



GENERAL MILLS

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**GENERAL MILLS, INC.
COMMENTS ON THE RECOMMENDED DECISION AND PROPOSED RULE
OF THE U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE
CLASS I FLUID MILK PRODUCT DEFINITION
IN RE MILK IN THE NORTHEAST AND OTHER MARKETING ORDERS
Docket No. AO-14-A73, Et. Al., DA-03-10
PUBLISHED IN THE FEDERAL REGISTER
MAY 17, 2006 (71 Fed. Reg. 28590)**

General Mills, Inc. (General Mills) appreciates the opportunity to comment on the recommended decision and proposed rule (recommended decision) published in the Federal Register on May 17, 2006, by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) in the above-referenced matter. General Mills is an integral part of the dairy value chain, and we rely on our relationship with America's dairy producers. We strongly believe that General Mills and America's dairy producers have a shared interest in expanding consumer demand for all dairy products.

General Mills also recognizes the efforts that AMS has taken in this matter to weigh all of the evidence in the record and to develop a recommended decision and proposed rule that addresses the myriad of issues that are raised herein.

In the proceedings leading up to the issuance of the recommended decision, General Mills argued that AMS should maintain the status quo with respect to the fluid milk product definition and refrain from making any changes thereto. We continue to believe that this approach offers the most efficient and equitable way to move forward together, in which manufacturers can innovate in a predictable, stable regulatory environment to meet consumer demand for the wide array of dairy products, resulting in growth that benefits both processors and producers alike. Except as provided herein, we do not believe that sufficient evidence was presented at the hearing to justify the alteration of the fluid milk product definition.

For the reasons explained below, General Mills strongly supports the recommended decision's exclusion from of the fluid milk product definition of yogurt smoothies that contain at least 20 percent yogurt that meets the standard of identify for yogurt, called "drinkable yogurts" in the recommended decision (hereinafter "yogurt smoothies"). Simply put, we believe that there is incontrovertible, substantial evidence in the record that yogurt smoothies are food products that do not compete with or substitute for fluid milk, and that they should be classified as Class II products.

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In addition to strongly supporting the exclusion of yogurt smoothies from the fluid milk product definition, General Mills has two additional comments that will be made below regarding the proposed protein standard and the application of the form and use concepts to products that do not meet with the proposed 2.25 percent protein standard or the 6.5 percent nonfat milk solids standard.

Statutory and Regulatory Framework

The Agricultural Marketing Agreement Act requires that milk be classified “in accordance with the form in which or the purpose for which it is used.”¹ In this regard, the fluid milk product definition has been used to define which products will be Class I. The fundamental concept that AMS has applied in defining Class I products is that dairy products that “compete with, or substitute for” fluid milk should be classified as Class I.² Simply put, by classifying products that compete for consumers with fluid milk as Class I, the fluid milk product definition is intended to ensure that dairy producers get their share of value from the marketplace.

Within the context of this framework, which is centered on those products that compete with or substitute for fluid milk, AMS has also applied a number of factors that differentiate fluid milk products from other products, including but not limited to storability, shelf life, serving sizes, percentage of nonfat milk solids, packaging, and the location at which products are processed and the area over which they are distributed.

As a general matter, AMS’ factual findings for this rulemaking must be based on the record developed at the hearing and AMS’ decision must be supported by substantial evidence in the record, i.e. “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³ Moreover, “[t]he conceptual, theoretical, and/or hypothetical does not constitute substantial evidence.”⁴ In addition, it is well-established that agencies must follow their long-standing interpretation of laws and regulations, or provide a “reasoned analysis” and “adequate data” from the record justifying a departure from precedent.⁵

The Recommended Decision Properly Excludes Yogurt Smoothies From the Fluid Milk Product Definition

The recommended decision’s exclusion of yogurt smoothies from the fluid milk product definition is supported by substantial evidence in the record. A review of the record in

¹ 7 U.S.C. § 608c (5)(a).

² 58 Fed. Reg. 12634, 12658 (March 5, 1993).

³ *Lehigh Valley Farmers v. Block*, 640 F.Supp. 1497, 1503(1986) (citations omitted).

⁴ *Id.* at 1512

⁵ *Id.* at 1517, citing *Natural Resources Defense Council v. U.S.E.P.A.*, 790 F.2d. 289, 298 (3d cir. 1986).

this matter demonstrates conclusively that yogurt smoothies are produced, distributed, marketed, and used by consumers as food products, not as beverages.⁶ Yogurt smoothies compete with and substitute for other food products, not fluid milk.

The record reveals how consumer lifestyles and the demand for convenient, portable on-the-go foods has changed dramatically over the past few years. Food companies are responding to those new trends to identify and meet consumer demands, and they have greater knowledge about how consumers view and use food and beverage products. The knowledge and data from the marketplace demonstrate clearly that these are food products, not beverages, and should be classified as such.

For example, nearly 80 percent of consumers of one General Mills smoothie would buy another yogurt product as an alternative to the smoothie. For a different smoothie product, less than 1 percent of consumers indicated that they would buy fluid milk instead of the smoothie.⁷ Consumer data also demonstrates that consumers use yogurt smoothie products as a base dish that they eat on their own nearly 96 percent of the time. In contrast, milk is typically consumed as a complement to a meal, particularly breakfast or dinner, whereas yogurt smoothies are commonly enjoyed as a snack.⁸

In contrast to this and other evidence regarding the use of yogurt smoothies as food products, not as beverages, there is virtually no evidence in the record to support the National Milk Producers Federation (NMPF) statement that yogurt smoothies are “similar in form and use...to flavored milks, and they are presumably a close market substitute” for flavored milks.⁹ There is no evidence that consumers buy yogurt smoothies instead of milk, and no evidence to support any claim that consumers use yogurt smoothies for the same purposes as milk.

Similarly, there is no evidence in the record in support of the allegations in the NMPF post-hearing brief regarding the expansion of yogurt smoothies into the beverage market.¹⁰ Indeed, there is nothing in the record to demonstrate that yogurt smoothies impact fluid milk sales; rather, the only evidence in the record demonstrates that they compete with and impact the sales of other yogurt products.¹¹

In addition to the evidence demonstrating that yogurt smoothies do not compete with or substitute for fluid milk, the record also contains a wide variety of evidence that

⁶ See generally General Mills testimony at pp. 732-757 of the hearing record and Dannon’s testimony at 647-690 of the hearing record (hereinafter “Record”).

⁷ See generally Record at 739-748.

⁸ *Id.*

⁹ Record at 183.

¹⁰ See NMPF brief at p. 7.

¹¹ Record at 684-685, 687, 743.

demonstrates how yogurt smoothies are different from fluid milk. For example, yogurt smoothies are produced by a few plants and shipped nationally across the country, unlike fluid milk, and the process by which they are produced is fundamentally different than fluid milk. They have a much longer shelf life than fluid milk that has not been heat-treated. Yogurt smoothies have a different taste, texture, and flavor than fluid milk. They contain a variety of different ingredients than fluid milk, including at least 20 percent yogurt with live and active cultures as well as fruit and other flavorings. They are generally sold in single serving containers, rather than bulk containers like fluid milk, and are placed in the yogurt case in supermarkets, not the milk case.¹²

There is virtually no evidence in the record that contradicts the extensive and specific evidence introduced at the hearing regarding these issues. Theoretical or speculative allegations cannot be used to disregard the actual evidence in the record. Any attempt to simply dismiss this evidence and assert that all yogurt smoothies should be Class I simply because they are drinkable instead of spoonable, for example, plainly contradicts substantial evidence in the record and would not withstand judicial challenge.

Similarly, there is not substantial evidence for the adoption of a protein standard that would result in more yogurt smoothies being classified as Class I. In this regard, it is important to recognize that the record reflects that the adoption of a 2.25 percent true protein standard, without the yogurt smoothie exclusion, would result in at least one yogurt smoothie switching from Class II to Class I.¹³ Such a result is simply not justified by substantial evidence in the record of this matter and is not consistent with the form and use of yogurt smoothies.

There is substantial evidence and reasoning in the record that compels the conclusion that yogurt smoothies are food products. Accordingly, the recommended decision's exclusion of these products from the fluid milk product definition is supported by substantial evidence and in accordance with AMS' long-standing application of the statutory form and use criteria.

If The Protein Standard Is Retained, It Should Not Include Whey

The recommended decision would adopt a 2.25 percent all-inclusive protein standard into the fluid milk product definition, while also retaining the 6.5 percent nonfat milk solids (NFMS) standard. For the reasons stated in its testimony and its post-hearing reply brief, General Mills does not believe there is sufficient evidence to warrant the adoption of a protein standard. However, if AMS decides to retain the protein standard in the final decision, AMS should exclude whey from the protein calculation.

¹² See generally Record at 647-690.

¹³ Record at 764.

Whey is used as a protein supplement and does not contain all the nutrient levels of nonfat dry milk.¹⁴ The inclusion of whey in the protein calculation will lead manufacturers to seek out alternative non-dairy protein sources.¹⁵ Conversely, the fact that whey is presently excluded from the calculation may help explain the expansion of its use as a protein source.

The recommended decision recognizes the limited value of whey by not subjecting it to an upcharge. However, the fact that whey would be considered in determining whether a product is Class I or Class II is sufficient to cause manufacturers to seek out alternative sources of protein, even if the whey itself is not upcharged.

Both yogurt manufacturers and whey producers testified that increasing the costs of production, or even increasing the risks that products using whey may be classified as Class I, will lead manufacturers to look for other ways to reduce costs, such as by using non-dairy ingredients, or by stopping production of less profitable products altogether, both of which will reduce demand for dairy ingredients and hurt dairy producers.¹⁶

Currently, whey is excluded from the calculation as to whether a product meets the 6.5 percent nonfat milk solids standard. It should similarly be excluded from consideration of whether a product meets the proposed protein standard.

Form and Use

The recommended decision would retain the current 6.5 percent NFMS standard and also incorporate a 2.25 true protein standard into the fluid milk product definition. However, the recommended decision also indicates that these “composition criteria” are not determinative of whether a product falls within the fluid milk product definition.¹⁷ Rather, they are guides to assist in determining whether the product has the form and use of fluid milk products. In other words, the recommended decision appears to suggest that a product could have neither 6.5 percent NMFS or the 2.25 percent true milk protein, but nevertheless be determined by AMS to be a fluid milk product if its form and use is that of a fluid milk product.

In general, General Mills believes that AMS should rely on objective criteria to determine if a product falls within the fluid milk product definition. Product manufacturers are more likely to use dairy ingredients in their products if they can be certain of the ultimate product classification. The proposed rule will deprive them of that certainty and thus will undoubtedly dissuade manufacturers from using dairy ingredients.

¹⁴ Record at 748-750.

¹⁵ Record at 972, 974, 975, 983.

¹⁶ Id.

¹⁷ 71 Fed. Reg. at 28600.

If AMS decides to retain this subjective authority to classify products as Class I even if they do not meet the protein or NFMS standard, then AMS should clarify that it will apply the form and use criteria in a manner that is consistent with its long-standing interpretation of these terms. In particular, General Mills believes that AMS should affirm that only those products that compete with or substitute for fluid milk products should be included in the fluid milk product definition. In evaluating whether a product should be a Class I product, even if it does not meet the 6.5 percent NFMS or 2.25 percent protein standard, AMS should give great deference to factual evidence regarding such a product's actual form and use in the marketplace, so that only those products that are actually competing with fluid milk for consumer dollars fall within the fluid milk product definition.

Conclusion

General Mills strongly supports the exclusion of yogurt smoothies from the fluid milk product definition. This exclusion is supported by substantial evidence in the record, is consistent with AMS' interpretation of the form and use criteria, and should be retained by AMS in the final decision in this matter. Any outcome that results in more yogurt smoothies being considered as Class I products is not supported by substantial evidence in this matter.

With respect to the protein standard, General Mills believes that AMS should exclude whey when calculating whether a product meets the protein standard. In addition, General Mills believes that AMS should clarify that only those products that actually compete with or substitute for fluid milk will be treated as fluid milk products.

Again, thank you for the opportunity to comment.

Respectfully submitted,

/s/

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