UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

Alden F. Abbott
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Direct Dial
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December 10, 2007

Mr. Alan L. Cohen
Vice President & General Counsel
Council of Better Business Bureaus, Inc.
4200 Wilson Boulevard, Suite 800
Arlington, VA 22203-1838

Dear Mr. Cohen:

This letter responds to your request on behalf of the Council of Better Business Bureaus ("CBBB") for an advisory opinion regarding a proposed program to encourage increased advertising of healthier choices and healthy lifestyles to children under 12.[1] You have asked whether, based on the facts submitted, the proposed program has any potential antitrust implications and is likely to result in an enforcement action by the Federal Trade Commission. We have determined that this matter is appropriate for a Bureau of Competition staff ("BC staff") opinion letter pursuant to Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). On the basis of information that you provided in your letter of January 19, 2007, BC staff have no present intention to recommend a challenge to implementation of the CBBB program as proposed. This conclusion is entirely dependent on the accuracy of our understanding of pertinent facts concerning the advertising program. Our understanding of those facts, in turn, is entirely dependent on the information that you provided. Our present enforcement intentions might be different should the CBBB advertising program not be as described in your letter and other materials.

Background

We understand that the CBBB is the national organization for the Better Business Bureau ("BBB") system whose goal is to foster trust between businesses and consumers. The CBBB administers the advertising industry's voluntary self-regulation program, which includes the National Advertising Division ("NAD") and the Children's Advertising Review Unit ("CARU"). We understand that NAD resolves complaints involving the truth or accuracy of

[1]Letter of January 19, 2007 from Alan L. Cohen to Donald Clark, Secretary of the Federal Trade Commission (hereafter cited as "Cohen Letter").

national advertising and CARU is a self-regulatory program that seeks to insure that advertising intended for children is not deceptive, unfair or inappropriate.

You indicate that in recent years regulatory authorities and advocacy groups have expressed concern about the growth of childhood obesity in the U.S. and that these groups have urged the food and beverage industry to change the mix of messages in their advertising directed to children. We understand that these same groups have also expressed concerns about related industry practices, such as the use of games that include advertising, licensed characters to promote their products, product placement, and the marketing of food and beverage products in schools. You indicate that the CBBB and the National Advertising Review Council conducted a review of CARU standards and that the proposed *Children's Food and Beverage Advertising Initiative*[2] ("Initiative") was designed to address the concerns that had been expressed.

We understand that the goal of the Initiative is to encourage children to make healthier dietary choices and pursue healthy lifestyles by changing the mix of advertising directed to them. You indicate that the program will be staffed by the CBBB and will be open to any food or beverage advertiser. To participate in the Initiative an advertiser must agree to take the following actions with respect to advertising primarily directed to children under 12:

> "Devote at least half their advertising on television, radio, print and Internet to promote healthier dietary choices and/or to messages that encourage good nutrition or healthy lifestyles.
>
> Limit products shown in interactive games to healthier dietary choices, or incorporate healthy lifestyle messages into the games.
>
> Not advertise food or beverage products in elementary schools.
>
> Not engage in food and beverage product placement in editorial and entertainment content primarily directed to children under 12.
>
> Reduce the use of third-party licensed characters in advertising that does not meet the Initiative's product or messaging criteria."[3]

You indicate that as of January 19, 2007 a number of companies have already agreed to participate in the Initiative.[4]

We understand that each participant will draft a "Pledge" that will commit the company to devote more than 50% of its advertising to children under 12 to:

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[2]An "Overview," entitled "Children's Food and Beverage Advertising Initiative," was attached to the Cohen letter and sets out in some detail the elements of the Initiative.

[3]Cohen letter, p. 2.

[4]Cadbury Schweppes USA; Campbell Soup Company; The Coca-Cola Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods Inc.; McDonald's; PepsiCo, Inc.; and Unilever.

a) products that represent healthy dietary choices in accordance with standards consistent with established scientific/government standards[5], and/or

b) advertising that prominently includes healthy lifestyle messages designed to appeal to the intended audience.[6]

You indicate that the Pledge will be developed by each participant in consultation with Initiative staff, who will also monitor compliance with each company's Pledge. The staff will review advertising materials, product information, and media impression information submitted by each participant. We understand that information submitted by participants on a confidential basis will not be shared with other participants or outside groups. You indicate that the Initiative will publicly disclose the results of its monitoring, will develop procedures for expulsion of a participant that does not comply with its Pledge, and will publicly disclose any expulsions, with a referral made to regulatory authorities.

Analysis of CBBB's Proposed Initiative

The value of truthful, non-deceptive advertising has been recognized by the Commission and the courts, as has the harm that may be suffered by consumers when such truthful advertising is limited by agreement among firms in an industry.[7] However, the antitrust laws do

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[5]Examples of government standards provided in the Overview are:

– FDA defined "healthy" foods [CFR 101.65(d)(2)];
– Products that qualify for an FDA authorized health claim [CFR 101.70-101.83]
– Products meeting FDA/USDA criteria for claims of "free," "low," or "reduced" calories, total fat, saturated fat, sodium or sugar
– Products that qualify for the USDA Healthier School Challenge Program criteria for Sales/Service of A La Carte and/or Vended Items
– Principles addressing recommended consumption by children under 12 under USDA Dietary Guidelines and My Pyramid
– Products representing a portion control option, such as products advertised and sold in a package size of 100 calories or less.

[6]Examples given in the Overview include:

– messaging that encourages physical activity
– messaging that encourages good dietary habits, consistent with established scientific and/or government standards such as USDA Dietary Guidelines and My Pyramid

[7] Truthful, non-deceptive advertising promotes competition by providing consumers with important information about product prices, quality, and availability, among other factors that consumers consider in their purchasing decisions. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Agreements on standards among competitors that restrict truthful, nondeceptive advertising, therefore, have the potential

not forbid legitimate self-regulation that benefits consumers. As the Commission has stated, "[s]uch self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare."[8]

BC staff typically analyze agreements among firms that may lead to restrictions on some forms of advertising under the "rule of reason" test rather than the *per se* test.[9] Under a rule of reason test, BC staff weighs the potential for competitive harm arising from an agreement among competitors against any procompetitive or efficiency benefits produced by the agreement. If BC staff concludes that the procompetive benefits more than offset the likely competitive harm, BC staff will not pursue an enforcement action. Given the facts as we understand them in this instance, it is unlikely that BC staff would conclude that potential anticompetitive effects arising from the implementation of the CBBB Initiative would outweigh procompetitive benefits. We find therefore that the CBBB Initiative does not warrant a staff recommendation to the Commission for enforcement action at this time. We reach this conclusion for a number of reasons.

First, CBBB's adoption of the proposed Initiative would not create an agreement among firms to restrict advertising. Based on the information supplied, it appears that any agreement would be voluntary, would be between an individual firm and the CBBB Initiative, and would alter the mix of advertising but not limit its amount in any way. The Initiative would encourage individual self-restraint by firms but would not establish a regime of self-regulation among firms in an industry. Limitations on output and advertising, and increased prices to consumers are the traditional concerns of antitrust; it does not appear that the Initiative has the potential to cause harm to consumers in either respect.

Second, the CBBB Initiative appears to have a significant pro-consumer rationale by by encouraging advertising that may encourage children under 12 to select foods or or beverages that may be the healthiest available. According to the Cohen letter and the accompanying document outlining the Initiative, the overriding goal of the proposed program is to change the mix of messages in food and beverage advertising and other promotional efforts directed to children in order to confront a national health issue. If successful, it appears that the Initiative may make a contribution to that goal without creating any harm to consumers that might flow from a reduction in competition.

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to restrict competition and harm consumers. *See, e.g., American Medical Association*, 94 F.T.C. at 1005.

[8]*American Academy of Ophthalmology*, 101 F.T.C 1018 (1983) (advisory opinion); *see also American Medical Association*, 117 F.T.C. 1091 (1994) (advisory opinion); *American Medical Association*, 94 F.T.C. 701, 1029 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

[9]Specifically, BC staff's analysis follows the framework set out in the Federal Trade Commission/Department of Justice Guidelines for Collaborations Among Competitors, available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, and in the Commission's decision in *In re Polygram Holding, Inc.*, Dkt. No. 9298 (2003), 2003 WL 2170765 (F.T.C.), *aff'd, Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

Conclusion

For the reasons stated above, we believe that, on balance, the likely benefits of CBBB's proposed Initiative more than offset any potential for competitive harm. On this basis, BC staff have no present intention to recommend a challenge to CBBB's Initiative.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. In addition, this Office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetiutive effects, if the program is used for improper purposes, if facts change significantly, or if it would be in the public interest to do so.

Sincerely yours,

Alden F. Abbott
Associate Director