



Ms. Julie Brewer
Chief, Policy and Program Development Branch
Child Nutrition Division
Food and Nutrition Service
3101 Park Center Drive
Alexandria, VA 22302

April 9, 2013

Re: Comment on Proposed Rule on Competitive Foods, FNS-2011-001 (submitted electronically)

Dear Ms. Brewer,

The Children's Food and Beverage Advertising Initiative (CFBAI or Initiative) of the Council of Better Business Bureaus (BBB) appreciates the opportunity to provide comments on the proposed rule for "Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010." Based on our own experience, we appreciate the challenges you face in setting nutrition standards for such foods and commend you on the thoughtful proposed rule you published for comment.

The CFBAI has considerable experience with nutritional criteria for children's foods. We have reviewed and approved nutritional criteria voluntarily created and used by the CFBAI's participants for identifying foods that may be in child-directed advertising and developed nutrition criteria ourselves. In July 2011, we issued CFBAI-developed category-specific uniform nutrition criteria that will apply to child-directed advertising, effective December 31, 2013. Although not applicable to the in-school sale of foods, we believe our experience in developing these nutritional criteria may be relevant. In particular, we wish to share our reasoning for allowing fortification of nutrients of public health concern as identified in the *2010 Dietary Guidelines for Americans (DGA)*.

About BBB and CFBAI

The Council of Better Business Bureaus, a non-profit 501(c)(6) membership organization, is the umbrella organization for local Better Business Bureaus, which are grassroots organizations that foster a fair and honest marketplace and an ethical business environment. BBB also administers respected self-regulation programs including the *National Advertising Division*, the *Children's Advertising Review Unit* and the *CFBAI*.

BBB and 10 leading food advertisers announced the CFBAI Core Principles in November 2006. (Currently, the CFBAI includes 17 leading consumer packaged goods companies and quick serve restaurants as participants.) The Initiative's goal is to be part of a multi-faceted solution to the complex problem of childhood obesity by using advertising to help promote healthier dietary choices and lifestyles among children under age 12. Under the Initiative's

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Core Principles, participants commit not to engage in child-directed advertising or to limit their child-directed advertising to healthier foods.¹ The CFBAI's participant advertising represents a substantial majority of child-directed food advertising on television. The CFBAI's participants also agree not to advertise their foods, including their healthier ones, to children in elementary schools (pre-K through 6th grade).

As participants in the CFBAI, two companies no longer engage in child-directed advertising, and another participant is continuing its longstanding commitment to not direct advertising to children under age 12.² Fourteen participants have pledged to advertise to children under age 12 only foods that meet science-based nutritional standards that CFBAI has reviewed and approved.³ The standards the companies use today are recognizable ones that are familiar to nutrition professionals. On December 31, 2013, however, new CFBAI-developed, category-specific uniform nutrition criteria go into effect.

Overview of the CFBAI's Uniform Nutrition Criteria

The CFBAI's new criteria are organized around 10 product categories, with requirements that recognize inherent nutritional differences among product categories (e.g., dairy and grain products) and the role they play in the overall diet. As explained in the CFBAI's White Paper, <http://www.bbb.org/us/CFBAIWhitePaper2011>, the new criteria are stronger than the current standards. First, the new criteria eliminate a food qualifying based solely on meeting a "reduced" claim (e.g., \geq 25% less sodium). Second, they eliminate a food qualifying solely because it is packaged in a portion controlled, 100 calorie pack. Third, they include calorie limits for all categories. Fourth, they include nutrients to limit (NTL) criteria for key items: saturated fat, *trans* fat, sodium, and total sugars. Fifth, they include nutrition components to encourage (NCTE) (food groups and/or nutrients) for all product categories. Currently, not every participant has a standard for each item – calories, NTL and NCTE – so the new criteria fill those gaps.

To be consistent with and to promote the DGA, the CFBAI's NCTE requirements include a minimum amount of at least a ½ serving of a food group(s) recommended for increased consumption by the DGA (specifically fruits, vegetables, fat-free/low-fat dairy products, and whole grains), at least one essential nutrient at the 10% Daily Value (DV) level, or a

¹ See <http://www.bbb.org/us/enhanced-core-principles/>. Because special protections are important for children under 12, the advertising industry has long had a set of stringent rules for advertising primarily directed to children under 12. Since 1974, the Children's Advertising Review Unit (CARU) has promoted high standards of responsible advertising to children under age 12. CARU's operational policies are set by the Advertising Self-Regulatory Council, which is a strategic alliance of the advertising industry and BBB. CARU and CFBAI are complementary programs. The CFBAI focuses on *what* foods are advertised to children by the companies that elect to participate and CARU focuses on *how* all products, including foods, are advertised to children. CARU's Guidelines apply to all advertising primarily directed to children under age 12 whether or not the advertiser is a BBB member or CARU supporter. Together the CFBAI and CARU self-regulation programs provide thoughtful and rigorous oversight of child-directed food marketing.

² The participants that do not engage in child-directed advertising are The Coca-Cola Co., The Hershey Co., and Mars, Incorporated. In addition, Nestlé USA no longer advertises its Wonka brand (or other confections) to children. It may advertise other products that meet its nutrition standards, such as 100% fruit juice.

³ Participants that advertise only foods meeting meaningful nutrition criteria are: Burger King Corporation; Campbell Soup Company; ConAgra Foods, Inc.; The Dannon Company; General Mills, Inc.; Hillshire Farm Brands, Kellogg Company; Kraft Foods Global, Inc.; McDonald's USA, LLC; Mondelez Global LLC; Nestlé USA; PepsiCo, Inc.; Post Foods, LLC; and Unilever United States.

combination of both for all product categories, except for foods in Categories 5 (nuts, etc.) and 6 (meat products). Under the CFBAI's criteria, the NCTE requirements increase as the calorie caps increase and as the role of the food in the overall diet (e.g., mixed dishes, main dishes and entrees) takes on greater importance. Essential nutrients include protein, fiber, and vitamins and minerals for which a DV has been established, including those added to meet standards of identity that have an enrichment requirement or to restore naturally occurring nutrients that are lost in processing.⁴ If the essential nutrient requirement is met through fortification, it must be a nutrient of public health concern as specified in the DGA 2010 (i.e., dietary fiber, potassium, calcium, and vitamin D) or a nutrient required to be listed on the Nutrition Facts panel (i.e., iron, vitamin A and vitamin C, as well as dietary fiber and calcium).⁵

CFBAI Comment

The proposed rule provides that foods may qualify for sale to students if they satisfy the proposed food group requirements or if they provide at least 10% of the DV of a "naturally occurring" nutrient of concern (calcium, potassium, vitamin D, or dietary fiber). The Department, however, stated that it is interested in comments from the public on whether food items to which specific nutrients of concern have been added also should be allowed. At Part IV, F, "Naturally Occurring Ingredients and Fortification," the Federal Register notice describes the pros and cons of allowing fortification with non-food ingredients, stating:

"It is unclear how cost might impact the mix of competitive foods offered for sale under these alternative provisions. If fortification with non-food sources of calcium, potassium, vitamin D or dietary fiber is an inexpensive way for manufacturers to gain access to the school competitive food market, then a rule that allows non-food fortification may increase the variety and lower the cost of competitive food products available to students. At the same time, inexpensive fortified snacks and beverages may crowd out whole grains, fruits, vegetables, and dairy products."⁶

The CFBAI and the experienced nutritionists and science officers from our participants, who worked with the CFBAI on developing our new criteria, also considered whether to permit foods to qualify based on fortification.⁷ Based on data showing the important role that

⁴ Some products are labeled as "enriched" because they meet FDA's definition (called a standard of identity) for a type of food with a name that includes that term (such as enriched bread or enriched rice). For example, a product labeled as "enriched flour" must contain specified amounts of thiamine, riboflavin, niacin, folic acid, and iron. Since the 1930s this has been done for certain foods to replace nutrients that were lost or removed through normal processing. For example, non- and low-fat milks are generally enriched with vitamins A and D because when milk is "defatted," vitamins A and D, which are naturally found in the milk fat, are removed. See *generally*, 21 C.F.R. § 104.20; *FDA Basics: Are foods that contain added nutrients considered "enriched"?*. Available online at: <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194348.htm> (accessed March 25, 2013).

⁵ In 1993, in final regulations implementing the Nutrition Labeling and Education Act of 1991, the FDA identified calcium, iron, vitamin C, and vitamin A as nutrients of public health concern and required the amount of these nutrients to be declared on the NFP. These same nutrients also are included in FDA's definition of "healthy" (i.e., an individual food must contain at least 10% DV of one or more of vitamins A or C, iron, calcium, or fiber). The definition also includes protein as a qualifying nutrient.

⁶ 78 Fed. Reg. 9530, 9564 (Feb. 8, 2013).

⁷ The nutritionists and other nutrition professionals ("expert group") who participated in the development of the CFBAI's criteria and reviewed the White Paper are listed in the White Paper.

fortification plays in helping Americans meet recommended nutrient levels, we decided to permit qualification based on fortification on a *limited* basis. Specifically, “if the essential nutrient requirement is met through fortification, it must be a nutrient of public health concern as specified in the DGA 2010 (i.e., dietary fiber, potassium, calcium, and vitamin D) or a nutrient required to be listed on the NFP (i.e., iron, vitamin A and vitamin C, in addition to dietary fiber and calcium).”⁸

We recognize that USDA is considering fortification only with regard to nutrients of public health concern. The CFBAI is not suggesting that USDA broaden its proposal to include other nutrients. Our reasoning for permitting qualification of foods fortified with nutrients of public health concern (as well as nutrients that are included in the regulatory definition of “healthy”) may, however, be of assistance to you.

The CFBAI and its participants recognized the importance of promoting the consumption of fruits, vegetables, whole grains, and low-fat dairy, particularly among children. Yet, as noted in our White Paper, our expert group believed that, “in lower calorie foods, it may not always be feasible to include a meaningful amount of a food group to encourage. Nevertheless, such foods, through their essential nutrient content, may contribute meaningfully to a healthy diet.”⁹ Further, our expert group recognized the important role that fortification has played and continues to play in helping Americans avoid nutrient deficiencies.¹⁰

After we posted our White Paper, another important article about fortification titled, “Foods, Fortificants, and Supplements: Where Do Americans Get Their Nutrients?” was published in the *Journal of Nutrition*.¹¹ It recognizes the role fortification plays in helping Americans meet dietary micronutrient requirements. According to the article:

“In evaluating total usual intake, most Americans met their recommended nutrient target for the majority of vitamins and minerals evaluated; however, far fewer individuals would have done so without fortification and enrichment. Nevertheless, even after accounting for the contributions of fortification and/or enrichment and dietary supplements, considerable percentages of individuals aged ≥ 2 y had intakes that were below the EAR for calcium and vitamin D and very few consumed the recommended amount of potassium (all nutrients that the *2010 Dietary Guidelines*

⁸ CFBAI White Paper at p. 26.

⁹ *Id.* Our criteria, however, require food groups to be encouraged to be present in larger and higher-calorie items: main dishes/entrees, small meals, and meals.

¹⁰ We noted in our White Paper that fortification can contribute significantly to the intake of nutrients. See Berner LA, Clydesdale FM, Douglass JS. 2001. Fortification contributed greatly to vitamin and mineral intakes in the United States, 1989-1991. *J Nutr* 131:2177-2183. Iron enrichment and fortification, for example, have played an important role in helping to reduce the incidence of iron deficiency anemia in key populations (e.g., young children and girls/women of childbearing age). Sherry B, Mei Z, Yip R. 2001. Continuation of the Decline in Prevalence of Anemia in Low-Income Infants and Children in Five States, *Pediatrics* 107(4):677-682.

¹¹ Fulgoni et al. 2011. Foods, Fortificants, and Supplements: Where Do Americans Get Their Nutrients? *J Nutr* 141:1847-1854. We were aware of the findings of this paper when we were developing our criteria, but because it had not yet been published we did not cite to it in our White Paper.

for Americans singled out as being of public health concern). Intakes of magnesium and vitamins A, C, E, and K were also low for a considerable percentage of the population. Our data suggest that enrichment/fortification makes a greater contribution in the U.S. compared to Europe.”

While the authors state “. . . naturally nutrient-dense foods such as fruits and vegetables, whole grains, milk and lean meats are more likely to help individuals meet their nutrient needs,” compared to other foods, they conclude by stating that, “[h]ealth professionals must be aware of the contribution that enrichment and/or fortification and dietary supplements make to the nutritional status of Americans.”¹²

The proposal for competitive snack foods involve somewhat lower calorie foods (no more than 200 calories has been proposed for snacks), such as those the CFBAI considered for qualification based on nutrient content. It may be worth considering, as we did, that it might be difficult to have an array of foods that appeal to a variety of children’s palates, preferences, and pocketbooks that contain the proposed amount of specific food groups (e.g., first ingredient listed) or 10% DV of nutrients of concern that occur naturally.

Allowing non-food fortification, particularly to “make up the difference” to reach a 10% DV level of specific nutrients of concern (e.g., calcium or fiber) may provide for a broader array of nutritious snacks and help students meet the recommended nutrient targets. For example, a hypothetical 100 calorie cereal bar that meets the sodium, sugar, and fat limits that is made with enriched flour and whole grains (with whole grains not the first ingredient or at the 50% level), that is fortified with dietary fiber could be viewed as making as positive a contribution to a child’s diet as a 100 calorie bar that consists of 50% whole grains.¹³

Importantly, the Food and Drug Administration’s (FDA) Fortification Policy can act as a brake to ensure that any fortification is appropriate. The policy specifically notes that, “[t]he addition of nutrients to specific foods can be an effective way of maintaining and improving the overall nutritional quality of the food supply.”¹⁴ At the same time, allowing fortification would not mean that any food could qualify because FDA “does not encourage indiscriminate addition of nutrients to foods, nor does it consider it appropriate to fortify . . . sugars; or snack foods such as candies and carbonated beverages.”¹⁵

¹² *Id.*

¹³ Whole grains vary in the amount of fiber they provide, and even foods with more than a serving of whole grains may not provide 10% DV fiber naturally. Thus, smaller portions of foods that contain whole grains – but are not at least 50% of the grain or the first ingredient – also may not necessarily provide 10% DV fiber without fortification. (We recognize that whole grains also are a source of other nutrients such as iron and B vitamins). We also note that very few foods are a good source of naturally occurring vitamin D, which is a nutrient of concern. As a result, fortified foods provide most of the vitamin D in United States. See <http://ods.od.nih.gov/factsheets/VitaminD-QuickFacts/> (accessed April 2, 2013).

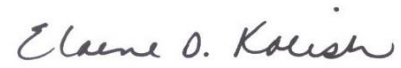
¹⁴ 21 C.F.R. 104.20. See <http://cfr.vlex.com/vid/104-20-statement-purpose-19705793> (accessed April 4, 2013).

¹⁵ *Id.*

Conclusion

We hope that sharing the CFBAI's consideration of and conclusions on a similar fortification issue will be of assistance as you promulgate this rule.

Respectfully submitted,

A handwritten signature in cursive script that reads "Elaine D. Kolish".

Elaine D. Kolish

Attachment A

Children's Food and Beverage Advertising Initiative
Council of Better Business Bureaus, Inc.
Category-Specific Uniform Nutrition Criteria

Children's Food and Beverage Advertising Initiative: Category-Specific Uniform Nutrition Criteria

Product Category	Unit	Nutrients to Limit (NTL)				Nutrition Components to Encourage (NCTE)	Notes
		Calories	Sat Fat	Sodium	Total Sugars		
1. Juices	LSS	≤ 160	0 g	≤ 140 mg	No added sugars	≥ ½ c F/V juices	<ul style="list-style-type: none"> – A serving must contain ≥ 4 fl oz of 100% F/V juice – Sugars limited to those naturally occurring in F/V
2. Dairy products							
– Milks and milk substitutes	8 fl oz	≤ 150	≤ 2 g	≤ 200 mg	≤ 24 g	1 c dairy	<ul style="list-style-type: none"> – For LSS < 8 fl oz, NTL & NCTE to be scaled proportionately – Powder/syrup flavorings mixed with 8 fl oz non-fat milk are allowed ≤ 25 g total sugars as prepared
– Yogurts and yogurt-type products	6 oz	≤ 170	≤ 2 g	≤ 140 mg	≤ 23 g	≥ ½ c dairy <u>and</u> ≥ 10% DV calcium	<ul style="list-style-type: none"> – 6 oz (170 g) is most common single serving size – For LSS < 6 oz, NTL & NCTE to be proportionately lower
– Dairy-based desserts	½ c	≤ 120	≤ 2 g	≤ 110 mg	≤ 20 g	≥ ¼ c dairy <u>and</u> ≥ 10% DV calcium	<ul style="list-style-type: none"> – Serving sizes limited to ½ c – For LSS < ½ c, NTL & NCTE to be scaled proportionately
– Cheese and cheese products	LSS	≤ 80	≤ 3 g	≤ 290 mg	≤ 2 g	≥ ½ c dairy equivalent (provides ≥ 10% DV calcium)	<ul style="list-style-type: none"> – For LSS < 1 oz, NCTE to be scaled to ≥ ⅓ c dairy equivalent and ≥ 10% DV calcium
3. Grain, fruit and vegetable products, and items not in other categories	LSS	≤ 150	≤ 1.5 g	≤ 290 mg	≤ 10 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient	<ul style="list-style-type: none"> – Subcategories differentiate, on a calorie basis, among products that have a small RACC (i.e., ≤ 30 g or ≤ 2 tbsp) and/or are lighter in density (e.g., g/cup) from those with a larger RACC and/or higher density – Examples of ≤ 150 calorie products: most children's breakfast cereals, crackers, & pretzels – Examples of > 150-200 calorie products: denser breakfast cereals (e.g., shredded wheat), waffles, & vegetable products with sauces
	LSS	> 150-200	≤ 2 g	≤ 360 mg	≤ 12 g		
4. Soups and meal sauces	LSS	≤ 200	≤ 2 g	≤ 480 mg	≤ 6 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient	<ul style="list-style-type: none"> – Tomato-based products allowed ≤ 12 g of total sugars/LSS to include sugars naturally occurring in tomatoes & those added to balance product pH
5. Seeds, nuts, and nut butters and spreads	1 oz or 2 tbsp	≤ 220	≤ 3.5 g	≤ 240 mg	≤ 4 g	≥ 1 oz protein equivalent	<ul style="list-style-type: none"> – For LSS < 1 oz or 2 tbsp, NTL & NCTE to be scaled proportionately
6. Meat, fish, and poultry products	LSS	≤ 120	≤ 2 g	≤ 480 mg	≤ 2 g	≥ 1 oz equivalent of meat, fish, or poultry, <u>and</u> ≥ 10% DV of any essential nutrient	<ul style="list-style-type: none"> – For LSS ≤ 1 oz, NTL reduced to ≤ 60 kcal, ≤ 1 g sat fat, ≤ 240 mg sodium and ≤ 1 g total sugars
7. Mixed dishes	LSS	≤ 280	≤ 2.5 g	≤ 540 mg	≤ 10 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of two essential nutrients	<ul style="list-style-type: none"> – Products include casseroles, burritos, pizzas, & sandwiches that do not meet FDA/USDA definition for <i>main dishes</i> – Items that contain ≤ 200 kcal and meet NTL criteria may qualify if they contain ≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient

Product Category	Unit	Nutrients to Limit (NTL)				Nutrition Components to Encourage (NCTE)	Notes
		Calories	Sat Fat	Sodium	Total Sugars		
8. Main dishes and entrées	LSS	≤ 350	≤ 10% kcal	≤ 600 mg	≤ 15 g	≥ 1 serving of F/V/D/WG or ≥ ½ serving of F/V/D/WG <u>and</u> ≥ 10% DV of <i>two</i> essential nutrients	– Items must meet FDA/USDA definition for <i>main dishes</i>
9. Small meals	LSS	≤ 450	≤ 10% kcal	≤ 600 mg	≤ 17/12 g (See notes)	≥ 1½ servings of F/V/D/WG or ≥ 1 serving of F/V/D/WG <u>and</u> ≥ 10% DV of <i>three</i> essential nutrients	– Small meals contain multiple items but do not meet FDA/USDA definition for <i>meals</i> – Meals must meet FDA/USDA definition for <i>meals</i>
10. Meals (entrée and other items including a beverage)	Meal	≤ 600	≤ 10% kcal	≤ 740 mg	≤ 20/15 g (See notes)	≥ 2 servings of F/V/D/WG or ≥ 1½ servings of F/V/D/WG <u>and</u> ≥ 10% DV of <i>three</i> essential nutrients	– Sugars from <u>one</u> qualifying milk/milk substitute, <u>or</u> qualifying yogurt/yogurt-type product, <u>or</u> qualifying fruit (i.e., without added sugars) <u>or</u> qualifying F/V juice are not counted in the 17 g or 20 g total sugars limits – When <u>two</u> qualifying items are present, the sugars from both items are not counted in the total sugars limit, but the limits (to account for all other items) are reduced to 12 g (small meals) and 15 g (meals) – All other NTL criteria for small meals and meals (calorie, sat fat, and sodium limits) must be met

Trans fat. The criteria for *trans* fat is 0 g labeled for all categories. For foods in the meat and dairy categories served as individual foods or as part of composite dishes or meals (e.g., soups, mixed dishes, entrees, meal-type products), naturally occurring *trans* fats are excluded.

Exemptions

- Sugar-free mints and gum.
- The following products also are exempt from the nutrient criteria specified above, except as indicated in notes to Categories 9 & 10:
 - Fruit products without added sugars;
 - Vegetable products without added fats and which meet FDA regulations for “very low sodium;”
 - Beverages, including bottled waters, that meet FDA regulations for “low calorie” and “very low sodium” (diet sodas are excluded from this exemption).

Abbreviations and Glossary DV: Daily Value.

Essential Nutrients: Those occurring naturally in foods (or that are added to foods to meet standards of identity or to restore nutrients lost in processing), and for which a DV has been established. If fortification is used to meet the criteria, the nutrient must be a DGA 2010 nutrient of concern (calcium, fiber, potassium, vitamin D) or a nutrient that is required to be listed on the Nutrition Facts Panel (iron, vitamins A & C).

F/V/D/WG: Any combination of fruits, vegetables, non/low-fat dairy, and/or whole grains.

LSS: Labeled serving size.

NA: Not applicable.

NCTE: Nutrient components to encourage are F/V/D/WG or Essential Nutrients.

NTL: Nutrients to limit are calories, saturated (sat) fat, *trans* fat, sodium and total sugars.

Qualifying F/V Juice: Any fruit or vegetable juice or blend that contains no added sugars and meets the requirements of Category 1.

Qualifying Flavored Milk/Milk Substitute/Yogurt/Yogurt-type Product: These are products that meet the Category 2 criteria for milk/milk substitutes, or yogurt/yogurt-type products.

RACC: Reference amount customarily consumed.

Serving(s): See USDA Food Group Serving Equivalents.

Total Sugars: Include naturally occurring and added sugars.