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January 7, 2013

The Honorable Joseph Biden
Vice President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20501

RE: Policy Recommendations to Address the School Shooting in Newtown, Connecticut

Dear Mr. Vice President,

I am writing on behalf of the Entertainment Merchants Association and the video and video game retail outlets we represent to offer our input on policy recommendations to address the Newtown tragedy, which the President has tasked you to develop.

The Entertainment Merchants Association (EMA) is the not-for-profit international trade association dedicated to advancing the interests of the \$34 billion home entertainment industry. EMA-member companies operate approximately 40,000 retail outlets in the U.S. and 50,000 around the world that sell and/or rent DVDs, Blu-ray Discs, computer and console video games, and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry. EMA was established in April 2006 through the merger of the Video Software Dealers Association (VSDA) and the Interactive Entertainment Merchants Association (IEMA).

EMA was sad – but not surprised – to see some blame gun massacres like the Newtown shooting on video games, motion pictures, and other forms of entertainment that contain depictions of violence. Make no mistake: blaming movies and video games is an attempt to distract the attention of the public and the media from meaningful action that will keep our children safer.

We want to take this opportunity to share with you the proactive efforts of retailers to keep violent entertainment out of the hands of children whose parents do not want them to have it, the legal issues surrounding attempts to restrict entertainment that contains violent content, and the studies that the federal government has conducted on minors and entertainment containing depictions of violence.

Enforcement of Ratings by Retailers

Computer and video games carry age advisories in the form of ratings assigned by the Entertainment Software Rating Board. An ESRB rating of “Mature” (M) advises that the game has “content that may be suitable for persons ages 17 and older.” “Adults Only” is an advisory that the game has “content that should only be played by persons 18 years and older.” (As a matter of policy, major retailers do not sell or rent video games rated “Adults Only.”)

Similarly, many DVDs, Blu-ray Discs, and online editions of motion pictures carry age advisories in the form of voluntary ratings from the motion picture industry’s Classification and Ratings Administration (CARA). For instance, a rating of “R – Restricted” means that the motion picture, “in the view of the Rating Board, contains some adult material.” According to CARA, “[p]arents are strongly urged to find out more about R-rated motion pictures in determining their suitability for their children” under age 17.

The ESRB and CARA ratings are advisory recommendations to parents, not legal determinations of whether the material can be restricted for minors. As explained below, for constitutional reasons, they cannot be given the force of law. Yet, as a service to parents, the vast majority of computer and video game retailers have voluntarily committed to enforcing the Mature rating at the point of sale and many video retailers have voluntarily committed to enforcing the CARA ratings on videos. In doing so, they are forgoing sales they otherwise could have made, and they are doing a very good job of enforcement.

The most authoritative surveys of retailer enforcement of computer and video game and motion picture ratings are conducted by the Federal Trade Commission (FTC). Since 2000, the FTC has periodically conducted “undercover shopper” surveys to determine retailers’ compliance with their voluntary ratings enforcement policies. According to the FTC, the results of its most recent undercover shop, released in April 2011, showed that “video game retailers continue to enforce most vigorously the ratings governing age and content that were established by the entertainment media industry,” and that, while there is opportunity for additional improvement, “[r]etailers of R-rated and unrated DVDs demonstrated meaningful improvement in ratings enforcement.” The overall rate of ratings enforcement among video game retailers in that survey was 87% and among DVD retailers was 62% for R-rated DVDs. The complete “undercover shop” results are available at <http://www.ftc.gov/opa/2011/04/violentkidsent.shtm>.

Constitutional Impediments to Legal Restrictions on Violent Entertainment

Any attempt to legally restrict the sale or rental to minors of entertainment containing depictions of violence will likely be found to be unconstitutional. The U.S. Supreme Court recently overturned on First Amendment grounds a California law that attempted to restrict the sale or rental of violent video games to minors. In *Brown v. Entertainment Merchants Association*, 564 U.S. ___, 131 S. Ct. 2729 (2011), in which EMA was a plaintiff, the high court found, in part, that:

1. Video games are protected speech;
2. First Amendment protections do not depend on the nature of the medium;

3. Legislatures cannot create new categories of unprotected speech by concluding that the speech is “too harmful to be tolerated”;
4. Minors have First Amendment rights (although those rights are not as expansive as the First Amendment rights of adults);
5. Since the California law imposed a restriction on the content of protected speech, it was subject to strict scrutiny and the law could not meet that standard, as the scientific evidence of harm relied on by the state was not compelling and has been rejected “with good reason” by all the courts that have considered it;
6. Legislatures cannot treat depictions of violence as a form of obscenity; and
7. The ESRB video game rating system and retailers’ voluntary enforcement of the ratings provide an effective alternative to government regulation.

The Supreme Court has ruled similarly on depictions of violence in other media. In *Winters v. New York*, 333 U.S. 507 (1948), the Court had before it magazines that were “nothing but stories and pictures of bloodshed and lust.” *Id.* at 512. Even though the Court recognized that the magazines had no serious literary value and saw “nothing of any possible value to society” in them, it nevertheless held that the magazines were protected by the First Amendment. *Id.* See also *Video Software Dealers Association v. Webster*, 968 F.2d 684, 688-89 (8th Cir., 1992) (statute restricting minors’ access to violent videos was not narrowly drawn to advance an articulated, compelling governmental interest).

In light of these rulings, it seems clear that government restrictions on the dissemination of depictions of violence are impermissible. But, as noted above, such restrictions are unnecessary in light of the effective voluntary ratings enforcement policies of retailers.

We should note that there are also constitutional impediments to codifying the voluntary entertainment ratings and requiring retailer enforcement of the ratings. See *Entertainment Software Ass’n v. Hatch*, 443 F.Supp. 2d 1065 (D. Minn. 2006), *aff’d sub nom. Entertainment Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (giving legal force to video game ratings of the Entertainment Software Rating Board (ESRB) is unconstitutional because “[t]he ESRB rating is determined by a private body with no duty to answer to the public” and the state did not demonstrate that the ESRB uses ascertainable and objective standards); *Swope v. Lubbers*, 560 F.Supp. 1328 (W.D. Mich, S.D. 1983) (use of CARA ratings is improper as a criteria for determination of constitutional protection); *Engdahl v. City of Kenosha*, 317 F.Supp. 1133 (E.D. Wis. 1970) (delegation to the CARA the authority to determine which movies are proper for minors is unconstitutional); *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa 1970) (use of CARA ratings to determine what is suitable for children violates the Constitution).

Studies of the Impact of Violent Entertainment on Minors

In the aftermath of the Newtown massacre, we have seen proposals put forth to authorize studies of the impact of violent entertainment on minors. See, e.g., “A bill to arrange for the National Academy of Sciences to study the impact of violent video games and violent video programming on children,” December 17 Staff Discussion Draft (available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=3e6bc4fc-64ef-4995-af86-d80f15f50c04) and “Rockefeller Introduces Bill To Study Violent Video Games Impact on

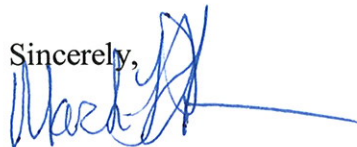
Children” (available at <http://www.rockefeller.senate.gov/public/index.cfm/2012/12/rockefeller-introduces-bill-to-study-violent-video-games-impact-on-children>) (calling on the National Academy of Sciences to do a comprehensive study of whether there is a connection between exposure to violent video games and violent video programming and harmful effects on children). While not expressing a view on the current proposals, we note that EMA has not objected to such proposals in the past, as we believe in the benefits of the accretion of knowledge and we are confident that additional studies will reach the same conclusions as the multitude of previous studies – that depictions of violence have a de minimis impact on real-world violence.

As noted above, since the Columbine tragedy, the Federal Trade Commission has done numerous studies of the marketing of violent entertainment to children – seven in twelve years, plus additional undercover shopper surveys of ratings enforcement. See www.ftc.gov/ratings. In 2002, a U.S. Secret Service/Department of Education study did not include media consumption as one of “the 10 key findings that the authors believe may have implications for the development of strategies to address the problem of targeted school violence.” United States Secret Service and United States Department of Education, *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States*, 31 (2002). A report issued by U.S. Surgeon General David Satcher, which examined a multitude of studies on youth violence, found that youth violence is caused by numerous factors and identifies lifestyle decisions, such as drugs, guns and gangs, as the main drivers. *Youth Violence: A Report of the Surgeon General* (2001). A study published in the FBI Law Enforcement Bulletin includes a cumulative offender profile of school shooters and lists 20 factors, such as low self-esteem and dysfunctional families, as indicators of the potential violent acts, but does not include consumption of violent video games or movies as indicators. Band, S. R., & Harpold, J. A., “The School Shooter: One Community’s Experience,” *FBI Law Enforcement Bulletin* 68 (9), 9, at 14 (1999).

In light of these and other reports, we would recommend that, prior to recommending another review of this topic, the federal government take stock of its existing studies and determine what new knowledge could be generated.

Thank you for the opportunity to share this information with you. We would be happy to meet with you or your staff if it would be beneficial. You can contact me at mfisher@entmerch.org or 818-209-1810.

Sincerely,



Mark Fisher
Interim President