

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.*

* 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.

The Honorable Barney Frank
October 1, 2009
Page 3

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