



April 4, 2005

The Honorable Tom Harkin
United States Senate
731 Hart Senate Office Building
Washington, DC 20510

Dear Senator Harkin:

We are writing on behalf of the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) to respond to your March 16th letter challenging the food, restaurant and beverage industries to take “swift action in promoting sound nutrition and fighting childhood obesity.” Our three associations, which represent a wide range of leading marketers, advertising agencies and media companies, fully share the national commitment to protect the health of America’s children. The advertising community is on record recognizing that childhood obesity is a serious worldwide problem. Our members and the advertising community in general have faced this challenge concretely and in dramatic fashion in the marketplace.

A broad range of companies have responded to concerns about obesity by developing menu alternatives and serving size changes. This response has not been due to political pressure but a reflection of the demands of consumers for more low fat, low calorie food options. Food manufacturers, for example, have introduced more than 3,000 new and reformulated products for consumers since the year 2000 to respond to these concerns. These are truly revolutionary marketplace developments. Furthermore, these efforts are far from complete. Virtually every day new products are being announced to meet this challenge. Such product innovations can only be successful if companies have the ability to communicate effectively with consumers through advertising.

The advertising community also is responding to the obesity challenge through the efforts of The Ad Council, in addition to numerous individual company initiatives. Also, our self-regulatory system, the Children’s Advertising Review Unit (CARU) plays a major role in ensuring a well-regulated marketplace in regard to advertising to children.

Childhood obesity is a complex problem that cannot be solved by simplistic proposals. Bans or restrictions on food marketing are unlikely to be effective in combating obesity. A number of other nations have instituted these types of restrictions without success. Efforts to restrict food marketing are a “feel good” approach that simply will shift focus away from real solutions. The advertising community stands ready to work with the

government, parents and the health community to find appropriate specific steps that will directly address the problem of childhood obesity.

The Advertising Community is Committed to Addressing this Problem

As you are probably aware, the U.S. Surgeon General's groundbreaking report on obesity in 2001 contained a broad range of specific recommendations on how to address this serious health challenge in a balanced, comprehensive way. See *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* at www.surgeongeneral.gov/topics/obesity/. It's noteworthy that the report contained no recommendations for restrictions on food marketing. The report called on companies, individuals, families, schools, governments, and the media to work together to build solutions that will bring better health to everyone in this country.

The advertising community clearly has accepted the Surgeon General's challenge. We are working proactively to help implement many of the recommendations contained in this groundbreaking call to action and to seriously address the problem of childhood obesity. Let us particularly highlight two industry efforts: the work of The Advertising Council and the self-regulatory efforts of the Children's Advertising Review Unit (CARU).

The Advertising Council and the Advertising Community are Working to Address Obesity

The Advertising Council provides over a billion dollars worth of public service ads over a wide range of public issues every year. The Ad Council's numerous ad campaigns can be found at www.adcouncil.org.

Last year, The Ad Council, in partnership with the U.S. Department of Health and Human Services, launched a comprehensive public service campaign to inspire Americans to change their lives through healthier eating and increased physical activity. Since its launch, the "Small Steps" campaign has received extraordinary support from both the media and the public. The media already has donated more than \$25 million in advertising time and space for these messages. The campaign's website, www.smallstep.gov, receives an average of 80,000 hits each month. The campaign includes African-American and Hispanic targeted efforts. These efforts are further enhanced by cooperation with the Sesame Street Workshop to develop effective child-centered messages.

The "Small Steps" campaign is just one example of partnerships between the advertising community and various government agencies to address the obesity problem. Our three associations support the Ad Council's efforts, and we will continue to encourage all of our members and partners to do the same through significant donated media and creative resources.

Many companies also have launched individual efforts. One food manufacturer, for example, has awarded \$700,000 in grants to community YMCA's, hospitals for children, and 4-H programs to sponsor healthy lifestyle programs. Another is offering 50 \$10,000 grants a year to assist communities that sponsor programs that promote balanced diets and physically active lifestyles. Yet another company is providing pedometers in schools to encourage kids to walk more, and there are numerous other initiatives ongoing as well.

The Advertising Industry's Self-Regulatory System Protects Children

The advertising community has an important proactive responsibility to help assure that advertising is truthful and nondeceptive. Special additional consideration and protection is given to the needs of children in the marketplace. In the mid-1970's, the advertising community developed the National Advertising Review Council (NARC). The NARC sets the policies for the National Advertising Division/National Advertising Review Board self-regulatory system, housed within the Council of Better Business Bureaus. This program allows for quick action on any national ad that is claimed to be false or deceptive. Several former Chairmen of the Federal Trade Commission (FTC) have described the NARC system as an outstanding model of effective industry self-regulation.

Realizing that children are not miniature adults, the NARC, NAD/NARB program has been supplemented by the Children's Advertising Review Unit (CARU), an organization focused on the special needs of young people. Marketers realize that material that might be truthful and nondeceptive for adults might still mislead young people. CARU has devised a detailed code to assure that children are not taken advantage of in the advertising marketplace. The code is available at www.caru.org/guidelines.

CARU carries out its own monitoring and receives complaints from regulators, consumer advocates, Attorneys General, competitors and the public at large. The record of industry's compliance with CARU's guidelines demonstrates an extremely high level of effectiveness. CARU has brought formal cases or informal inquiries on a wide number of food advertising campaigns directed at children including a case just last month.

Our self-regulatory system is an active cop on the beat, working to see that food marketing aimed at children is appropriate. Last May, NARC published a 92-page White Paper providing a historical overview of the efforts of CARU and the NAD to regulate food marketing. That paper is available online at www.narcpartners.org/narcwhitepaper.aspx

As you know, FTC Chairman Majoras announced recently that the Federal Trade Commission and the Department of Health and Human Services will be holding a joint workshop this summer on advertising industry self-regulatory efforts. We welcome that announcement and look forward to the opportunity to discuss CARU's efforts and how our self-regulatory system can be further strengthened.

The FTC Provides Major Protection for Consumers in the Marketplace

The public and honest businesses alike also are protected by the Federal Trade Commission's broad authority to stop any false, deceptive or unfair acts or practices in the marketplace. The Commission thereby provides broad regulation over food, beverage, restaurant, and other advertisers. The Commission can ban ads or require that they be modified. Violations of these restrictions can lead to severe fines.

We believe these protections are extraordinarily strong and sufficient and we oppose your proposed legislation to provide unfairness rulemaking authority over food marketing to the Federal Trade Commission (FTC). The Commission has had authority for more than twenty-five years under both Republican and Democratic leadership to bring individual cases against companies based on the theory that a specific marketing practice is unfair. As far as we are aware, not a single case based on "unfairness" has been brought in the children's marketing area during that period. Clearly this lack of action signals that the FTC did not see any need for this type of added authority. It is therefore highly unlikely that the Commission would find any basis or sufficient evidence to support this type of rulemaking.

We Reject the "Good Food/Bad Food" Argument

Unfortunately, much of the criticism of food advertising to children rests on fundamentally flawed premises that demonize certain food products. There is nothing inherently unhealthy about foods from quick service restaurants, or cereals, or soft drinks, or candy or the myriad of other food choices, so long as those products are consumed in moderation as part of a well-balanced diet.

While the government plays a vital role in protecting the safety of our nation's food supply, we do not believe that it should be the responsibility of the government to define "good foods" or "bad foods" nor are parents incapable of making these choices for their children. Parents have more information today about food products than they have ever had, due to the Internet and the requirements of the Nutrition Labeling and Education Act (NLEA), plus efforts by industry.

Restricting Food Advertising Will Not Combat Obesity

There is strong reason to believe that governmental manipulation of food marketing does not effectively combat obesity. In a number of countries, there are broad restrictions on food advertising. In fact, in Sweden and the Canadian province of Quebec, broad bans on advertising to children have been imposed. Recent analysis of these bans, however suggest that they have had minimal, if any, impact on obesity levels. Additionally, in the Netherlands and certain other European countries, where there are no ad restrictions and relatively high levels of food advertising, obesity levels are lower than in either Quebec or Sweden.

In the United States, the amount of advertising for food products is relatively uniform across this nation. Yet there are significant differences in obesity levels in different regions, cities and even closely contiguous areas. According to 2002 figures from the Centers for Disease Control, the city with the highest rate of obesity among adults was San Antonio, Texas at 31.1%. By contrast, the rate of obesity among adults in another southwestern city, Santa Fe, New Mexico, was only 15.1%. While the obesity rate was 28.8% in Gary, Indiana, it was only 14.2% in Denver, Colorado and 15% in Portland, Maine. This strongly suggests that food marketing is not a primary factor in the growth of obesity among children or other groups, or obesity rates would be far more uniform. In your home state of Iowa, the obesity rate in 2001 was 22%, while in neighboring Minnesota the obesity rate was 19%. To take another example, in the same year in Florida, the obesity rate was 18%, while in nearby Alabama it was five percent higher at 23%. There is no research of which we are aware that suggests that any of this variation is due to advertising.

Many critics of food marketing allege that children are “bombed” by an ever-increasing number of food commercials leading to increased obesity rates. In fact, food marketers and restaurants are spending less in real dollars on TV advertising and children are seeing fewer TV commercials for food products. Last year, ANA and the Grocery Manufacturers of America (GMA) commissioned Nielsen Media Research to quantify food advertising expenditures and exposures for the period from 1993 to 2003. This ten-year period has been cited as the time during which obesity rates grew the most and at the highest rate.

The study drew the following conclusions: (1) adjusting for inflation in order to hold the value of dollars constant, real expenditures on food and restaurant advertising on all television, including cable, fell over the ten-year period from 1993 to 2003. In 1994, ad spending in these categories reached \$5.92 billion. In 2003, ad spending in these categories had dropped to \$4.98 billion. This was a 13% drop from the first four years of the period to the last four years. (2) Rather than being increasingly bombarded by restaurant and food ads, children under 12 in fact saw fewer ads on TV in these categories between 1993 and 2003. The Nielsen data showed that the number of food and restaurant ads reached 5,909 per year in 1994 but dropped to 5,038 in 2003.

Let’s also take a closer look at some of the other assertions in your recent press conference and letter to us. You say, “There is mounting evidence that the deluge of advertising aimed at kids in schools, on television, and elsewhere likely contributes to skyrocketing rates of childhood obesity and related diseases.” We appreciate your use of the qualifying term “likely,” but even that substantially misstates the research on which you are relying.

Let’s examine the 2004 report of the Kaiser Family Foundation (KFF), “The Role of Media in Childhood Obesity.” That report states, in part, “Pediatricians, child development experts, and media researchers have theorized that media may contribute to childhood obesity in one or more...ways” (emphasis added).

The first factor that is mentioned is the time children spend using media displaces time they could spend in physical activities. The report also mentioned cross-promotions with popular TV and movie characters of high-calorie foods. To illustrate how difficult it is to identify high calorie foods as a cause, however, consider these results from a National Health and Nutrition Examination (NHANES) Survey carried out by the Centers for Disease Control and Prevention (CDC) of energy intake for young people from samples taken between 1971-74 and 1999-2000. According to this research, calorie consumption for children age 6-11 decreased from 2045 to 2025 during this period. For males age 12 to 15, consumption declined from 2625 to 2460. Only for females 12-15 and 16-19 was there any increase in calorie intake. This data would strongly suggest that physical activity in fact is being displaced by other activities, and not that young people are eating more calorie-dense foods.

This conclusion is not surprising considering the fact that only one state – Illinois – still requires students to take physical education in school. For many decades we have built housing communities without sidewalks for walking or bike riding, but today communities and businesses are developing ways to be more active. We need to do much more to establish a respect and discipline in our schools and in our daily lives for the importance of regular exercise, which is one of the major areas of focus of The Ad Council’s “Small Steps” efforts.

On page two of your letter, you cite the Institute of Medicine report, *Preventing Childhood Obesity: Health in the Balance*, for the conclusion that marketing directed at children likely contributes to their obesity. While again we appreciate your use of the qualifying word “likely,” you are drawing a conclusion that even the researchers are not ready to make. Moreover, you cite the IOM study as a source, but it in turn has to go back to the KFF report, because the IOM did no original research to support its conclusions. Even then the IOM was only willing to say, “Children’s exposure to advertising and marketing, particularly to the food, beverage, and sedentary lifestyle messages delivered through the numerous media channels, may have a strong influence on their tendency toward increased obesity and chronic disease risk” (emphasis added). A close look at the studies relied on by KFF for this conclusion show that the vast majority of them do not focus primarily on the impact of advertising and the very limited number that do are far from definitive in their scope or conclusions.

Not to belabor a point, but the respected Institute, and the KFF report they are citing, are much less certain of their conclusions than you seem to be.

It is completely premature and we believe counterproductive to attempt to blame increased obesity trends in the United States on advertising expenditures or exposures. The data fails to uphold this point of view and it would be reckless to make such charges without this solid foundation of fact.

Food Advertising Has Substantial First Amendment Protection

In this regard, any effort to ban or restrict food advertising aimed at children raises very serious First Amendment concerns. The FTC noted this fact when it closed consideration of the children's advertising rulemaking in 1981, and this conclusion has been reiterated by FTC staff recently. Furthermore, in the intervening years the U.S. Supreme Court has greatly strengthened the First Amendment protections for advertising.

The Court has made it clear that truthful, nondeceptive commercial speech cannot be banned or restricted unless the restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech must also be "no more extensive than necessary." *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001).

In a series of cases, including *Greater New Orleans Broadcasting Association v. U.S.*, 527 U.S. 173 (1999) and *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Supreme Court has ruled that all products and services have the same protection under the First Amendment.

In a decision in the *Western States* case, the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). Writing for the majority, Justice O'Connor stated: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."

Given the complex and multifaceted causes of obesity and the welter of inconsistent studies on the role of advertising and media, we do not believe that bans or restrictions on food or beverage advertising aimed at children could meet the *Central Hudson* test. While the government has a substantial interest in protecting the health of children, it is not likely that a ban or restriction on food advertising would directly advance that interest. In addition, it would be very difficult to craft a "narrowly tailored" restriction on advertising to children that is no more extensive than necessary.

Conclusion: Look for Solutions that Work

The advertising community stands ready to work with the government, parents and the health community to further efforts that address the problem of childhood obesity.

It is clear that the advertising community already is taking major steps to respond to the obesity crisis in this country through the creation of a vast array of new or improved low fat and low calorie food and beverage items. We also continue to champion and strengthen our advertising self-regulatory processes that substantially buttress the broad federal and state regulation in the advertising arena. Furthermore, there is substantial

data that raises significant questions as to whether manipulating or suppressing various types of advertising would be an effective approach to the obesity challenge. The small amount of data that exists to the contrary is equivocal at best. Clearly these types of studies are totally insufficient to support or serve as a foundation for the sweeping charges that have been leveled at the advertising community and the food, beverage, and restaurant industries in particular. Furthermore, without this factual foundation, proposals to restrict advertising could not sustain a First Amendment challenge.

There are numerous non-speech steps the government can take to directly address the childhood obesity problem. We are glad to work with all groups that are sincerely trying to combat obesity in this country and internationally. We believe the Surgeon General's report on obesity serves as an excellent template for this effort. However, this effort will be severely undermined if misdiagnosis of the obesity problem and its causes leads to proposed "cures" and policy initiatives that take us down legislative and regulatory blind allies.

We would be glad to discuss this issue further with you. We stand ready to work with you and other members of Congress and all other interested parties to come up with solutions that work.

Thank you for your consideration of our views.

All best wishes,

Robert D. Liodice
President and CEO
Association of National
Advertisers
1120 20th Street, NW,
Suite 520-S
Washington, D.C. 20036
(202) 296-1883

O. Burtch Drake
President and CEO
American Association of
Advertising Agencies
1203 19th Street, NW,
Fourth Floor
Washington, D.C. 20036
(202) 331-7345

Wallace S. Snyder
President and CEO
American Advertising
Federation
1101 Vermont Avenue,
NW, Suite 500
Washington, D.C. 20005
(202) 898-0089

About the Association of National Advertisers:

ANA is the industry's premier trade association dedicated exclusively to marketing and brand building. We represent more than 340 companies with over 8,000 brands that collectively spend more than \$100 billion annually in marketing communications and advertising. Our members market products and services to both consumers and businesses. Most of America's largest food marketing companies and many restaurants are members of ANA. More information about our association is available at www.ana.net

About the American Association of Advertising Agencies:

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas. More information about our association is available at www.aaaa.org

About the American Advertising Federation:

As the "Unifying Voice for Advertising," the American Advertising Federation (AAF), headquartered in Washington, D.C., with a Western Region office in Newport Beach, California, is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations. AAF has a national network of 210 ad clubs and connects the industry with an academic base through its 210 college chapters. More information about our association is available at www.aaf.org.