October 27, 2009

The Honorable Henry Waxman
Chairman
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member
House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

The Association of National Advertisers (ANA) wants to express our strong opposition to several key provisions of H.R.3126, the "Consumer Financial Protection Agency Act of 2009," as approved by the House Financial Services Committee.

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. However, due to its scope and complexity, critical aspects of this proposal have received inadequate focus and analysis. We agree that our nation's consumer protection regulatory regime needs to be reformed. However, we are very concerned that this legislation would dramatically transform the regulatory powers of the Federal Trade Commission (FTC) without any detailed hearings or opportunity for industry input.

H.R. 3126 would make three critical changes in the regulatory authority of the Commission: expedited rulemaking authority; expanded liability for "aiding and abetting" an unfair act or practice; and immediate civil penalty authority.

Expedited Rulemaking Authority – 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.

Senator Magnuson and Congressman Frank Moss were two of the leading consumer champions of their era and certainly would never have pushed this legislation if they thought it would handcuff the agency.

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."

The FTC is not an agency that has specific subject matter expertise over a particular area of the economy, such as the SEC, the CFTA or the EPA. Therefore, it is more important for the agency to follow the detailed and focused procedures of Magnuson-Moss when carrying out an industry-wide rulemaking.

We urge the members of the House Energy and Commerce Committee to either uphold the Magnuson-Moss provisions or keep some hybrid version of the procedural safeguards in the Act. These safeguards include: the requirement that the Commission must identify a pattern of activity – a prevalence, as opposed to one instance -- before engaging in a rulemaking; the requirement that a rule may be overturned by the courts if it is not supported by substantial evidence taken as a whole; the requirement that the Commission provide a statement as to the economic effect of the rule. All of these protections are presently being abrogated in the bill. They are all sensible requirements that should be maintained.

Aiding and Abetting – the bill would give the FTC the authority to go after companies or persons that "aid or abet" a violation of the FTC Act. This would have serious implications for advertising agencies, media companies and other companies that play

any role in the communication/sale/delivery process. We are very concerned that this change would import criminal law concepts into a civil statute.

Immediate Civil Penalty Authority – the bill would give the FTC power to impose civil penalties without any prior rule or order by the agency for any violation of section 5 of the FTC Act, a scope of authority the Commission has never had before. Currently, the FTC is limited to recovering civil penalties for violations of a rule or a final cease and desist order with respect to an unfair or deceptive act or practice. For example, unfairness is a very broad and evolving standard. Giving the FTC the authority to immediately impose civil penalties, without any understanding of or notice that particular conduct is "unfair," could impose serious multimillion dollar financial burdens on a business. Honest companies could be faced with back-breaking burdens despite the fact that they made every effort to stay within the strictures of the FTC Act.

It is possible that these major revisions to FTC authority might be appropriate after careful review. However, we believe it is inappropriate to make such significant and fundamental changes to FTC powers without full hearings and analysis, as an afterthought in a legislative package focusing on financial regulatory reform.

We have several other important concerns about portions of the bill dealing with the CFPA. 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. Inconsistent state rules in this area can make national advertising campaigns virtually impossible, hurting both business and consumers.

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.

Unfairness Rulemaking Authority

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 established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." (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.

Relationship between the CFPA and FTC

Under section 161 of H.R.3126, much of the regulatory authority that the Congress has delegated to the FTC over financial products and services will now be transferred to the CFPA, with the FTC having residual authority. We are very concerned that there has not been adequate attention given to the implications of this change for the staff and expertise of the FTC.

How many current FTC staff working primarily on financial issues within the jurisdiction of the CFPA would be transferred to that agency? If the CFPA has primary responsibility, what incentives would there be for experts in this area to remain at the FTC? Whether or not FTC staff migrates to the CFPA, one agency is going to have to hire a whole new cadre of new employees to deal with this overlapping jurisdiction. How does this improve the efficient and effective regulation of this critical sector?

The two agencies would have different substantive standards (for example, in the definition of unfairness). Would the two agencies end up competing or second-guessing each other? There has not been sufficient consideration given to these and a host of other concerns about the relationship between the two agencies.

Conclusion

H.R. 3126 not only attempts to totally transform consumer financial regulation. It 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.

Overlapping jurisdiction and inconsistent standards could lead to bureaucratic overregulation or confusion for companies that operate in a national and global marketplace. We urge you to reject these proposed changes in FTC authority.

Thank you for your consideration of our views.

Sincerely,

Daniel L. Jaffe
Executive Vice President

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.