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GENERAL MILLS, INC.
POST-HEARING BRIEF IN THE U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE
CLASS I FLUID MILK PRODUCT DEFINITION HEARING,
IN RE MILK IN THE NORTHEAST AND OTHER MARKETING ORDERS
Docket No. AO-14-A73, Et. Al., DA-03-10

I. Introduction

General Mills, Inc. appreciates the opportunity to provide a post-hearing brief in the above-referenced matter. As our testimony indicated during the hearing, General Mills is an integral part of the dairy value chain, and we value our relationship with America's dairy producers. We believe that maintaining the status quo with respect to the fluid milk product definition 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.

General Mills believes that the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) should maintain the status quo and should not make any changes to the fluid milk product definition at this time. We do not believe the producer associations that initially requested changes to the fluid milk product definition, the pertinent parts of which have been in place for over 30 years, have produced sufficient justification in the hearing record for adopting their protein proposals.

If AMS believes that some change is warranted based on the hearing record, then AMS should exclude from the fluid milk product definition all yogurt-containing products that contain at least 20 percent yogurt that meets the standard of identify for yogurt (hereinafter "yogurt smoothies"). Simply put, we believe that there is incontrovertible, substantial evidence in the record that these products are food products that should be classified as such; they are not beverage products that compete with or substitute for fluid milk. Furthermore, there is no substantial evidence in the record to support any other change in the fluid milk definition or its application with respect to these products.

General Mills would not oppose a conversion of the current 6.5 percent nonfat milk solids exception to a protein standard, so long as the conversion preserves the status quo. If AMS should adopt a 2.2 or 2.25 percent standard, then whey should not be included in the protein calculation. If AMS includes whey in the calculation, then a higher level of protein is needed to proximate the status quo. If whey is to be included, General Mills proposes a 2.8 percent protein standard, just below the protein level of the standard of identify for milk, as an objective means of differentiating the classification of these products. In either event, if AMS adopts a protein standard, AMS should exclude from the fluid milk product definition yogurt smoothies that meet the protein standard for the same reasons set forth above—yogurt smoothies are a food product and do not compete with fluid milk.

II. Legal and Regulatory Framework

A. History and Purpose of Fluid Milk Product Definition

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, AMS has 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. AMS has also looked at issues like health requirements and price elasticity compared to fluid milk.

For example, in 1945, AMS included flavored milk, flavored milk drinks, and buttermilk as Class I because “[t]hese products are disposed of in a form and for a use more nearly similar to the form and use of fluid milk than any other milk product.”³ Similarly, filled milk was included in 1969, when AMS noted that it is “mainly intended as a beverage substitute” and that it “is clearly marketed for the same use as whole milk ... and is, in fact, designed as a substitute for whole milk.”⁴ Sterilized milk was made Class I in a 1974 decision, where USDA stated that “[sterilized milk products] are generally intended for use in place of their unsterilized counterparts and are competing for the same consumers.”⁵

Just as products that compete with fluid milk are included in the fluid milk product definition, those products that do not compete with fluid milk are excluded from Class I. Thus, since 1974, the fluid milk product definition has excluded products that contain less than 6.5 percent nonfat milk solids because “... fluid products containing only a minimal amount of nonfat milk solids are not considered as being in the competitive sphere of the traditional milk beverages.”⁶ While USDA made some minor changes to the definition in the early 1990s, USDA decided against making changes to the 6.5 percent definition as recently as the late 1990s.⁷

¹ 7 U.S.C. § 608c (5)(a).

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

³ 10 Fed. Reg. 13315, 13321 (October 26, 1945).

⁴ 34 Fed. Reg. 11811 (July 15, 1969).

⁵ 39 Fed. Reg. 9012, 9014-9015 (March 7, 1974).

⁶ *Id.* at 9015.

⁷ 63 Fed. Reg. 4802,4924

AMS also considered the classification of yogurt smoothies in the early 1990s. At that time, AMS determined these products to be Class I, essentially on the basis that they “clearly are intended to be consumed as beverages and are packaged as beverage milk products.”⁸ Despite evidence that these products do not compete with fluid milk, that they are more price sensitive than fluid milk, and that production is done by a small number of plants and product is shipped over great distances, unlike fluid milk, AMS used the descriptive terms of “drinkable” and “spoonable” to identify the form and use of products. Thus, AMS decided that, “because of [its] characteristics as [a] beverage milk product,...liquid yogurt should be considered Class I.”⁹

Since that time, the record of this hearing demonstrates that yogurt smoothies are currently being classified as Class I and as Class II products, depending on whether they meet the 6.5 nonfat milk solids exception. As noted below, USDA must make its decision in this matter based on the record developed at this hearing, and the record plainly contains substantial evidence and reasoning to classify all yogurt smoothies that contain at least 20 percent yogurt as Class II food products, regardless of the level of nonfat milk solids or protein that they may contain.

B. AMS’ Decision Must Be Supported By Substantial Evidence and Be In Accordance With Its Longstanding Interpretation of Form and Use

As a general matter, AMS’s factual findings with respect to the fluid milk product definition must be based on the record developed at the hearing and its 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.”¹⁰ Moreover, “[t]he conceptual, theoretical, and/or hypothetical does not constitute substantial evidence.”¹¹

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.¹²

III. Summary of the Record

The record demonstrates that the producer organizations, including but not limited to the Dairy Farmers of America (DFA) and the National Milk Producers Federation (NMPPF), requested that AMS initiate rulemaking to modify the fluid milk product definition principally if not exclusively to address the issue of carbohydrate free or low carbohydrate milk (hereinafter “low/no carb milk”). These products are alleged to have all or most of the lactose removed and

⁸ 56 Fed. Reg. 58972, 58991 (November 22, 1991).

⁹ 58 Fed. Reg. at 12657.

¹⁰ *Lehigh Valley Farmers v. Block*, 640 F.Supp. 1497, 1503(1986) (citations omitted).

¹¹ *Id.* at 1512

¹² *Id.* at 1517, citing *Natural Resources Defense Council v. U.S.E.P.A.*, 790 F 2nd. 289, 298 (3d cir. 1986).

other milk proteins added, with the end result being a product that could fall below the 6.5 percent nonfat milk solids standard and thus be classified as Class II.

DFA and NMPF presented evidence that they believed demonstrates that low/no carb milk is packaged, sold, and used by consumers in place of fluid milk, including data from NPD and IRI that purported to show that consumers buy the low/no carb milk instead of fluid milk.

Throughout their testimony, NMPF, DFA and their advocates repeatedly focused on the alleged competition and substitution between fluid milk and low/no carb milk to support their claim that the 6.5 percent nonfat milk solids exclusion should be transformed into a 2.25 percent protein standard.

NMPF, for example, claimed that the Carb Countdown product is clearly designed to be similar in form and use to fluid milk and introduced into evidence two market studies in support of its claim that Carb Countdown is a market substitute for milk.¹³ NMPF also argued that Carb Countdown is “used for the same types of things that regular milk is used...” and that “purchases of Carb Countdown had ...replace[d] purchase of regular milk.”¹⁴

Proposal 7 (hereinafter the “protein proposal” or “Proposal 7”) would convert the 6.5 percent nonfat milk solids standard to a 2.25 percent protein standard, and would include whey in the protein calculation, which is not included in calculating the nonfat milk solids standard in the existing regulations. With respect to the need for the protein proposal, the record contains a variety of conflicting and confusing statements. Proponents regularly cite as its justification that the current system prices all nonfat milk solids the same, despite the fact that the solids have different prices in the market.¹⁵ However, proponents also admit the protein proposal would not change how protein or other solids are priced under milk marketing orders.¹⁶

In addition, the record is fundamentally unclear with respect to how Proposal 7 would actually be implemented. For example, it is ambiguous how dry versus wet whey would be priced and upcharged,¹⁷ and how sweet and acid whey would be treated.¹⁸ It is unclear if all whey is excluded from the upcharge, unless it is for fortification i.e. exceeds the milk equivalent level of protein, in which case it may or may not be upcharged.¹⁹ It is also difficult to discern how products that contain a mix of whey and other proteins would be treated for purposes of

¹³ Transcript of Hearing on Class I Fluid Milk Product Definition (“Record”), at 157.

¹⁴ *Id.* at 191.

¹⁵ *Id.* at 66-67, 152-153, 504-505. See, for example, the Dairy Farmers of America (DFA) testimony on p. 66-67, NMPF testimony on pp. 152-153 as well as DFA Counsel’s cross examination of Drew Davis, American Beverage Association, pp. 504-505.

¹⁶ *Id.* at 90-91.

¹⁷ *Id.* at 283-285, 289.

¹⁸ See generally e.g. 267-277, 418-420.

¹⁹ *Id.* at 281-285.

determining which portion of the product is for fortification and which portion is within the 100 percent milk equivalent level.²⁰

Proponents also testified inconsistently about the impact of the protein proposal. DFA testified before NMPF and stated that it (DFA) produced products that would change classification if Proposal 7 were adopted.²¹ Subsequently, NMPF testified on a number of occasions that it was unaware of any product that would move from Class II to Class I if Proposal 7 were adopted.²² Proponents also attempt to portray Proposal 7 as an accounting change,²³ despite the fact that it would change a regulation that has existed for over thirty years by moving from a NFMS standard to a protein standard that includes whey in the calculation.²⁴

With respect to yogurt, the data submitted by USDA establishes that some yogurt containing products are Class I, while other such products are Class II. The Class II products fall below the 6.5 percent nonfat milk solids exclusion to the fluid milk product definition. If Proposal 7 is adopted, at least one such product would move from Class II to Class I.²⁵

The record contains a wide variety of evidence demonstrating that these products are fundamentally different than fluid milk in terms of form and use. General Mills presented detailed evidence about how its yogurt smoothie products are used by consumers as food products and how they compete with other food products, not with fluid milk.²⁶ For example, extensive consumer data was provided showing how consumers eat yogurt smoothies on their own as a snack, whereas milk is viewed and used as a complement to a meal.²⁷ In fact, when asked if he is familiar with yogurt smoothies, one witness for DFA stated that in his family, "they eat them."²⁸ In addition, nearly all of the growth in the yogurt smoothie category comes from other yogurt purchases, not from fluid milk purchases, a finding that is corroborated by the Dannon testimony.²⁹ None of the General Mills evidence was rebutted or contradicted by any specific evidence in the record.

²⁰ *Id.*

²¹ *Id.* at 93.

²² *Id.* at 150, 244-245.

²³ *Id.* at 219.

²⁴ *Id.* at 151

²⁵ *Id.* at 764.

²⁶ See generally, General Mills Testimony, pp. 732-757, particularly 769-748.

²⁷ *Id.* at 744-745.

²⁸ *Id.* at 99.

²⁹ *Id.* at 743, 684-685

Similarly, Dannon provided specific evidence outlining a wide range of differences between its yogurt-containing products and fluid milk, including but not limited to taste, texture, flavor, live and active cultures, packaging, production, distribution, shelf life, and price elasticity, as well as providing evidence with respect to how consumers use the products as food, not as beverages.

³⁰None of Dannon's evidence was rebutted or contradicted by any specific evidence in the record.

Indeed, the NMPF testimony simply presumes that yogurt smoothies compete with flavored milks without any specific evidence to support this proposition, such as market data demonstrating that consumers buy yogurt-containing products instead of fluid milk.³¹ For example, even though NMPF purported to submit certain market data with respect to low carb milk, it did not introduce any evidence that consumers buy yogurt smoothies instead of fluid milk or use yogurt smoothies for the same purposes as fluid milk.³²

Proponents of the protein proposal claim that dairy proteins provide the most characteristic attributes of nutrition, flavoring, and texture of dairy products, but failed to provide any specific evidence demonstrating these assertions.³³ A wide array of evidence was introduced with respect to how yogurt is the principal or characterizing ingredient of yogurt smoothies, and how each yogurt smoothie contains live and active cultures, a variety of non-dairy ingredients, and is uniquely formulated to meet specific market sectors.³⁴

In addition, a number of witnesses, including product manufacturers, economists, whey producers, and dairy producers, testified that Proposal 7 would hurt the dairy industry's ability to compete with other non-dairy proteins since the protein proposal would have the effect of by increasing the cost to manufacturers and consumers of products that contain dairy proteins. Cornell's economic model suggests that substitution of non-dairy proteins will hurt producer revenues,³⁵ and others testified how the increased price of dairy and the complexity of dairy regulation will lead product manufacturers to look for and use other sources of protein.³⁶

In this regard, specific evidence was provided demonstrating that whey protein provides much less nutritional benefit than nonfat dry milk, and that whey is used as a protein supplement that can be replaced by other non-dairy proteins.³⁷ Witnesses testified that the use of soy proteins is

³⁰ See generally pp. 647-690.

³¹ *Id.* at 263-264.

³² *Id.* at 301-302.

³³ *Id.* at 82-83.

³⁴ *Id.* at 672-679; 739-748.

³⁵ *Id.* at 578.

³⁶ *Id.* at 972, 974-975, 983.

³⁷ *Id.* at 748-750.

growing substantially faster than the growth of dairy products,³⁸ and evidence was introduced into the record regarding a yogurt product that is using soy protein, as well as the development of other non-dairy proteins for use in previously dairy dominated products.³⁹

Finally, other than general assertions that the current system is not functioning properly to classify products because it classifies all nonfat milk solids equally, there is no economic evidence or analysis in the record that demonstrates a problem with the operation of the current fluid milk product definition that would warrant changes at this time, or that Proposal 7 would in fact fix any such problems. As a result, a number of witnesses, including General Mills, called for such analysis before any action is taken.

IV. USDA Should Maintain The Current Fluid Milk Product Definition As Proponents Failed to Present Sufficient Evidence To Warrant The Modification of A Long-Standing Regulatory Provision

The fluid milk product definition has included the 6.5 percent nonfat milk solids exclusion since the 1974 decision that established the foundation for the current classification regime. As recently as 1998-99 in the Federal Milk Marketing Order (FMMO) reform, USDA declined to make any changes to the 6.5 percent standard. The exclusion of whey from the 6.5 percent calculation has similarly existed for over 30 years.

Given this longstanding regulatory provision, as well as USDA's relatively recent review in FMMO reform, proponents and AMS bear a heavy burden to justify a change to the 6.5 percent standard. Any change by USDA must be based on a reasoned analysis and supported by adequate data in the record. With respect to Proposal 7, an objective assessment of the record demonstrates that there is insufficient evidence for USDA to move forward.

Proponents claim that the current system is broken because it treats all solids the same, despite the fact that they have different market values. However, Proposal 7 will not change the pricing provisions for any solids, only the manner in which products are determined to be fluid milk products. If the pricing scheme for proteins would not change under milk marketing orders, then the argument claiming that different prices in the marketplace justify the conversion to a protein standard does not hold any water.

Moreover, proponents of the protein proposal also gave inconsistent testimony about how Proposal 7 would actually be applied to various types of milk proteins and products, such as wet versus dried whey as well as how fortification with whey and other proteins would be handled. Based on the record, it is difficult to see how the protein proposal could be consistently and transparently applied to the wide range of products on the market.

³⁸ See pp. 457-459

³⁹ *Id.* at 753-755.

Proponents also gave contradictory testimony regarding the impact of Proposal 7 on classification of current products, despite the fact that it is clear that at least some products would change classes if Proposal 7 were adopted.

In particular, at least one yogurt smoothie would move from Class II to Class I if Proposal 7 is adopted. Given the evidence in the record in support of making yogurt smoothies Class II, it would be an indefensible outcome for AMS to adopt a protein standard with such an impact.

It is clear that this proceeding is not based upon any fundamental problem with the current fluid milk product definition and classification regime. Rather than being aimed at correcting an underlying problem with the current regulatory framework, this entire proceeding is targeted at capturing a product that producers fear may be able to compete with fluid milk at potentially lower Class II prices, the low-carb milk.

We believe that this is an insufficient basis for changing a regulatory provision that has existed for over 30 years. Absent substantial evidence in the record of a fundamental problem with the current regime, as well as evidence that the proposed change will fix the problem, USDA does not have a sufficient basis for moving forward.

If USDA does not maintain the status quo and believes some action is necessary based on the record in this proceeding, then USDA should first conduct an economic analysis that evaluates how the various products and proteins at issue are competing in the marketplace and analyzes exactly how each proposal for reform of the fluid milk product definition would impact the market for dairy products and dairy ingredients. USDA should publish this analysis for public review and comment before it takes any other action in this matter. The record is simply too unclear to support a change to the protein standard at this time.

In fact, as demonstrated below, the only issue that is clear in the record is that yogurt smoothies are fundamentally different in form and use from fluid milk, that they compete with and substitute for other food products, not fluid milk, and that they should be classified as Class II products.

V. USDA Should Exclude Yogurt Smoothies From the Fluid Milk Product Definition

As noted above, in the early 1990s, AMS considered the classification of yogurt smoothies. At that time, AMS used the descriptive terms of “drinkable” and “spoonable” to identify the form and use of the products, and determined these products to be Class I, essentially on the basis that they “clearly are intended to be consumed as beverages and are packaged as beverage milk products.”⁴⁰

⁴⁰ 56 Fed. Reg. 58972, 58991 (November 22, 1991).

⁴² In this regard, simply because yogurt smoothies are both Class I and Class II does not mean that the classification system is not working. Rather, it demonstrates that the market is working fine, and that companies are formulating different products to meet different market segments, on both sides of the classification line. If AMS believes that all yogurt smoothies should be classified the same, then it must classify them as Class II food products, in accordance with the substantial evidence in the record with respect to their form and use.

AMS must make its decision on the basis of the evidence in this record, not on the basis of presumptions, or on the record from the earlier proceeding. A review of the record in this matter demonstrates that yogurt-containing products that contain at least 20 percent yogurt are produced, distributed, marketed, and used by consumers as food products, not as beverages. They compete with and substitute for other food products, not fluid milk. In this regard, it should be noted that the requirement that yogurt smoothies contain at least 20 percent yogurt that meets the standard of identity in order to be Class II will protect the integrity of fluid milk market. As a result of this requirement, products that contain mostly milk and only a small amount of yogurt, or products like buttermilk or eggnog, would continue to be Class I under the fluid milk product definition

There is virtually no evidence in the record that contradicts the extensive and specific evidence introduced at the hearing regarding these issues. In short, there is substantial evidence and reasoning in the record that compels the conclusion that yogurt smoothies are food products. Accordingly, AMS should exclude these products from the fluid milk product definition and classify them as Class II.

A. The Market Has Changed Substantially Since 1993-1994

The record demonstrates that there have been a wide variety of changes in the market since USDA last determined that yogurt-containing products should be Class I. There has been tremendous growth in the number and types of products that are being produced and marketed, all of which are geared towards various markets, such as meal replacements, low carb, children, and women. Consumer lifestyles and the demand for convenient, portable on-the-go foods has also 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.

B. Yogurt Smoothies Are Fundamentally Different Than Fluid Milk

As noted above, USDA has examined a variety of factors over the years to assess if products should be included in the fluid milk product definition, including but not limited to 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. AMS has also looked at issues like health requirements and price elasticity compared to fluid milk.

The record contains a wide variety of evidence that differentiates yogurt smoothies from fluid milk. For example,

- The products are produced by a few plants and shipped nationally across the country, unlike fluid milk.
- 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 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.
- They can be manufactured with Grade B milk, and they are much more price sensitive than fluid milk, with Dannon testifying that the price elasticity for its products is 2 to 3 times as high as fluid milk products.

While supporters of the protein proposal make general assertions regarding how milk proteins offer the defining characteristics for consumers, they offer no consumer evidence to support this assertion. Moreover, yogurt manufacturers testified how each product is developed with unique live and active cultures and ingredients, and how each product is targeted at particular consumer markets and trends, unlike fluid milk.⁴² In other words, neither the milk nor the milk proteins are the defining characteristic of yogurt smoothies, and thus should not drive their classification. Rather, yogurt is the yogurt smoothie's characterizing ingredient.⁴³ This characterization, along with their status as yogurt food products (which is amply and irrefutably demonstrated in the record), should drive the yogurt smoothie's classification as Class II food products.

C. In Form and Use, Yogurt Smoothies Neither Compete With Nor Substitute For Fluid Milk

Fundamentally, AMS has used the fluid milk product definition to cover those products that compete with or substitute for fluid milk. Products that are used for the same purposes as fluid milk or that are competing for the same consumers as fluid milk have been determined to be Class I products.

Both DFA and NMPF focus on substitutability of the low/no carb milk products in their effort to ensure that it is classified as Class I. Indeed, NMPF recognizes that products that are "similar in form and use are the first candidates for substitution," and goes on to indicate that one would examine sales patterns, surveys, how consumers use products, and what they replace them with, in evaluating if products are substitutable and thus similar in form and use.⁴⁴

The record contains a wide variety of data that demonstrates that all yogurt smoothies, whether Class I or Class II, are produced, marketed, and used by consumers as food products, not as beverages, and thus should be excluded from the fluid milk product definition entirely. For example, nearly 80 percent of consumers of one General Mills smoothie would buy another

⁴³ See e.g. *Id.* at 678,824, 828-829.

⁴⁴ Record at 305-310.

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.⁴⁵

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.⁴⁶

Dannon's testimony and product experience is similar to General Mills. Dannon testified that over 95 percent of consumers buying one of its drinkable products were buying it in place of other yogurt purchases, and consumer surveys showed that only 1 percent of customers would use the product instead of fluid milk. For another product, market research showed that 86 percent of consumers are buying it instead of other yogurt products. In other words, consumers are using Dannon's drinkable products instead of other yogurt products, not instead of fluid milk. The fact that drinkable yogurts cannibalize other yogurt products is demonstrated by the fact that the rate of growth in cup yogurt consumption has declined since yogurt smoothies were introduced.⁴⁷

In contrast to this extensive testimony and data regarding the use of yogurt smoothies as food products, not as beverages, virtually no evidence was introduced to support the 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.⁴⁸ 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. 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.

In addition to its presumption that yogurt smoothies are similar in form and use to flavored milks, NMPF also implies that the nutritional profiles of yogurt and fluid milk are relevant to the product classification.⁴⁹ This notion is without merit, and is not supported by any of the proposals that are the subject of this hearing.

The nutritional value of many dairy products is similar because they are all derived from milk. Moreover, yogurt smoothies are fundamentally different. The record contains a variety of specific evidence regarding the production and manufacturing of yogurt smoothies that details how milk is fermented into live and active cultures and how yogurt smoothies are formulated with different combinations of ingredients, textures, and flavors to meet various consumer

⁴⁵ See generally *Id.* at 739-748.

⁴⁶ *Id.*

⁴⁷ See generally 647-690.

⁴⁸ *Id.* at 183.

⁴⁹ *Id.*

markets. This entire process adds value to the milk and fundamentally transforms it into a yogurt product that is used by consumers as food, not as a beverage.⁵⁰ Nouriche, for example, has a nutritional profile that is substantially different than fluid milk.

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 yogurt containing products should be Class I simply because they are drinkable instead of spoonable, as USDA did in the early 1990s, or that they have a nutrient profile similar to fluid milk, plainly contradicts substantial evidence in the record and would not withstand judicial challenge.

VI. Any Protein Standard Should Not Modify Current Product Classifications

Proponents of the protein proposal attempt to characterize it as a mere accounting change. However, Proposal 7 is not a mere conversion from a nonfat milk solids standard to a protein standard. Rather, it constitutes a fundamental revision of the current standards that would move products from Class II to Class I.

Currently, whey is excluded from the calculation as to whether a product meets the 6.5 percent nonfat milk solids standard. Proposal 7, however, would include whey, in all of its forms, in determining if a product exceeds the proposed protein level of 2.25 percent. Thus, it is clear that Proposal 7 would expand the scope of the fluid milk product definition by including whey in the protein calculation.

The inclusion of whey would lead to the substitution of whey by non-dairy proteins. Whey is used as a protein supplement and does not contain all the nutrient levels of nonfat dry milk. The inclusion of whey in the protein calculation, even if the whey itself is not upcharged, will lead manufacturers to seek out alternative non-dairy protein sources.

The record demonstrates that yogurt smoothies are highly sensitive to changes in price, much more sensitive than fluid milk, and moving a product from Class II to Class I will result in increased manufacturing costs. 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.

As we testified, General Mills wants to continue to use dairy products and to work in partnership with producers to “unlock the power of dairy due to its nutritional density.”⁵¹ However, proponents of Proposal 7 appear to believe that all dairy proteins have such unique functionality and characteristics that manufacturers have no alternative but to use them, no matter what the cost or how complex the regulation. This belief is neither supported by the record nor reality, which demonstrates that there are viable alternatives on the market today and more being

⁵⁰ *Id.* at 677-678, 828-831.

⁵¹ *Id.* at 772.

developed all the time by competitive protein sources. Changing the terms or application of the current nonfat milk solids exception by including whey in the protein calculation will undoubtedly lead to a reduction in the use of whey, or the elimination of products that use whey altogether.

Therefore, if AMS is inclined to adopt a protein standard, then AMS should do so in a manner that maintains the current scope and application of the current nonfat milk solids exception to the fluid milk product definition. There is insufficient evidence in the record to justify modifications to the existing standard, which has been in effect for over 30 years. Proponents and AMS bear a heavy burden to change such a longstanding regulatory provision, and the record lacks any substantial evidence that there is a problem with the current definition, or that Proposal 7 would in fact fix such a problem.

The current fluid milk product definition excludes whey, and such exclusion should be maintained if AMS moves to adopt a protein standard. Thus, General Mills proposes that products that meet a 2.2 percent protein standard, excluding whey, and include at least 20 percent yogurt, should be excluded from the fluid milk product definition. If AMS includes whey in the protein standard, even if the whey is not upcharged, AMS should set the standard at 2.8 percent, which reflects the protein levels of milk which meet the standard of identify for milk, and contain an exclusion for products that meet the protein standard and contain the requisite amount of yogurt.

VII. Conclusion

Supporters of Proposal 7 initiated this hearing because of concern that low/no carb milk was being manufactured and could potentially be sold at Class II prices in alleged direct competition with fluid milk. While General Mills does not profess an opinion on the alleged competition between the products, we would point out that producers could have just as easily proposed to include the low/no carb product as a category within the fluid milk product definition. Rather than do so, they proposed two fundamental, interrelated changes to the fluid milk product definition that has existed for over 30 years, by moving from a 6.5 percent nonfat milk solids exclusion to a protein standard, and by including whey in the protein calculation.

As demonstrated above, the record is replete with unclear, inconsistent, and contradictory statements regarding the need for Proposal 7 and how it would in fact be applied to the wide variety of proteins and products on the market. It is plainly neither a well-developed nor well-defended proposal, and USDA would be hard-pressed to justify changing such a long-standing provision on the reasoning and data contained in this record.

However, there is clear and compelling evidence in the record establishing that yogurt smoothies are food products that should be classified as Class II. There is virtually no evidence in the record that contradicts the testimony and data in support of this position.

Unlike supporters of Proposal 7, General Mills understands that modifying the fluid milk product definition raises a host of complex issues for AMS and for the industry as a whole. Thus, we

continue to support maintaining the status quo, which we believe is working effectively. However, if AMS believes it must take action, the only substantial evidence in the record is overwhelmingly in support of classifying all yogurt smoothies as Class II.

Given such a longstanding provision, AMS should be cognizant that any changes to the fluid milk product definition or the application thereof may have market and commercial impacts, and AMS should therefore provide for an appropriately delayed effective date to allow for a smooth transition to and implementation of the new regime. In addition, AMS should provide for a production variance similar to that provided for under Federal nutritional labeling, to account for normal production variances while maintaining the integrity of the underlying standard.

Thank you for the opportunity to participate in this matter.