there's been criticism. But we're not responding to press conferences."

The Kansas Senate gave Pritchard a warm welcome Friday morning with a resolution he called a step toward creation of a multicultural society.

The senators gave a Pritchard a standing ovation.

The resolution cites his work in the Pan-American-Pan-African Association Inc., which has prompted dialogue and economic ties between the nations of Benin and Lesotho in Africa and Kansas.

Pritchard, who lives in Syracuse, N.Y., chose Kansas to share the spotlight of African-American History Month because "the efforts and compatibility of the white power structure bespoke of something that bears watching and bears supporting."

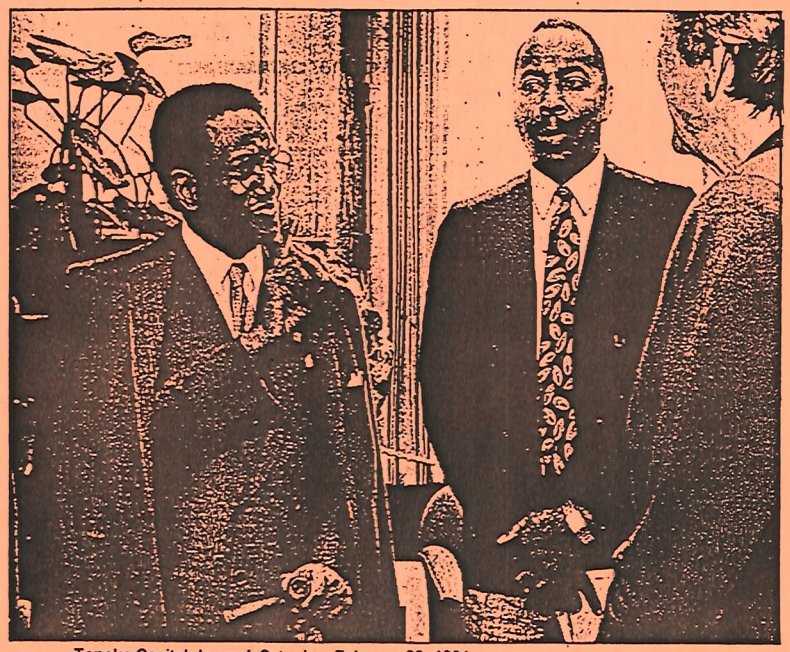
But he said the warmth accorded him as a visiting dignitary was probably quite different from what local black citizens experience every day.

"I'm quite certain that wasn't the same warmth the average black citizen feels every day," he said. "I saw one black senator, and I think Topeka has one black city council member. I call that tokenism."

The Associated Press contributed to this report.

Finney takes cultural heat

Continued from page 1-A



Topeka Capital-Journal, Saturday, February 23, 1991

—Amy Kunhardt/The Capital-Journal

Robert Starling Pritchard, concert pianist and founder of African-American History Month, greeted Gov. Joan Finney Friday in her office during a Washington Day reception. Pritchard and Finney discussed music Friday. Topeka activist Sonny Scroggins listened.

PANAMERICAN ASSOCIATION
Administrator of the African-American History Month (Formerly Black History Month) Founder's Commission and The 1991-1993 Dumile-Pritchard Touring Festival Sankofa-Mašianoke
"Applecrest" • P.O. Box 143 • Baldwinsville, New York 13027 • Tel. (315) 638-7379

FOR IMMEDIATE RELEASE

24 February 1991

GOV. JOAN FINNEY AND A-AHM FOUNDER DR. ROBERT S. PRITCHARD MEET

Pritchard Intensifies Charges of Racialism/Chauvinism While Governor Finally Attempts A Defense

As the visit to the State of Kansas by the Founder of African American History Month winds down, Dr. Robert Starling Pritchard characterized his sojourn as one which reflects "certain stark contrasts" within the Government of the State of Kansas.

On the one hand, Dr. Pritchard cited as an example "the feeling of non-partisan commitment to the goals of racial harmony within the State of Kansas that was in the very air on that memorable morning of 22 February 1991 that I was so warmly and cordially received by the Republican Vice President of the Senate and enthusiastically welcomed by the majority Republican body of the entire Senate." The Senate also adopted and passed Resolution 1824, which congratulated and commended Dr. Pritchard as Founder of Black History Month, the Panamerican/Panafrican Association, Inc., and its Programme Unit, the African-American History Month Founder's Commission.

Dr. Pritchard went on to say, "This would give one the impression that the state of race relations in Kansas was reflective of that progressive course of race relations one finds in the more enlightened statal areas of the U.S. (i.e., New York, Louisiana, Georgia, Virginia, California, Michigan, Pennsylvania and many others)."

Dr. Pritchard, as Chairman of the Panamerican/Panafrican Association, Inc. (the parent body of the African-American History Month Founder's Commission), has amassed over 25 years experience in the general areas of Economic, Cultural, and Educational Interchange between Africa and the United States, and Latin America and the United States, and has sought to share the benefits of his experience with Kansas State Government representatives. His originally-scheduled visit to Kansas on 31 January was for the purpose of launching what would have been the nation's first 1991 African-American History Month Regional Centerpiece Observance. He would have been joined by two high-level African Diplomats from the West African

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Gifts and contributions to the Panamerican/Panafrican Association, Inc. are tax deductible.

Republic of Benin and the Southern African Kingdom of Lesotho, who were to discuss economic exchange with the Kansas business community under the aegis of the Kansas State Department of Commerce. "That visit was aborted," Pritchard stated, "by the executive branch of the Finney Administration."

On his 20-24 February trip to Kansas, the African-American Foundation Executive lauded "the foresight, imagination and industry with which the State of Kansas Department of Commerce has taken the initiative to pursue the prospects of economic links with African States. The Department has done so in the context of the potential for a mutuality of benefit which could issue from such trans-economic contact. This perspective was dramatically manifested in my meeting with the Department Heads of the Kansas State Department of Commerce last Friday."

Dr. Pritchard went on to describe the auspicious meeting attended by representatives of the State of Kansas Department of Commerce, including Mssrs. James E. Beckley, Director, Trade Development Division and Gordon German, Director of International Marketing (Trade Development Division); Antonio Augusto, Director of Minority Business, and Ms. Amber A. Clark, Programme Manager, both of the Office of Minority Business. The Kansas State Dept. of Commerce officials met with prominent African American Citizens of Kansas, including Mr. Samuel Jordon, CEO of Worldwide Communications Co. and Publisher of the *Kansas State Globe* of Kansas City, and Mr. C.E. "Sonny" Scroggins, Chairman of the State of Kansas Regional African-American History Month Founder's Commission, Topeka. Also in attendance with Dr. Pritchard was his Foundation's Career-Intern and Administrative Assistant, Mr. Stephen Powell.

"We agreed in principle to pursue the opportunities for developing trade relationships with the West African nation of Benin and the Southern African Kingdom of Lesotho," Dr. Pritchard stated.

Mr. Beckley will include on his current trip to Washington, D.C. a visit to the Embassies of the two African countries, made possible by appointments secured for him through the good offices intercessions of Dr. Pritchard and his Central New York-based foundation, the Panamerican/ Panafrican Association, Inc.

Returning to his reference to "certain stark contrasts," Dr. Pritchard stated, "Courtesy and civility are, after all, alive and well in Kansas

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State Officialdom, for I have been pleased to learn that the Department of Commerce's Mr. Beckley will, on his own initiative, issue due apologies to the two Black African Diplomats that Governor Finney has withheld, a stance which has placed in serious jeopardy any updated credibility of her long-standing record of equity in her dealings with persons-of-colour. Thanks to the sensitivity of a Kansas Department of Commerce Official, the good name of Kansas amongst the members of the African Diplomatic Corps in Washington, D.C. and at New York City's United Nations has been redeemed."

"The contrast deepens," continued Dr. Pritchard, "in considering the Governor's attempt to scapegoat Mr. C.E. "Sonny" Scroggins for a political and racialist mess that key white female operatives close to Governor Finney perpetrated in order to abort the scheduled 31 January 1991 official A-AHM Observance at the State Capitol, either with or without the Governor's knowledge."

"If without her knowledge," added Dr. Pritchard, "I told the Governor she has a serious problem of organization and authority within her Administration. Whether with or without her knowledge, it should be obvious to her that she has a serious problem of judgment in filling posts. Her appointees obviously have neither the skills nor the experience to avoid such mishaps embarrassing to her Administration. In addition, they are also without the sensitivity to avoid the problems that would unleash criticisms from the Black Communities within the State of Kansas and even from throughout the nation such as mine which have charged the Governor with racialism and chauvinism."

In referring to a hastily called "Conflict Resolution Meeting" on Saturday, 23 February at the Ramada Inn between himself and Governor Finney, Dr. Pritchard stated, "At the very least, I finally had an opportunity to personally assay both the character, political sagacity and good will intentions of Mrs. Finney. The meeting was a total failure, despite the good offices intercessions of Mr. C.E. "Sonny" Scroggins, who arranged the meeting with the Governor's and my acceptance."

"Succinctly put," said Dr. Pritchard, "Mrs. Finney began the meeting by rudely and unceremoniously (and, I might add, even with fishwifery) excoriating and dismissing Mr. Scroggins.....after her daughter Ms. Halliday had indicated to my Administrative Assistant that both he and Mr. Scroggins

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would be welcome at the meeting. The Governor then asserted that she didn't know 'what this is all about...I know nothing...Nobody has told me anything'."

Dr. Pritchard further recalled, "While I thought to myself, 'This is really bad Off-Off-Off Broadway Theatre', I actually said to the manifestly upset Governor, 'For the sake of argument, I will, as a gentleman, accept your assertions and brief you on precisely what happened' (referring to the aborted African-American History Month 31 January Official Observance at the Topeka State Capitol). I then proceeded to remind the Governor that she had not only supported Mr. Scroggins' proposal for an official African-American History Month Observance, but had herself agreed to participate in the Official Proclamation-signing Ceremony and had so indicated it in a Thanksgiving Day greeting she had sent to Mr. Scroggins. Moreover, I reviewed with the Governor the copious list of letter-faxes I personally sent to her office and the Governor's Residence 'Cedarcrest', in addition to the yet unacknowledged and unanswered letter-faxes sent to her Chief of Staff Ms. Susan Seltsam, to her Director of Special Events, Ms. Wendy McFarland, and following the aborted 31 January A-AHM Ceremony, to her Special Assistant Ms. Ann Cook."

Dr. Pritchard further recounted, "Can you believe it.....the Governor's response was 'And where are you from?...What music do you like to play most?' These questions were uttered in that painfully obvious mode of the Lady-of-the-Plantation-Manse, who had never quite managed to become comfortable with her newly elevated social status by virtue of a marriage which catapulted her from relatively nothing to relatively something."

"It seemed that the meeting was an ordeal for Mrs. Finney," Dr. Pritchard observed, "particularly given the fact that she had failed in her attempt to divide and conquer between me and Mr. Scroggins (after having used him to effect a meeting between her and myself). Consequently, she found herself in the hopeless position of trying to paint Mr. Scroggins into the picture of a scapegoat for her own and her triumverate or quartet of subalterns' failure to protect her in her attempt to take a distance from the scheduled 31 January A-AHM Official Observance with impunity. For when I pointed out to Mrs. Finney that the racialist scandal will not disappear until she openly and forthrightly addresses the issues-of-concern to both

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Black and White citizens of Kansas, she responded, 'What do you mean?' I then attempted to be gentle, even compassionate, with the woman before me, who obviously recognized that she was not in control of our conversation, nor of the events which had catapulted her into a racialist contretemps, nor indeed of me. I therefore decided not to string out the conversation unnecessarily, but rather to put the matter to the Governor precisely as it was, so that she could not fail to understand the dilemma that she and her subalterns had created for her. I stated: 'Madame Governor, your Chief of Staff, Ms. Seltsam, is a liar. She lied to the press when she stated that the misunderstanding resulted from a failure in communications. In fact, the only communications failures there were, were those imposed upon Mr. Scroggins by Ms. Seltsam, which made it impossible for the A-AHM Programme Coordinator to accept or receive telephone calls from me or the two African Ambassadors, or to accept or send letter-faxes to us, fully one week before we were due to appear in Topeka."

"Your Special Assistant, Ms. Cook, is a liar. She lied when she reported to the press that the misunderstanding was simply a matter of rescheduling," Dr. Pritchard continued. "Ms. Cook very well knows that no request for rescheduling had been made by her or any other member of your staff."

"And you, Mme. Governor, are obviously unaware that I personally know of leaks within your own Administration that you were in fact aware of the entire histoire surrounding the aborted 31 January Official A-AHM Observance," Dr. Pritchard stated.

"Given your widely publicized plans to participate as Grand Marshall of the forthcoming St. Patrick's Day Parade, in addition to your commitment to perform as a harpist at the Cathedral during that Observance, has it not occurred to you," Dr. Pritchard queried the Governor, "that you yourself become responsible for a racialist impression? For you would on the one hand take distance from one of America's oldest Black American Annual Observances, whilst at the same time you give open support to an Observance whose most immediate appeal is to the white voting public?"

At this point, Dr. Pritchard noted, "The Governor asked me once again, '...And where are you from?... What composer did you say you liked best?' I responded to the latter with 'My favourite composer is Johann Sebastian Bach... and what are you going to do about the matter of an apology to the

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Attachment 8-5

two Ambassadors?' At this juncture, the Governor became manifestly addled, abruptly rose... feebly attempted to assert herself with finger pointing whilst intoning almost incoherently, 'He can never use the fax, he can never use the fax, he can never use the fax, he can never use the fax' etc. etc."

Dr. Pritchard concluded his account thusly. "Only later in the day, when I spoke with a few persons who allegedly had formerly been very close to Mrs. Finney, I learned that she had allegedly suffered one or two nervous breakdowns several years ago. I cannot know to what extent the Governor's behavior with me was a residual of that experience in her life (if in fact she had undergone such an experience). However, it is painfully clear that the Governor is no more near understanding the necessity to resolve her current political difficulties with the Black Community of the State of Kansas than was the former Governor of Arizona. Former Arizona Governor Mecham's intransigence on the issue of whether or not his state would officially observe the Birthday of Martin Luther King had finally earned him that same place of ignominy in American history that Governor Joan Finney appears to be well on her way to earning, given the fact that she is now virtually the only Governor in the United States who did not issue an A-AHM Proclamation to all of its citizens."

Meanwhile, following repeated assertions to the press through her subalterns that she would not respond to press conference statements that have been made on the matter of the aborted 31 January 1991 A-AHM Observance, Gov. Joan Finney reversed that position. Dr. Pritchard commented, "In doing so, she too officially became a liar. Mrs. Finney lied to the press and to the people of the State of Kansas when, during the course of her brief Sunday evening television interview re: her response to my charges of racialism and chauvinism, she never, in fact, referred to my charges of racialism...nor could our meeting remotely be characterized as a welcome on her part for me (given the fact of the ambiance of addled hostility, including the very same penchant for avoiding a direct and truthful response to an inquiry that she played out in her TV interview of Sunday evening.")

"In any case," concluded Dr. Pritchard, "coincidence will place me back in Topeka again during the St. Patrick's Day Celebration, when I shall have an opportunity to personally witness the Governor's response to the Irish-American Community in the State of Kansas, and compare that to her

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non-response to the State of Kansas Black American Community's expectation that she would have officially participated in its annual A-AHM Observance Proclamation Ceremony."

Dr. Pritchard will participate in an African-American History Month Minority Business Enterprise Workshop presenting former Congressman Parren Mitchell, "The Father of MBE Congressional Legislation", in Syracuse, N.Y. on Tuesday, 26 February, whereafter he will fly to West Africa for one week to participate in the establishment of the structure of the World Council of Panafrican Organizations in Cotonou, Benin.

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Special to the print and sound media, State of Kansas;
Major Black-owned newspapers, U.S.A.;
Major Wire Services, U.S.A., the United Nations, and the U.N. Africa Broadcast Service

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