

summary of the terms of the Proposed Final Judgment and CIS was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, during the period of June 24 through 30, 2003.

Under the consent order, NCPG is prohibited from directly or indirectly initiating, adopting, or pursuing any agreement, program, or policy that has the purpose or effect of prohibiting or restraining any Problem Gambling Service Provider ("PGSP") from: (1) Selling problem gambling services in any state or territory or to any customer; or (2) submitting competitive bids in any state or territory or to any customer. The NCPG is also prohibited from directly or indirectly adopting, disseminating, publishing, seeking adherence to or facilitating any agreement, code of ethics, rule, bylaw, resolution, policy, guideline, standard, certification, or statement made or ratified by an official that has the purpose or effect of prohibiting or restraining any PGSP from engaging in any of the above practices, or that states or implies that any of these practices are, in themselves, unethical, unprofessional, or contrary to the policy of the NCPG.

The consent order further provides that the NCPG is prohibited from adopting or enforcing any standard or policy that has the purpose or effect of: (1) Requiring that any PGSP obtain permission from, inform, or otherwise consult with another PGSP before selling problem gambling services or submitting bids for the provision of problem gambling services in any state or territory or to any customer; or (2) requiring that any PGSP contract with, provide a fee or a portion of revenues to, or otherwise remunerate any other PGSP as a result of selling problem gambling services in any state or territory or to any customer. Finally, the NCPG is prohibited from adopting or enforcing any standard or policy or taking any action that has the purpose or effect of: (1) Sanctioning, penalizing or otherwise retaliating against any PGSP for competing with any other PGSP; or (2) creating or facilitating an agreement not to compete between two or more PGSPs.

The sixty-day period for public comments expired on August 29, 2003. During the period for public comments, the United States was sent one additional comment which was not noted in its original Response to Public Comments filed on September 17, 2003. That comment was from Messrs. Nicholas Provenzo, Chairman, and S.M. Olivia, Senior Fellow, The Center for the Advancement of Capitalism ("CAC"). The United States has carefully considered the views expressed in that comment, but nothing in the comment has altered the United States' conclusion that the Proposed Final Judgment is in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is now filing with this Court its response to the comment submitted by the CAC. Once this comment and this response are published in the **Federal Register**, the United States will have fully complied with the Tunney Act and will file a motion for entry of the Proposed Final Judgment.

## II. Supplemental Response to Public Comments

### *The Center for the Advancement of Capitalism*

Among the issues the CAC has raised in its comment are: NCPG's status as a nonprofit corporation; the relationship of the antitrust laws to the First Amendment; and the Court's public interest determination. The CAC also noted the absence of a barrier to entry analysis. A copy of the CAC comment is attached as Exhibit A.

The CAC argues that, as a nonprofit organization, the NCPG is exempt from the authority of the antitrust laws. Section 1 of the Sherman Act specifically states that "[e]very person" who acts in restraint of trade or commerce falls within its scope. 15 U.S.C. 1. The Supreme Court has consistently held that nonprofit organizations are not exempt from Section 1 of the Sherman Act. See *NCAA v. Board of Regents*, 468 U.S. 85, 100 n. 22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct." (citations omitted)); *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws."); see also *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

The CAC also argues that the Proposed Final Judgment violates the First Amendment by "the shackling of NCPG's future speech and assembly" and that this amounts to "overt censorship by the United States." A horizontal agreement to allocate territories, whether by spoken or written word, is conduct within the reach of the Sherman Act.

. . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972), quoting *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949). The California Motor Transport Court went on to say that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted], which the legislature has the power to control." *Id.* at 515. See also *Associated press v. United States*, 404 U.S. 1 (1945).

With respect to the public interest determination, the CAC suggests the availability of other remedies in lieu of the Proposed Final Judgment. The territorial allocation alleged in the Complaint was a horizontal agreement among state affiliates, effectuated by the NCPG, the sole purpose and effect of which was to reduce competition for the sale of problem gambling products and services between and among

state affiliates. The Proposed Final Judgment addresses the violation alleged in the Complaint—an unlawful territorial allocation of problem gambling products and services along state lines in violation of Section One of the Sherman Act. Nothing in the CAC's comment changes the view of the United States that the Proposed Final Judgment is in the public interest. In making its determination whether the Proposed Final Judgment is "in the public interest," the "court is without authority to 'reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made'" *United States v. Microsoft Corp.*, 231 F. Supp 2d 144, 154 (D.D.C. 2002) (quoting *United States v. Microsoft Corp.*, 56 F. 3d 1448, 1459 (D.D.C. 1995)).

Finally, the CAC also expressed concern about the absence of a barrier to entry analysis. However, the Division took into account all relevant economic and legal factors in its investigation of NCPG's practices.

## III. Conclusion

After careful consideration of this public comment, the United States has concluded that entry of the Proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and is therefore in the public interest. Pursuant to Section 16(d) of the APPA, the United States is submitting this public comment and this response to the **Federal Register** for publication. After this comment and this response are published in the **Federal Register**, the United States will move this Court to enter the Proposed Final Judgment.

Dated: \_\_\_\_\_ Washington, DC.

Respectfully submitted,

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## Certificate of Service

I hereby certify that I served a copy of the foregoing Supplemental Response to Public Comments via First Class United States Mail, this \_\_\_\_\_ day of \_\_\_\_\_, 2003, on: Sanford M. Saunders, Jr., Esq., Greenberg Traurig, LP, 800 Connecticut Avenue, NW., Suite 500, Washington, DC 20006. Rosemary Simota Thompson, Attorney, Chicago Field Office, U.S. Department of Justice, Antitrust Division, 209 South LaSalle Street, Suite 600, Chicago, Illinois 60604, (312) 353-7530 (telephone).

## United States District Court for the District of Columbia

United States of America, Plaintiff, v. National Council on Problem Gambling, Inc., Defendant. Civil Action No. 1:03CV01278. Before: Judge Henry H. Kennedy.