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The Honorable Mike Johanns
Secretary
United States Department of Agriculture
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RE: PETITION TO STRENGTHEN THE ENFORCEMENT OF THE COMPETITIVE FOODS RULE

Dear Secretary Johanns:

Three years ago, U.S. Surgeon General David Satcher issued a report that brought national attention to the epidemic of obesity in America. There was, the Surgeon General said, no time to lose. He titled his report *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, and among his action items was one that the Department of Agriculture could do tomorrow – and should have acted upon many yesterdays ago. He said you simply should enforce existing laws and regulations regarding the sale of junk food in the schools.

Junk food is sold in the schools not because it is good for kids or because they need it. It is there because the manufacturers of these products want a captive market of impressionable schoolchildren in which to sell it. That's not reason enough. That's why the Surgeon General called upon your agency to enforce its rules that "prohibit serving foods of minimal nutritional value during mealtimes in school food service areas, including in vending machines."¹

American kids are too fat and getting fatter. Fifteen percent of children aged 6-19 are obese in the United States, which is about 9 million children.² During the last three decades, the incidence of obesity has more than doubled for children aged 2-5 and 12-19. It has more than tripled for children aged 6-11.

This is not the result of genetic abnormalities. It is due largely to eating too much junk food, and lack of exercise. The USDA can't do much about the latter. But Congress gave it a direct role in the former, especially during the hours that children spend in school,³ and so do the Department's own regulations.⁴ Yet incredibly, the Department has done little to enforce existing rules against the sale of foods of minimal nutritional value in the schools during mealtimes.

The consequences for the nation and for the children involved are grim. For one thing, children are suffering more and more from type 2 diabetes. American boys born in 2000 have an estimated 32% lifetime risk of developing diabetes,

¹ U.S. Surgeon General David Satcher, "The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity," p. 34, December 13, 2001.

² Cynthia L. Ogden, Katherine M. Flegal, Margaret D. Carroll, Clifford L. Johnson, "Prevalence and Trends in Overweight Among US Children and Adolescents, 1999-2000." *Journal of the American Medical Association*, October 9, 2002; 288(14):1728-32.

³ National School Lunch Act, 42 U.S.C. §§ 1751 et seq., Child Nutrition Act of 1966, 42 U.S.C. §§1771 et seq.

⁴ 7 C.F.R. § 210, 7 C.F.R. § 220.

while girls have a lifetime risk of 38%.⁵ The medical costs from this and coronary problems will be enormous, which is exactly what this country does not need.

Overall, the obesity epidemic could reverse a two-century trend of increases in the average lifespan of Americans.⁶ "The No. 1 health problem in the United States is not SARS," said Dr. Julie Gerberding, director of the Centers for Disease Control and Prevention (CDC). "It is not emerging infectious diseases. It is the epidemic of obesity that we are watching unfold before our very eyes."⁷

Parents and citizens are acutely aware of the childhood obesity problem, and want government to limit junk food sales to schoolchildren. According to a *Wall Street Journal* poll in February, 2005, 83% of American adults "believe public schools need to do a better job of limiting children's access to unhealthy foods like snack foods, sugary soft drinks and fast food."⁸

This brings us to the USDA, and the National School Lunch Program, which it administers. That program was enacted to promote the health of our nation's children. The school lunch program is not just a vehicle for anything the food industry wants to sell to kids. When he signed the National School Lunch Act into law in 1946, Harry Truman remarked that "no nation is any healthier than its children."⁹ The then-President expanded on the idea later that same year. "The well nourished school child is a better student," Truman said. "He is healthier and more alert. He is developing good food habits which will benefit him for the rest of his life. In short, he is a better asset for his country in every way."¹⁰

President Truman was simply articulating the aim that Congress had written into the National School Lunch Program, which was to "safeguard the health and well-being of the Nation's children."¹¹

A 1970 amendment¹² to the Child Nutrition Act of 1966¹³ gave the Secretary of Agriculture authority to regulate foods sold in competition with the National School Lunch Program and the School Breakfast Program.¹⁴ With this authority, the Department of Agriculture promulgated regulations establishing two categories of foods not sold via the school meals programs. The first type is "food of minimal nutritional value,"¹⁵ which is soda, gum, some candies, and the

⁵ K. M. Venkat Narayan, James P. Boyle, Theodore J. Thompson, Stephen W. Sorenson, David F. Williamson, "Lifetime Risk for Diabetes Mellitus in the United States." *Journal of the American Medical Association*, October 8, 2003; 290(14):1884-90.

⁶ S. Jay Olshansky, Douglas J. Passaro, Ronald C. Hershov, Jennifer Layden, Bruce A. Carnes, Jacob Brody, Leonard Hayflick, Robert N. Butler, David B. Allison, David S. Ludwig, "A Potential Decline in Life Expectancy in the United States in the 21st Century." *New England Journal of Medicine*, March 17, 2005, 352:1138-1145.

⁷ "Overweight and Obese Children: The Facts," *San Francisco Chronicle*, June 29, 2003.

⁸ "Most of the American Public, Including a Majority of Parents, Believe That Childhood Obesity in the U.S. Is a Major Problem." *Wall Street Journal* news release, February 15, 2005.

⁹ President Harry S. Truman, Statement by the President Upon Signing the National School Lunch Act, June 4, 1946.

¹⁰ President Harry S. Truman, Statement by the President Concerning the National School Lunch Program, October 22, 1946.

¹¹ "It is hereby declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of non-profit school lunch programs." 42 USC § 1751.

¹² 91 P.L. 248, § 8.

¹³ 42 U.S.C. §§ 1771 et seq.

¹⁴ (a) The Secretary shall prescribe such regulations as the Secretary may deem necessary to carry out this Act [42 U.S.C. §§ 1771 et seq.] and the Richard B. Russell National School Lunch Act [42 U.S.C. §§ 1751 et seq.], including regulations relating to the service of food in participating schools and service institutions in competition with the programs authorized under this Act and the Richard B. Russell National School Lunch Act. (b) The regulations shall not prohibit the sale of competitive foods approved by the Secretary in food service facilities or areas during the time of service of food under this Act or the Richard B. Russell National School Lunch Act if the proceeds from the sales of such foods will inure to the benefit of the schools or of organizations of students approved by the schools." 42 U.S.C. § 1779. See also *National Soft Drink Association v. Block*, 721 F. 2d 1348 (D.C. Cir 1983).

like.¹⁶ The “competitive foods rule” prohibits the sale of these in food service areas during mealtimes.¹⁷ The second type is all other “competitive foods” sold in competition with the school meals programs. All of these may be sold, provided that the revenues inure to the benefit of the schools, school food authorities, or student organizations approved by the schools.¹⁸

The competitive foods rule should be a crucial element in the battle against the childhood obesity epidemic. In a common sense way, it encourages children to eat nutritious foods and not those that provide little other than calories.

Most parents know that foods with large amounts of added sugars or fats are not good for their children. Scientific evidence increasingly confirms that view. An important study in *The Lancet* found that the likelihood of obesity in children “increased 1.6 times for each additional can of sugar-sweetened drink that they consumed every day.”¹⁹ Another study found that higher intake of nondiet soft drinks was correlated to higher caloric intake among children and adolescents.²⁰ A study of young and middle-aged women found that drinking more sugar-sweetened beverages was associated with weight gain and increased risk of type 2 diabetes.²¹ Another study found that a modest school-based program teaching children not to drink soda pop succeeded in reducing the number of overweight and obese children compared to the control group.²²

For these and other reasons, the American Academy of Pediatrics stated last year that “Pediatricians should work to eliminate sweetened drinks in schools.”²³ There is also ample evidence that high-sugar, energy-dense, fiber-poor foods (such as most candy sold in school vending machines) promote weight gain and obesity.²⁴

¹⁵ “Food of minimal nutritional value means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intakes (RDI) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are—protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron.” 7 C.F.R. § 210(a)(2).

¹⁶ 7 C.F.R. § 210.10 Appendix B.

¹⁷ “State agencies and school food authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the [National School Lunch] Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the lunch periods.” 7 C.F.R. § 210.11(b). “State agencies and School Food Authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with breakfasts served under the [School Breakfast] Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the breakfast periods.” 7 C.F.R. § 220.12(a).

¹⁸ “The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all income from the sale of such foods accrues to the benefit of the non-profit school food service or the school or student organizations approved by the school.” 7 C.F.R. § 210.11(b).

¹⁹ David S. Ludwig, Karen E. Peterson, Steven L. Gortmaker, “Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: a Prospective, Observational Analysis.” *The Lancet*, February 17, 2001. 357: 505-08.

²⁰ Lisa Hamack, Jaime Stang, and Mary Story, “Soft Drink Consumption Among US Children and Adolescents: Nutritional Consequences.” *Journal of the American Dietetic Association*, April 1999; 99(4):436-41.

²¹ Matthias B. Schulze, JoAnn E. Manson, David S. Ludwig, Graham A. Colditz, Meir J. Stampfer, Walter C. Willett, Frank B. Hu, “Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women.” *Journal of the American Medical Association*, August 25, 2004; 292:927-934.

²² Janet James, Peter Thomas, David Cavan, and David Kerr, “Preventing Childhood Obesity by Reducing Consumption of Carbonated Drinks: Cluster Randomised Controlled Trial.” *British Medical Journal*, May 22, 2004; 328(7450):1237.

²³ American Academy of Pediatrics Committee on School Health, “Soft Drinks in Schools.” *Pediatrics*, January 1, 2004; 113(1 Pt 1):152-4. <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;113/1/152>

²⁴ See, for example, Theresa A. Nicklas, Su-Jau Yang, Tom Baranowski, Issa Zakeri and Gerald Berenson, “Eating patterns and obesity in children. The Bogalusa Heart Study.” *American Journal of Preventive Medicine*, July 2003, 25(1):9-16. Mark A. Pereira, David S. Ludwig, “Dietary Fiber and Body-Weight Regulation. Observations and Mechanisms.” *Pediatric Clinics of North America*, August, 2001, 48(4):969-980. NC Howarth, E Salzman, SB Roberts, “Dietary Fiber and Weight Regulation.” *Nutrition Reviews*, May, 2001, 59(5):129-139. World Health Organization, “Diet, Nutrition and the Prevention of Chronic Diseases.” WHO Technical Report Series 916, section 5.2.4.

For fiscal year 2005, the federal government will pay \$11.8 billion to implement the National School Lunch Act and the Child Nutrition Act of 1966. Given this enormous expenditure, taxpayers deserve far better accountability, monitoring and compliance controls to ensure that school districts and school food authorities are keeping their part of the bargain – by obeying restrictions on the sale of foods of minimal nutritional value during mealtimes.

A: NATURE OF THE PETITION & JURISDICTION

Pursuant to 5 U.S.C. § 553(e), 7 C.F.R. § 1.28 and 42 U.S.C. § 1779, this is a petition for rule-making to strengthen the reporting requirements and enforcement provisions arising from the competitive foods rule, which prohibits the sale of foods of minimal nutritional value during mealtimes in schools.²⁵

The petition is submitted to Mike Johanns, who, in his official capacity as Secretary of the United States Department of Agriculture, is responsible for complying with the requirements of the National School Lunch Act and the Child Nutrition Act of 1966.

B: PETITIONER

Commercial Alert is a nonprofit organization that protects children and communities from commercialism. We work to reduce the incidence of marketing-related diseases, such as obesity, type 2 diabetes, cardiovascular disease, alcoholism, pathological gambling, smoking-related illnesses and some types of cancer. Commercial Alert has more than 2,000 members, including members in every state of the nation.

C: THE REPORTING AND ENFORCEMENT PROVISIONS OF THE COMPETITIVE FOODS RULE ARE TOO FEEBLE TO ADEQUATELY PREVENT CHILDHOOD OBESITY

The reporting and enforcement mechanisms for competitive foods rule are extremely weak, and our children are suffering for it.

There are six major problems with the reporting and enforcement mechanisms of the competitive foods rule.

1. Many schools are rarely, if ever, reviewed for compliance with the competitive foods rule. The USDA has not promulgated rules to require state agencies or anyone else to review every school to determine whether they are complying with the competitive foods rule. Nor does the USDA require schools and school food authorities to certify that they are in compliance with the competitive foods rule. In other words, the USDA has not created a policy mechanism to quickly identify schools that are out of compliance with the competitive foods rule. National School Lunch Program regulations merely require state agencies to conduct administrative reviews of all school food authorities at least once during each five-year review cycle, and at least once every six years.²⁶ But these review requirements for school food authorities are so lax that typically only a small proportion of schools served by a school food authority must be reviewed for compliance with the competitive foods rule. For example, if a school food authority serves 20 schools, the state agency is only required to review three of them during each five-year review cycle. And if a school food authority serves 100 schools, it only must review 10 of them during each five-year review cycle.²⁷ The rest of the schools do not have to be reviewed at all during the five-year review period, and some may never be reviewed.

²⁵ 7 C.F.R. § 210.11.

²⁶ 7 C.F.R. § 210.18(c)(1).

2. State reviews of school food authorities are far too infrequent. States are required to review school food authorities on a five-year cycle, and every school food authority is supposed to be reviewed “at least once every 6 years.”²⁸ The USDA encourages state agencies to conduct more frequent reviews of large school food authorities, but does not require it.²⁹ And USDA may even provide unlimited numbers of one-year extensions to the 6-year requirement.³⁰ This is entirely inadequate. Even if school food authorities came into compliance with the competitive foods rule after the administrative reviews, as much as six years or more could elapse between the time that a school food authority once again falls out of compliance, and the time that the state agency identifies that it is out of compliance. Of course, there is no requirement to review most schools during a five-year cycle, so those schools that are not reviewed may never come into compliance.

3. The USDA does not explicitly require state agencies to review school food authorities for compliance with the competitive foods rule. Regulations implementing the National School Lunch Act and the Child Nutrition Act of 1966, as amended, require state agencies to “establish such rules or regulations . . . to prohibit the sale of foods of minimal nutritional value . . . in the food service areas”³¹ during breakfast and lunch periods. Administrative reviews of school food authorities under the National School Lunch Program are defined as reviews of compliance with “critical” and “general” areas of review, along with any additional reviews that state agencies may require.³² But compliance with the competitive foods rule is not included in the “critical areas of review.”³³ Nor is it explicitly a part of the “general areas of review.”³⁴ In the definition of “general areas of review,” the rule states that these “shall include, but are not limited to”³⁵ five key standards, but compliance with the competitive foods rule is not one of them. States may voluntarily include compliance with the competitive foods rule under “general areas of review,” but the USDA does not require it.

4. There is no specific requirement for sanctioning school food authorities or schools that are not complying with the competitive foods rule. The USDA does not specifically require state agencies to apply fiscal sanctions to school food authorities that are out of compliance with the competitive foods rule. There is merely a blanket rule that a “State agency shall withhold [National School Lunch] Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part.”³⁶ However, since compliance with the competitive foods rule is neither explicitly a part of the “critical areas of review” or the “general areas of review,” school food authorities and schools may not take this non-specific threat seriously. More generally, compliance with National School Lunch Program nutritional requirements is less than perfect. According to the most recent data available, of school food authorities reviewed, 62% required improvement plans for compliance with the School Meals Initiative for Healthy Children.³⁷

5. There is no requirement to sanction state agencies that fail to monitor whether their school food authorities comply with the competitive foods rule. The USDA’s Food and Nutrition Service (FNS) is

²⁷ 7 C.F.R. § 210.18(e)(1).

²⁸ 7 C.F.R. § 210.18(c)(1).

²⁹ 7 C.F.R. § 210.18(c)(2).

³⁰ 7 C.F.R. § 210.18(c)(3).

³¹ 7 C.F.R. § 210.11(b), 7 C.F.R. § 220.12(a).

³² 7 C.F.R. § 210.18(b)(1).

³³ 7 C.F.R. § 210.18(g).

³⁴ 7 C.F.R. § 210.18(h).

³⁵ 7 C.F.R. § 210.18(h).

³⁶ 7 C.F.R. § 210.24.

³⁷ Sameer Abraham, Manas Chattopadhyay, Margrethe Montgomery, Darby M. Steiger, Lynn Daft and Brooke Wilbraham, “School Meals Initiative Implementation Study – Third Year Report,” Nutrition Assistance Program Report Series, CN02-SMI3, USDA, 2002, p. VIII-9.

required to conduct “comprehensive management evaluations” to “evaluate all aspects of State agency management of the [National School Lunch] Program.”³⁸ However, in the list of state agency responsibilities that FNS is supposed to monitor, verifying compliance with the competitive foods rule is not explicitly mentioned.³⁹ For this reason, state agencies may not take the competitive foods rule seriously, and this likely detracts from school food authority compliance with the competitive foods rule.

6. The USDA does not monitor compliance with the competitive foods rule at a local level. It does not collect copies of state agency reviews of school food authorities, according to Gary Vessels, a program analyst at the Food and Nutrition Service.⁴⁰ Nor does it collect national statistics regarding compliance with the competitive foods rule. Consequently, national policymakers have no idea whether compliance with the competitive foods rule is improving or deteriorating.

The net effect of these six weaknesses is that there is no meaningful enforcement of the competitive foods rule.

D: ACTION REQUESTED: STRENGTHEN THE REPORTING AND ENFORCEMENT PROCEDURES FOR THE COMPETITIVE FOODS RULE

To reduce the incidence of childhood obesity, and to improve the health of our children generally, the USDA should promulgate new rules to strengthen the enforcement and reporting procedures related to the competitive foods rule.

1. Monthly certification. Every school food authority should have to certify every month that it is in compliance with the competitive foods rule. If it is not in compliance, then it should not receive any National School Lunch Program or School Breakfast Program funding until it (1) certifies that it is in compliance with the competitive foods rule and (2) a state agency verifies that it is in compliance with the competitive foods rule. And there should be significant penalties for false certifications.
2. Annual audits of every school. State agencies should be required to conduct annual surprise visits to every school in the state to verify whether school food authorities are complying with the competitive foods rule. If they are out of compliance, then they should not receive reimbursements until they (1) certify that they are once again in compliance and (2) a state agency verifies this certification.
3. Make the competitive foods rule a critical area of review. The USDA should add compliance with the competitive foods rule as a new critical area of review for school food authorities.
4. Review state agencies activities on the competitive foods rule. The USDA should make compliance with the competitive foods rule an explicit part of Food and Nutrition Service management reviews of state agencies.
5. Track compliance at a national level. The USDA should establish basic management controls over compliance with the competitive foods rule. This includes monitoring the number of schools and school food authorities that are in or out of compliance with the competitive foods rule, establishing goals such that the number reaches 100%, and installing other policies to make sure that, as a nation, we soon reach and maintain the goal of having all schools comply with the competitive foods rule.

³⁸ 7 C.F.R. § 210.29.

³⁹ 7 C.F.R. § 210.29(c)(2).

⁴⁰ Telephone conversation with Gary Vessels, February 1, 2005.

E: THERE IS EVIDENCE THAT SOME SCHOOLS ARE NOT COMPLYING WITH THE COMPETITIVE FOODS RULE

Given the weak reporting and enforcement procedures for the competitive foods rule, it would not be surprising if compliance with the competitive foods rule were imperfect. At a minimum, there is not data to show that schools are fully in compliance with the competitive foods rule.

The USDA itself is forthright about its ignorance regarding compliance with the competitive foods rule. In a report released in March, 2005, USDA wrote, "it is unclear to what extent federal and state regulations [against the sale of foods of minimum nutritional value] are enforced at the local level."⁴¹

Some state agency staff are equally forthright about the failure of their schools to comply with the competitive foods rule. For example, in Hawaii, "Our public schools are not quite in compliance" with the competitive foods rule, said Janice Low, acting food service manager, child nutrition programs. Hawaii has not even completed its first five-year review cycle for child nutrition programs. It is currently in the third year of its first five-year review cycle.⁴² Another example is Kentucky. It has adopted rules (tougher than federal requirements) that prohibit the sale of foods of minimal nutritional value until 30 minutes after the last meal period. According to Steve Smith, program manager, school nutrition branch, since 2000-2001, it has found 17 districts that violated the Kentucky's more stringent competitive foods rule. That is 7% of all Kentucky school districts.⁴³ In South Dakota, Sandra Kangas, State Director of Child & Adult Nutrition Services for the Department of Education, explained that they do not track compliance with the competitive foods rule as a critical area, so they do not know how many schools are in compliance. However, "anecdotally, I know there have been some issues" regarding compliance with the competitive foods rule, she says.⁴⁴

Some older evidence suggests widespread noncompliance with the competitive foods rule. In 1996, the Government Accountability Office conducted a survey of school cafeteria managers. It found that during lunch, 10 percent reported the sale of carbonated soft drinks, and 6 percent reported sale of candies.⁴⁵

F: CONCLUSION

To improve the health of our nation's children, to reduce the incidence of childhood obesity, and to ensure that taxpayer dollars are properly spent for only for child nutrition programs that obey federal prohibitions against the sale of foods of minimal nutritional value during mealtimes, the USDA should promulgate new rules to strengthen the reporting and enforcement procedures of the competitive foods rule.

Sincerely,



Gary Ruskin
Executive Director

⁴¹ "Making It Happen! School Nutrition Success Stories." USDA Team Nutrition and the Centers for Disease Control and Prevention, Division of Adolescent and School Health, p. 19. <http://www.fns.usda.gov/tn/Resources/makingithappen.html>.

⁴² Telephone conversation with Janice Low, acting food service manager, child nutrition programs, Hawaii, February 7, 2005.

⁴³ Telephone conversation with Steve Smith, Program Manager, School Nutrition Branch, Kentucky, February 2, 2005.

⁴⁴ Email communication from Sandra Kangas, State Director, Child & Adult Nutrition Services, Department of Education, South Dakota.

⁴⁵ "School Lunch Program: Role and Impacts of Private Food Service Companies." Government Accountability Office, August, 1996. GAO/RCED-96-217, p. 55.