October 6, 2009

The Honorable Barney Frank
Chairman
House Financial Services Committee
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable Spencer Bachus
Ranking Member
House Financial Services Committee
B371A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Frank and Ranking Member Bachus:

The Association of National Advertisers (ANA) wants to express its strong opposition to several key provisions of H.R.3126, the "Consumer Financial Protection Agency Act of 2009" as well as the September 25, 2009 "Discussion Draft." In particular, we are deeply troubled about the sweeping impact this legislation would have on the jurisdiction, regulatory powers, and long term health of the Federal Trade Commission (FTC). The FTC, from its inception in 1914, has increasingly become the federal agency with the broadest responsibility and expertise over the regulation of advertising in the United States. These issues, therefore, are of critical importance to virtually every segment of the consumer and business communities.

ANA is the advertising industry's oldest trade association and the only group exclusively dedicated to enhancing the ability and protecting the right of companies to market their products on a national and regional basis. Our members are a cross section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 9,000 separate advertising entities, our member companies market a wide array of products and services to consumers and other businesses. ANA's members expend over 200 billion dollars annually on advertising and marketing in the U.S. More information is available at www.ana.net.

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H.R. 3126 is certainly one of the largest regulatory reorganization efforts proposed for the financial sector since the Great Depression of the 1930's. Due to its scope and complexity, unfortunately, critical aspects of this proposal have received inadequate focus and analysis. While we agree that our nation's consumer protection regulatory regime needs to be reformed, we do not believe the proposals of H.R. 3126 in regard to its impact on the FTC are well designed or likely to improve consumer protection.

H.R. 3126 would radically transform the FTC. Virtually all of the FTC's current authority over financial practices (and most of the FTC staff working in this area) would be transferred to the CFPA. In testimony before the House Energy and Commerce Committee, Stephen Calkins, former FTC general counsel and now Associate Vice President for Academic Personnel and Professor of Law at Wayne State University, estimated that potentially more than 30 percent of the FTC's Bureau of Consumer Protection staff would be moved to the CFPA. Also, FTC Commissioners Rosch and Kovacic in related testimony estimated that further staff would be lost from the FTC Bureau of Competition and other offices at the Commission. The bill would further transfer much of the FTC's substantial authority over financial privacy issues to the CFPA. This type of drastic regulatory transplant surgery is almost certain to adversely affect the efficacy of the consumer protection and privacy missions of the FTC.

Even in the areas that clearly will remain within the jurisdiction of the FTC, the widespread excision of authority over financial issues will substantially hobble the Commission's ability to operate effectively. The FTC, for example, will retain jurisdiction over general telemarketing fraud issues, but if the products that are being sold through such fraud fall under the CFPA financial definitions, then the FTC would have to defer to the CFPA in regard to enforcement of these transactions. This example could be substantially multiplied. Numerous fraudulent ad practices regulated by the FTC include important financial components that now would fall under the jurisdiction of the Consumer Financial Protection Agency.

Unfortunately, the so called "backstop" authority provisions of the CFPA Act fail to resolve these problems. While it is true that in the financial regulatory arena, the FTC could recommend that the CFPA begin an enforcement proceeding, the Commission could not initiate an enforcement action on their own unless the CFPA did not act within 120 days. A 120 day delay often will allow fraudulent "boiler room" operators to bilk millions of dollars from consumers and then successfully cover their tracks from regulatory pursuit. Even more fundamentally, the obvious question remains, how could the FTC, once its entire financial staff and funding for these efforts have been transferred to the CFPA, play a meaningful or productive role in this arena?

In addition, despite the claim that the CFPA Act would end conflicting and overlapping regulatory regimes in the financial area, H.R.3126 would give the states concurrent authority to enforce regulations adopted by the CFPA and give them the green light to

adopt consumer protection laws that are even stricter than federal laws. This approach clearly will undermine the goal of consistent and coherent national financial regulation.

Also, over the last decade the FTC has developed a broad expertise concerning privacy issues. The Commission clearly has become the federal government's lead agency in regard to these issues. To now divide government oversight of this critical area on a sector by sector rather than subject matter basis will create a balkanized regulatory approach that seems both counterintuitive and highly counterproductive.

Another critical issue of significant concern is that H.R.3126 would provide the CFPA with "unfairness" rulemaking authority which is likely to be inconsistent with and clearly goes far beyond the similar authority provided to the FTC under current law. Unfairness has always been a highly elusive and amorphous concept that if not carefully anchored to more concrete considerations will provide regulators with nearly unfettered discretion. It is for that reason that under section 45 (n) of the FTC Act, the Commission has no authority to declare an act or practice unlawful on the grounds that it is unfair unless: "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider <u>established</u> public policies as evidence to be considered with all other evidence. <u>Such public policy considerations may not serve as a primary basis for such determination</u>." (emphasis added)

This definition of "unfairness" was carefully crafted by the Congress in reaction to the FTC launching numerous rulemakings based on expansive public policy considerations including an effort to ban all advertising directed to children predicated on the claim that this advertising was inherently unfair. The Commission's profligate use of unfairness rulemaking authority, at that time, created an uproar that led the *Washington Post* to claim that the Commission was attempting to become "the Nation's Nanny." Clearly, the ability to utilize the highly elastic concept of public policy without the restrictions of Section 45 (n) of the FTC Act would seriously compound the inherent vagueness and elusiveness of the definition of "unfairness."

Unfortunately, Section 131 of H.R.3126 totally ignores this history and provides the CFPA with unfairness rulemaking authority without the important restrictions that public policy considerations must be "established" and may not serve as a "primary basis" for carrying out the cost benefit analysis mandated to justify an unfairness rulemaking. This omission raises very serious concerns, particularly given the extraordinary power and scope of the CFPA. We urge you to impose the same unfairness standard for the CFPA as currently applies to the FTC.

Paradoxically and strikingly, H.R. 3126 not only attempts to totally transform consumer financial regulation but also launches sweeping changes in the enforcement powers of the FTC in areas having nothing ostensibly to do with financial reorganization. These changes do not merely tinker at the margins of the Commission's authority. Instead,

they substantially impact critical aspects of the FTC's functions and responsibilities. Nevertheless, there has been no systematic examination of the implications of these changes or an opportunity for thorough examination by the numerous constituencies directly affected by these proposals.

Section 201 of H.R. 3126, for example, makes the following major changes to FTC authority:

Rulemaking Process – the bill gives the FTC authority to conduct across the board rulemakings under the expedited Administrative Procedures Act (APA) rather than under the present Magnuson-Moss rulemaking procedures. The Congress in the 1970's instituted the Magnuson-Moss rulemaking procedures at the Commission due to its growing concern that the FTC, which at the time was carrying out multiple wide-ranging concurrent rulemakings, should be required to carry out more structured rulemaking procedures. In light of the Commissions' extremely broad powers over vast segments of the nation's economy, the Congress, at that time, believed that expedited rulemaking authority (180 days) could lead to a serious "rush to judgment" allowing the FTC to make major, industry-wide regulatory changes without adequate time for industry input and thoughtful consideration.

Timothy Muris, who served as Chairman of the FTC from 2001-2004, testified at a July 14th hearing of the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, and Insurance to strongly urge the Congress to retain the Magnuson-Moss rulemaking procedures at the FTC. Muris stated:

> "The administration's [CFPA] proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners' meetings with outside parties and the prohibition on *ex parte* communications with Commissioners also are eliminated. These sensible and important protections should be retained."

It is certainly possible that these revisions now deserve review and reexamination, but to make such a significant and systemic change to fundamental FTC procedures should not be carried out as an afterthought in a legislative package focusing totally on other aspects of regulatory reform.

- **Aiding and Abetting** – the bill also allows the Commission to hold entities accountable that "aid or abet" another in violating any law enforced by the FTC. This provision which also potentially impacts every segment of the advertising community also has not been carefully vetted to allow affected groups to present

testimony on this important provision. ANA is a member of The Advertising Coalition (TAC), which has written a separate letter discussing this issue in greater detail, which we attach for your review.

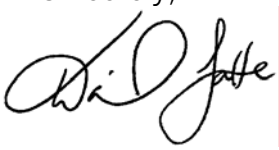
We urge you to carefully consider the impact these proposals would have on the business community and the FTC and eliminate Section 201 of the CFPA bill.

In the past, ANA consistently has supported incremental increases in FTC authorizations in order to provide adequate funding for the agency. Additionally, we have worked with Congress and the FTC in providing the Commission increased authority in areas such as the Children's Online Privacy Protection Act (COPPA) and the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN SPAM Act). In these areas, however, the changes were developed only after thoughtful hearings and cooperation with all other interested groups.

We urge you before radically and irrevocably transforming the FTC, one of this nation's most important regulatory agencies, to provide adequate opportunity for careful analysis of the likely impact of this legislation on the Commission's functions and capacity to continue to effectively oversee the marketplace for the protection of consumers and the business community. ANA hopes that the Congress, in its legitimate effort to strengthen regulation in regard to financial markets, will not create severe unintentional collateral damage to the FTC and the regulation of advertising in all other areas of the economy.

Thank you for your consideration of our views.

Sincerely,



Daniel L. Jaffe
Executive Vice President

Enclosure: The Advertising Coalition letter

THE ADVERTISING COALITION

October 1, 2009

The Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
2129 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express the concerns of The Advertising Coalition about provisions in H.R. 3126, the Consumer Financial Protection Agency Act of 2009, and the Discussion Draft, that could subject media companies and advertising agencies to civil and criminal penalties and other sanctions for information contained in advertising.

The Advertising Coalition includes advertising, media and manufacturing trade associations that work together to protect advertising from excessive regulation or restrictive legislation. In this instance, we are confident that you, your Committee and your staff are well acquainted with the broad scope of protection afforded advertising by the First Amendment as it has been applied by the U.S. Supreme Court for more than 30 years. Please let me review some of our concerns and the cases that we think are relevant to your legislative proposal. Our Coalition would welcome the opportunity to discuss these issues with you.

We are concerned that Section 138 of the Committee's Discussion Draft is too vague because it would make it unlawful for a person to "advertise . . . [a] financial product or service that is not in conformity with this title or applicable regulation prescribed or order issued by the Agency . . . ." We would recommend Section 138 be modified to provide a clearer standard for regulating or sanctioning false or misleading commercial speech and not leave the definition of this standard to the discretion of the agency. We also would request that you preserve the definition of "unfairness" that was developed by the House and Senate Commerce Committees and contains important safeguards. An example is the FTC definition that specifically says the agency cannot rely solely on the public policy standard of unfairness as the basis for bringing a complaint.

We also believe that Subsection (3) of Section 138 raises serious issues as it expands the liability for advertising a consumer financial product that is not in conformity with this title to any person who "knowingly or recklessly provide[s] substantial assistance to another person in violation of the provisions of Section 131 . . . ." This language could create a very large net that reaches virtually anyone involved in preparing, placing, receiving, televising or printing an advertisement. Section 131 in turn directs the agency

to "take any action . . . to prevent a person from committing or engaging in an unfair, deceptive, or abusive act or practice . . . " relative to a consumer financial product or service. This language could be read to authorize the prior restraint of speech. While we have focused on Sections 131 and 138, similar language in Section 201 would also expand the liability for many people involved in an advertisement beyond just the advertiser and its employees.

The Supreme Court has said that false or misleading commercial speech is not protected by the First Amendment. However, if the speech is truthful and about a legal product the government is constrained by the four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) in its ability to regulate its content. The government must show that the regulation would advance a substantial government interest and not be broader than necessary to advance that objective. More recently the Court has said that restricting speech must be the last option pursued by the government.

In a few instances, Constitutional issues have arisen over the responsibility for assuring the advertising involves a lawful activity. In the few significant cases the courts concluded a newspaper or magazine (and presumably television and radio stations) does not have a duty to investigate the claims made in an advertisement. They also have said if a court or government agency later determines that the advertising content may be unlawful, the media cannot be held accountable unless the language in the ad is clearly unlawful "on its face." In a landmark case the 11th Circuit Court of Appeals said in 1992:

> "Now, while Defendants owe a duty of reasonable care to the public, the magazine publisher does not have a duty to investigate every ad it publishes. Defendants owe no duty to the Plaintiffs for publishing an ad if the ad's language on its face would not convey to the reader that it created an unreasonable risk that the advertiser was available to commit such violent crimes as murder." (Emphasis added). *Braun v. Soldier of Fortune of Magazine, Inc.*, 968 F 2d 1110 (11th Cir. 1992).

The practical and constitutional concern that the courts often discuss is that if there is ambiguity about what is lawful, it may result in the chilling of speech because the media will reject ads that are in fact truthful and appropriate because of the blurring of the legal lines – or that the media will be forced to examine the claims in each and every ad.*

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* In 2002 the FTC proposed to publish a list of claims that often appear in advertising of weight loss products in order to enlist the support of the media in using these claims to reject advertising for products that made them. Testimony presented to the FTC by the Magazine Publishers of America and the Newspaper Association of America pointed out the case law that states the media has no legal obligation to investigate the claims made in an ad, and that asking the media to screen advertising against a list of weight loss claims would inevitably result in the exclusion of many ads making lawful claims – in effect a prior restraint of speech.

Again, we would welcome an opportunity to work with you and your staff to clarify the intent of these sections and to assure that advertisers are not subject to an ambiguous standard and that recognizes judicial precedents which hold that media companies do not have a duty to investigate the content of advertising.

Thank you for your consideration.

Respectfully,

Jim Davidson
Executive Director
The Advertising Coalition

cc: Members of the Committee on Financial Services