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Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex W)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P094513

Dear Sir or Madam:

The Entertainment Software Association (“ESA”), the trade association that represents companies that publish interactive games for video game consoles, handheld devices, personal computers, and the Internet, respectfully submits these comments in connection with the solicitation by the Federal Trade Commission (“FTC”) for public comments on the Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (the “Principles”) offered by the Interagency Working Group on Food Marketed to Children (“Working Group”).

The ESA shares the Working Group’s goals of promoting children’s health and reducing the incidence of childhood obesity, and for that reason ESA appreciates the opportunity to comment upon the Principles. Obviously, ESA members are not in the business of selling food and beverages. Accordingly, ESA’s interest in this matter relates to the scope and application of the Principles in ways that indirectly affect its industry. The Principles, as drafted and proposed, restrict product placements in a manner that will impinge upon the First Amendment freedoms of video game developers and publishers. Furthermore, the remainder of the advertising restrictions embodied in the Principles are overbroad in the way they approach “targeting to children 17 years old or younger,” particularly as applied to the video games industry, and are therefore unworkable. The ESA urges the Working Group to consider these Comments as it continues work on its report to Congress.

## **I. THE ROLE OF THE VIDEO GAME PUBLISHING INDUSTRY IN ADDRESSING CHILDHOOD OBESITY**

### **A. Industry Initiatives**

The ESA and the video game industry strongly support projects that address both childhood nutrition and physical fitness. Working in cooperation with the USDA and the White House, the ESA contributed to the “Innovations for Healthy Kids Challenge” initiative. The ESA worked with the federal government to develop a video game design competition aimed at creating engaging content that would educate children about healthy eating choices. The resulting program, “Apps for Healthy Kids Challenge,” focused on educational messages derived from the Dietary Guidelines for Americans and

the MyPyramid Food Guidance System. The competition drew nearly 100 submissions from 29 states. Additionally, in September 2010, the ESA partnered with the Obama Administration to launch the “Active Play Challenge.” This initiative strives to harness the excitement and innovation surrounding video games and to capitalize on recent advances in full-motion game technology, which promotes activity when playing video games. The Active Play Challenge is designed to create a pathway for youth to achieve the Presidential Active Lifestyle Awards (“PALA”) through full-motion video games. The initiative’s goal is to create a long-term, sustainable approach in establishing healthy lifestyles by making video game screen time an *active* activity, across a range of video games, consoles, online game networks, and game-related websites.

Individual video game publishers and game console manufacturers are going even further to harness technologies to make exercise fun and engaging. Active and fitness-related games (sometimes referred to as “exergames”) are an important and growing segment of the video game industry. For example, Nintendo’s *Wii Fit* uses a sensory Balance Board to provide exercises in aerobics, balance, strength training, and yoga. It measures players’ Body Mass Index and creates a personally tailored workout program of gradually more challenging exercises. It even provides health and fitness tips along the way. In addition, both Microsoft’s Xbox 360 and Sony’s PlayStation 3 also offer fitness-related games using new, innovative motion control technologies.

The impact of exergames can be seen not just in homes but also in America’s school systems. According to research published in the Rochester Democrat & Chronicle, physical education classes in at least 35 states have embraced video game technology.<sup>1</sup> In Pennsylvania, for example, the Highmark Foundation made \$10,000 grants to several school systems to purchase gamer bikes and a game called *Dance Dance Revolution*, produced by Konami, which requires players to vigorously dance across four arrow-shaped floor pads following a game-generated pattern set to music.<sup>2</sup> Thus, the video game industry’s innovative technologies and creativity are playing an important role in helping to address the problem of childhood obesity.

#### B. The Video Game Publishing Industry and the Principles

Representing an industry that creates and publishes video games, the ESA does not approach the Principles with an opinion as to the nutritional recommendations set forth therein. Companies in the food and beverage industry who will have acute interest in those aspects will assuredly address them. Rather, the ESA’s comments on the Principles will address the extremely broad scope and application of the Principles.

In terms of the scope and application of the Principles, the Working Group was instructed by the 2009 Omnibus Appropriations Act to “conduct a study and develop recommendations for standards for

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<sup>1</sup> <http://exergamefitness.com/wordpress/?tag=kids-exercise> (last visited July 14, 2011).

<sup>2</sup> [http://www.highmarkhealthyhigh5.org/pdfs/Challenge\\_Grant\\_Report\\_2008.pdf](http://www.highmarkhealthyhigh5.org/pdfs/Challenge_Grant_Report_2008.pdf) (last visited July 14, 2011).

the marketing of food when such marketing targets children who are 17 years old or younger....”<sup>3</sup> These instructions gave the Working Group certain latitude as to the “scope of the media to which such standards should apply.”<sup>4</sup> The Working Group has sought the broadest possible application, and now seeks comment in order to understand where it should tailor its proposal.<sup>5</sup>

That the Working Group has specifically sought comment in this regard bears testament to the difficulty of applying advertising and marketing standards across all media.<sup>6</sup> The Working Group’s current draft of the Principles suffers from two primary problems. First, the restrictions on product placements will impinge upon the First Amendment freedoms of video game developers and publishers. Second, the definition of “targeting” is unworkable and overbroad as applied to other forms of advertising that relate to video games.

## II. THE PRINCIPLES, AS APPLIED TO “PRODUCT PLACEMENTS,” WILL IMPINGE UPON THE FIRST AMENDMENT RIGHTS OF VIDEO GAME DEVELOPERS AND PUBLISHERS

There is no doubt that video games are entitled to full First Amendment protection; the recent Supreme Court decision in *Brown v. Entertainment Merchants Association* makes this clear.<sup>7</sup> Therefore, any content-based restriction that impacts the expressive freedom of video games must undergo Constitutional strict scrutiny. Here, the Principles’ application to “product placements”<sup>8</sup> will impact the

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<sup>3</sup> Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009); see also Federal Trade Commission, *Statement of the Commission Concerning the Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, April 28, 2011, available at <http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf> (last visited July 14, 2011) (hereinafter, “Statement of the Commission”).

<sup>4</sup> Statement of the Commission, *supra* Note 3, at p. 2.

<sup>5</sup> *Id.* at p. 23.

<sup>6</sup> *Id.* at p. 17. Indeed, the ESA notes that the Working Group borrowed heavily from the Commission’s 2008 report to Congress entitled *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self Regulation* (hereinafter, the “FTC Report”). Copies of the FTC Report are available at [www.ftc.gov/os/2008/07/P06450foodmktngreport.pdf](http://www.ftc.gov/os/2008/07/P06450foodmktngreport.pdf) (last visited July 14, 2011).

The FTC Report in turn borrowed from the Commission’s 2006 industry information collection activities directed towards the food and beverage industry. Based on these references, the Principles incorporate definitions and assumptions that do not reflect the realities of the today’s technology-based industries. For that reason, the ESA reserves the right to supplement these comments at a later date should the Working Group revise the Principles in terms of definitions or their application.

<sup>7</sup> *Brown v. Entertainment Merchants Ass’n/Entertainment Software Ass’n*, --- S.Ct. ----, 2011 WL 2518809 (June 27, 2011) (No. 08-1448) (holding that speech that is “neither obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”).

<sup>8</sup> The Working Group’s proposal relies on definitions created by the Commission in connection with the agency’s periodic studies of food marketing to children. For example, product placement is defined by the Commission as the permitting, promoting, or procuring the integration of any food product, logo, signage, trade name, or package into a television or radio

expressive speech of game developers and publishers,<sup>9</sup> and those restrictions cannot survive a First Amendment analysis. Therefore, the Principles' treatment of product placements is unconstitutional as applied to video games.

A. "Product Placements" in Video Games Are Used to Create Realistic Virtual Game Environments

The Principles' restrictions on "product placements" would impinge upon the expressive choices made by video game developers and publishers because they would impact the ability to create authentic, virtual representations of the real world. The omission of ads and/or branded products where they exist in real life would restrict the ability of video game companies to provide convincing virtual experiences.

Consider, for example, a NASCAR-based video game. In real life, there is a significant amount of food product integration with NASCAR. Some races are sponsored by soda manufacturers,<sup>10</sup> some cars are sponsored by quick service restaurants,<sup>11</sup> etc. Depiction of such races or race cars in video games, then, would likely be prohibited under the Principles because they would qualify as "product placements."<sup>12</sup> Thus, in the context of video games, use of carefully placed brands, logos and ads are often intended to enhance the verisimilitude of the game experience, not necessarily to sell a product or propose a commercial transaction.

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program, motion picture, video, music recording, electronic game, or other form of entertainment programming. *See* FTC Report, *supra* Note 6 at p. B-20. The ESA notes that the Principles do not appear to take in to account whether product integrations are paid or unpaid. In the context of video games, the paid or unpaid nature of a product integration does not in any way impact the video game industry's rights of free expression.

<sup>9</sup> The Principles utilize the vague, undefined term "industry." From the title of the initiative to the details of the proposed Principles, the term "industry" is used without any indication as to whether video game publishers are subject to the same requirements as marketers of foods and beverages. The FTC Report, which supplies the background, justification, and definitions for the Principles, focused on the activities of food and beverage marketers. *See id.* Therefore, the ESA recommends that the Working Group replace all references to "industry" with "food and beverage marketers." Such clarification is not only reasonable and warranted, but likely what the Working Group intended.

<sup>10</sup> *E.g.*, the Coke Zero 400 at Daytona. *See* <http://www.daytonainternationalspeedway.com/Tickets-Events/Events/2011/Coke-Zero-400/Coke-Zero-400-Powered-By-Coca-Cola.aspx> (last visited July 14, 2011).

<sup>11</sup> The number 38 car is sponsored by Long John Silvers, and the number 99 car is sponsored by Subway. *See* <http://www.nascar.com/drivers/list/cup/dps/> (last visited July 14, 2011).

<sup>12</sup> Indeed, the Principles could be interpreted as going even further, resulting in compelled speech for many game publishers and developers. By restricting what can and cannot be contained in the expressive elements in a game, the Principles would force game developers to make certain choices. Consider popular social games like Diner Dash or Lemonade Tycoon. If a game developer wanted to make a simulation game with this type of theme, but wanted that game to be grounded in reality (*e.g.*, managing a branded restaurant chain instead of a generic diner), then that developer would need to structure the game, and its in-game depiction of food, in ways that comply with the Principles. This would force game companies to make expressive choices that affect, and likely reduce, the real-life simulation.

B. Restriction on “Product Placements” Would Chill Expressive Speech

As applied to video games, the Principles would have a chilling effect on the free speech rights. Taking the example of the NASCAR-themed game described above, the game developer may want to depict the M&M’s-themed car driven by Kyle Busch in order to create a realistic virtual product. This may occur regardless of whether the depiction of the M&M’s brand was paid for by the Mars Corporation. The inclusion of the M&M’s brand (regardless of the intent behind that placement) could raise legal issues for Mars.<sup>13</sup> Mars may in turn seek compensation from the game developer for the legal costs incurred in responding to those issues. Responsible video game developers would recognize this risk and be forced to make an impossible choice – create a game that is realistic and face the potential legal consequences for it, or apply the Principles wholesale to its games and thereby restrict the creative expression that would otherwise be its right. It is precisely because the Principles would present game developers with this Hobson’s choice that the Principles operate as an impingement upon the First Amendment rights of the video game industry.

C. The Proposed Restrictions on Expressive Speech Cannot Survive Strict Scrutiny

Content-based restrictions such as those created by the Principles are subject to strict scrutiny, under which the Principles could not survive. Strict scrutiny analysis requires that content-based restrictions on speech be created to address a substantial public interest, and that the means of accomplishing that interest is narrowly tailored to the underlying harm. The ESA does not dispute that public health is an area of governmental interest. Nor does it dispute that obesity is a public health concern, and that reducing the incidence of obesity would be beneficial to the public. The industry’s efforts to help reduce childhood obesity are evidence of the industry’s beliefs on the subject. However, the fact that a governmental interest exists, even one as important as childhood obesity, is insufficient to satisfy strict scrutiny. To satisfy strict scrutiny, the Principles also must be narrowly tailored to the harm at issue. It is in this crucial respect that the Principles fall short.

First, there is no evidence that restricting expressive speech in video games would reduce the incidence of obesity in children. Therefore, there is no support for the suggestion that the type of prohibition being contemplated by the Principles would advance the substantial interest in reducing childhood obesity. Second, even if there were reason to link childhood obesity to the depiction of real world ads and brands in virtual video games, the Principles target a far broader array of expression than

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<sup>13</sup> The Principles operate as “voluntary guidance” to industry, meaning that the Principles do not technically have the full force of law. Regardless, they evidence the mindset of the government. To the extent that the Commission participates in this “industry guidance,” it does so because it wants to express a particular viewpoint on the bounds of Section 5 of the Federal Trade Commission Act. Even if the Commission were not to bring the Principles within the bounds of Section 5, non-compliance with the Principles may still serve as grounds for a private unfair competition action. See Martin H. Redish, *Childhood Obesity, Advertising and the First Amendment*, White Paper for the U.S. Chamber of Commerce (June 2011), available at <http://www.uschamber.com/sites/default/files/issues/environment/files/CHILDHOOD%20OBESITY,%20ADVERTISING%20AND%20THE%20FIRST%20AMENDMENT%20PDF.pdf> (last visited July 14, 2011) (hereinafter “Redish White Paper”). In the Redish White Paper, Professor Redish argues that non-compliance with even “voluntary” principles sanctioned by the government will almost certainly lead to class action lawsuits. *Id.* at pp. 4-5.

just that which is geared to minors. The Principles would cover media in which up to 70%-80% of the viewers/participants are adults.<sup>14</sup> Third, there are numerous less-invasive means of advancing the goal of reducing childhood obesity, as set forth in the White House Task Force on Childhood Obesity Report to the President.<sup>15</sup> Thus, the Principles are not adequately tailored to address the identified harm.

In light of these significant constitutional concerns, ESA believes that the application of the Principles to product integration in video games cannot be sustained.<sup>16</sup>

### III. THE PRINCIPLES' DEFINITION OF "TARGETING" IS NOT TENABLE AS APPLIED TO THE VIDEO GAME INDUSTRY

As to the other forms of advertising covered by the Principles, including, among other, "video game advertising"<sup>17</sup> and "character licensing,"<sup>18</sup> the definition of "targeting to children" as applied to video games and video game-related items is inappropriate. The Principles' definition of "targeted to children" relies on the following stand-alone factors: (A) whether a game is rated EC or E by the Entertainment Software Rating Board ("ESRB"); (B) whether children ages 2-11 constitute at least 30% of the users of a game, or whether adolescents between the ages of 12-17 constitute at least 20% of all users of the game, according to demographic data or other information within the company's possession, custody, or control; and (C) whether the game makes use of child- or teen-oriented animated or licensed

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<sup>14</sup> See Entertainment Software Association, *Essential Facts about the Computer and Video Game Industry, 2011 Sales, Demographic and Usage Data*, available at [http://www.theesa.com/facts/pdfs/ESA\\_EF\\_2011.pdf](http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf) (last visited July 14, 2011).

<sup>15</sup> See White House Task Force on Childhood Obesity Report to the President, *Solving the Problem of Childhood Obesity Within a Generation*, at pp. 33-34 (May 2011), available at [http://www.letsmove.gov/sites/letsmove.gov/files/Obesity\\_update\\_report.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/Obesity_update_report.pdf) (last visited July 14, 2011). See also Redish White Paper, *supra* Note 13, at pp. 12-20.

<sup>16</sup> Even if the Working Group believes that product integrations in video games should be treated under the commercial speech doctrine, the Principles would still fail the intermediate scrutiny test as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and the line of cases following it. Based on the *Central Hudson* line of cases, a government-imposed restriction on commercial speech can survive only if the restriction: (a) directly advances a substantial governmental interest; and (b) is not more extensive than is necessary to serve that interest. *Id.*, see also *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001). For the reasons stated in Section II.C of this Comment, the Principles could not survive the scrutiny applied to commercial speech because the Principles would not directly advance the goal of reducing childhood obesity and are far more extensive than necessary to serve the government's state interest.

<sup>17</sup> "Video Game Advertising" is defined in the Commission's 2008 report as advertising within a video game (including as a pre-roll, post-roll, or banner advertisements), but excluding product placements. See *Marketing Food to Children and Adolescents*, *supra* Note 8, at p. B-16.

<sup>18</sup> "Character Licensing" is defined in the Commission's 2008 report as licensing or otherwise obtaining permission to use a character or toy in the advertising or promotion of a food product, including both licensing agreements for character use in the company's advertisements or promotions and cross-promotional arrangements. *Id.* at p. B-34.

characters. These criteria are inappropriate to make a determination about whether a video game is targeted to children.<sup>19</sup>

A. Use of ESRB Ratings Represent the Youngest Appropriate Age for a Player, Not the Intended Audience

ESRB ratings are not a proxy for intended age groups of end users. Instead, ESRB ratings are merely indicative of the minimum age at which it would be appropriate for the player to see and experience the content in the game. The E rating means that the title has “content that may be suitable for ages 6 and older.”<sup>20</sup> Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language. There is nothing inherent in the ESRB ratings or content descriptors that would indicate the degree of motor skills, reasoning ability, or other attributes that may bear upon playability by users of a certain age. Indeed, some of the most popular video games among adults are rated “E” (for everyone). For example, Electronic Arts’ *Madden NFL 12*, a football game, is rated “E.”<sup>21</sup> So too is *Puzzle World 2*, a game that is a collection of crossword, Sudoku, and Wordsearch puzzles.<sup>22</sup> These games are clearly not intended to be played by children, and yet based on the current Principles, they would meet the definition of “targeted to children” because of the ESRB ratings. Thus, the use of the ESRB ratings as a “trigger” for application of the Principles to a particular game is inappropriate.

B. The Demographic Threshold Set by the Principles is not a Reliable Determiner of Whether a Video Game is “Targeted to Children”

The demographic levels, as currently incorporated in the Principles, are not indicative of “targeting to children.” Roughly 20% of all gamers are under the age of 18.<sup>23</sup> Thus, most games are likely to have player demographics that meet or exceed the “targeting” thresholds proposed by the Principles regardless of developer intent or marketing activities. For this reason, it cannot be deduced that a particular game “targets” children when the definition of “targeting” mirrors the industry’s average demographic. To the extent that demographics are used as one factor among several to indicate

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<sup>19</sup> The ESA notes that the Principles are not entirely clear as to whether to treat video game advertising as “measured” or “non-measured” media. The Principles only reference to video games and targeting criteria comes in the paragraph with other “measured” media, though the Commission’s report describes video game advertising as “non-measured” media. The ESA has interpreted the Working Group’s statements as assigning video game advertising to the “measured media” category, and adding the new criteria of ESRB ratings.

<sup>20</sup> Entertainment Software Ratings Board, *ESRB Ratings Guide and Definitions*, available at [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited July 14, 2011).

<sup>21</sup> <http://www.esrb.org/ratings/synopsis.jsp?Certificate=31226&searchkeyword=madden> (last visited July 14, 2011).

<sup>22</sup> <http://www.esrb.org/ratings/synopsis.jsp?Certificate=31178&searchkeyword=> (last visited July 14, 2011).

<sup>23</sup> See Note 14, supra.

“targeting to children,” the demographic levels utilized by the Principles must be significantly higher than the industry demographic norms.

C. The Use of Animated or Licensed Characters Cannot Be a Litmus Test for Targeting To Children Because Using Animation and Licensed Characters Predominates the Video Game Industry

Finally, the Principles would restrict a significant amount of video game-related advertising and cross-promotion because most games make use of animated or licensed characters that could appeal to children. Yet, just because a character is featured in a game, or in advertising related to that game, does not mean that children were the intended audience. Rather, games that use licensed characters, and the licensing of the characters themselves to other media, are often meant to target adults (*e.g.*, those who enjoy video games, those who remember with fondness and nostalgia their childhood heroes, and combinations of the two). Under the current definition of “targeting,” these activities would be restricted even though targeted to adults, which would be both inappropriate and overinclusive.

**IV. CONCLUSION**

The ESA appreciates the opportunity to submit these Comments to the Working Group, and thanks the Working Group for its careful consideration of the points raised herein. The video game industry as a whole is committed to improving the health of our nation’s children, but wants to make sure that the strategies used to do so reflect measured, reasonable analysis of the problems and the impact of the proposed solutions.

Sincerely,

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Counsel for the Entertainment Software Association