

**BEFORE THE UNITED STATES FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD**

In re:
Reference Amount Customarily Consumed
for Flavored Nut Butter Spreads (e.g., cocoa,
cookie, and coffee flavored), and Products
That Can Be Used To Fill Cupcakes and
Other Desserts, in the Labeling of Human
Food Products

Docket No. FDA-2016-N-2938
81 Fed. Reg. 76323

**COMMENTS OF CONSUMERS AND FANS OF NUTELLA
IN OPPOSITION TO THE CITIZEN PETITION**

The commenters identified on page 10 respectfully submit the following comments in response to the Request for Information and Comments dated November 2, 2016. The Request seeks information on the reference amount customarily consumed (RACC) and the major intended use of flavored nut butter spreads, with specific reference to the food product “Nutella.”

In arguing for a change in the RACC for Nutella from two tablespoons per serving to one tablespoon, the Citizen Petition of Ferrero U.S.A., Inc. relies heavily on a self-conducted survey of 722 mothers with children between 3 and 12 years old to conclude that Nutella is primarily used as a breakfast toast spread. Besides being irrelevant to a statute that seeks reference amounts “for persons 4 years of age or older,”¹ this survey ignores the diverse range of people and the wide range of uses to which Nutella is commonly put.

The commenters love Nutella, and also love the community and innovative uses that have grown around that product. Yet the commenters also believe that the Citizen Petition paints a picture of Nutella consumption that is inconsistent with that well-known, creative, innovative community. This comment seeks to highlight at least some of that creativity, in an effort to encourage further exploration of the actual uses and consumers of Nutella as the regulation requires.

I. Food Creations, from Ordinary to Epic, Generously Use Nutella

Anyone who believes that Nutella is just a toast spread has not met the Internet. A brief review of some of the most unexpected Nutella creations suggests the diversity of uses to which the spread is put, a diversity that demands further investigation of the product’s major intended use.

¹21 C.F.R. § 101.12(a)(1); *see also* § 101.12(a)(3) (food consumption surveys must be “representative of the demographic and socioeconomic characteristics of the relevant population group”). The Citizen Petition also relies on 43 data points from the NHANES data. Respectfully, the undersigned counsel observes that he can personally identify at least 43 consumers of Nutella.



Nutella Lasagna. This concoction, composed of “layers of buttery lasagna noodles, cannoli custard, copious amounts of Nutella, crushed roasted hazelnuts and chopped chocolate,” is sold out of a bakery in Brooklyn, New York.²



Nutella-Filled Croissant-Donut Hybrid. The donut made with croissant dough, popularized under the name “cronut” by Chef Dominique Ansel in 2013,³ can be prepared with a variety of fillings. One recipe calls for filling the pastry with Nutella, at a proportion of 5 to 6 tablespoons of Nutella per three doughnuts.⁴ That proportion notably supports a two-tablespoon serving size.

²Elie Ayrouth, *A Bakery in Brooklyn Combined Nutella and Lasagna: Nutellasagna*, FOODBEAST (Dec. 7, 2014), <http://www.foodbeast.com/news/nutellasagna-nutella-lasagna/>.

³Brendan O’Connor, *The Mysterious Persistence of the Cronut*, N.Y. TIMES MAG. (May 8, 2015), <http://www.nytimes.com/2015/05/08/magazine/the-mysterious-persistence-of-the-cronut.html>.

⁴*Nutella Cronuts Recipe*, TASTEMADE (Sept. 29, 2016), <https://www.tastemade.com/videos/Nutella-Cronuts>.



Bacon Coated in Nutella. In line with the ongoing bacon-with-chocolate food trend⁵ is sweet and spicy bacon coated with Nutella.⁶



The Great Nutella Pyramid. This construction, made for the popular video series Epic Meal Time, comprises bricks of Rice Krispies treats with Nutella mortar, housing (naturally) a bacon sarcophagus.⁷

⁵See Michelle Locke, *Food Trend: You Got Bacon in My Chocolate*, SALT LAKE TRIB. (Aug. 20, 2008), http://archive.sltrib.com/story.php?ref=/ci_10248187.

⁶See Paula Jones, *Sweet & Spicy Bacon Coated with Nutella*, BELL'ALIMENTO (Feb. 5, 2011), <http://bellalimento.com/2011/02/05/sweet-spicy-bacon-coated-with-nutella/>.

⁷See Epic Meal Time, *The Great Nutella Pyramid*, YOUTUBE (June 10, 2014), <https://www.youtube.com/watch?v=6N8UfS1cxTY>.

The above is just a partial list. Nutella has been put to far more (and more conventional) uses, including coffee drinks,⁸ dessert turnovers,⁹ cocktails,¹⁰ pizzas,¹¹ Boba Fett pie pops,¹² and more. Nutella's uses go far beyond spreading on toast for breakfast, as these examples show.

II. Nutella Is Often Eaten Straight from the Jar

When a product is used both as an ingredient of other foods and for consumption in the form in which it is purchased, the use of the product in the form purchased (e.g., milk as a beverage rather than as an addition to cereal) controls the determination of the RACC.¹³ This is actually important because Nutella is commonly eaten plain from the jar.



Eating Nutella by the spoonful appears to be common practice. The Los Angeles Times interviewed the noted chef Alain Giraud, “who once confessed that his favorite way to eat Nutella

⁸See Wendy O’Neal, *Nutella Blended Coffee Drink* (Nov. 27, 2016), <http://www.aroundmyfamilytable.com/nutella-blended-coffee-drink/>.

⁹See Keri Bassett, *Nutella Turnovers & 4 More Easy Nutella Desserts*, SHAKEN TOGETHER (Mar. 31, 2016), <http://www.shakentoggetherlife.com/2016/03/nutella-turnovers-easy-nutella-desserts.html>.

¹⁰See Perry Santanachote, *11 Decadent Nutella Cocktails, So You Can Drink Your Dessert*, THRILLIST (July 20, 2015), <https://www.thrillist.com/recipe/nation/11-decadent-nutella-cocktails-to-try>.

¹¹See Nicole Perry, *Two Words: Nutella Pizza*, POPSUGAR FOOD (May 29, 2014), <http://www.popsugar.com/food/Almond-Nutella-Pizza-Recipe-24257127>.

¹²See Cory Doctorow, *Bake: Nutella-filled Boba Fett pie pops*, BOING BOING (Dec. 22, 2016), <http://boingboing.net/2016/12/22/bake-nutella-filled-boba-fett.html>.

¹³21 C.F.R. § 101.12(a)(7)–(8).

was out of the jar.”¹⁴ A young Australian girl was caught on video hiding in a cupboard eating from a Nutella jar.¹⁵ When one person posed the question online of whether it is “normal to eat Nutella straight from the jar,” the top response agreed and recommended eating with fingers rather than a spoon.¹⁶

Along similar lines, it is often also suggested to finish an almost-done jar of Nutella by filling it with ice cream and eating the resulting agglomeration.¹⁷ Nutella here is used perhaps not as a dessert topping, but rather as a dessert “siding.”

Flatware manufacturer WMF sells a “Nutella spreader” knife that is specifically designed to match the interior contours of a Nutella jar, for getting every last smudge of cocoa-hazelnut spread out. The knife is marketed as “perfect . . . just for licking, carefully of course!”¹⁸ A clever Internet commenter responded by noting the much more convenient existence of another “special shaped tool for cleaning out Nutella jars entirely”: an index finger.¹⁹



Even the data upon which the Citizen Petition relies supports the regularity of direct Nutella consumption: Appendix II of that Petition indicates that 6% of mothers with young children eat Nutella “by itself.” Yet that figure likely understates the actual incidence of the phenomenon, by excluding people without children who are perhaps (at least, conventional wisdom would suggest) more likely to engage in unconventional eating behaviors like Nutella by spoon.

¹⁴Amy Scattergood, *Nutty for Nutella: Spreadable Joy*, L.A. TIMES (Feb. 11, 2009), <http://www.latimes.com/style/la-fo-nutella11-2009feb11-story.html>.

¹⁵Alison Lynch, *Adorable Little Girl Hides in the Cupboard to Eat Nutella Straight from the Jar (Because Nutella)*, METRO UK (Dec. 15, 2014), <http://metro.co.uk/2014/12/15/adorable-little-girl-hides-in-the-cupboard-to-eat-nutella-straight-from-the-jar-because-nutella-4987231/>.

¹⁶*Is it normal to eat Nutella straight from the jar...?*, <https://answers.yahoo.com/question/index?qid=20080526060258AAAs6xj>; see also *Survey: Did you ever eat Nutella straight from the jar?*, <https://uk.answers.yahoo.com/question/index?qid=20080809180348AA7J4FF>; *Do you ever eat nutella straight out of the jar?*, <https://answers.yahoo.com/question/index?qid=20090207113343AAVj3o>; *Poll: Do you ever eat nutella straight out of the jar by itself?*, <https://uk.answers.yahoo.com/question/index?qid=20110712154225AATMt9l>; *Have you ever eaten Nutella straight out of the jar?*, <https://answers.yahoo.com/question/index?qid=20130606172555AA1DkE4>.

¹⁷See Gabrielle Taylor, *You’ve Been Wasting the Best Part! 5 Delicious Uses for Your “Empty” Nutella & Peanut Butter Jars*, WONDER HOWTO (Jan. 21, 2014), <http://food-hacks.wonderhowto.com/how-to/youve-been-wasting-best-part-5-delicious-uses-for-your-empty-nutella-peanut-butter-jars-0150598/>; Elie Ayrouth, *Here’s What to Do with That Almost Empty Nutella Jar*, FOODBEAST (Sept. 5, 2013), <http://www.foodbeast.com/news/heres-what-to-do-with-that-almost-empty-nutella-jar/>.

¹⁸*Nutella Spreader Bistro*, WMF GROUP, <http://www.wmf.com/en/nutella-spreader-bistro.html>.

¹⁹*Nutella Knife Fixed*, IMGUR (Dec. 18, 2013), <http://imgur.com/gallery/CUQ4kxe>.



Certainly this is not to suggest that plain is the predominant mode of consuming Nutella. (One reporter attempted eating nothing but Nutella for a week. It was not a good idea.²⁰) But that such a mode is well known and apparently practiced with some regularity suggests that data beyond the Citizen Petition is necessary to review the frequency of all uses of Nutella.

III. The Many and Diverse Fans of Nutella, Not the Manufacturer's Impositions, Should Define the Major Intended Use and Reference Amount Customarily Consumed



These varied and unexpected uses of Nutella arise only because the public views Nutella as an immensely popular food product and cultural icon. This popular understanding further confirms that the “major intended use of the food”²¹ may not be as a breakfast toast spread, requiring further investigation.

²⁰David Allegretti, *I Ate Nothing but Nutella for a Week and Found My Inner Darkness*, VICE (Apr. 1, 2015), http://www.vice.com/en_us/article/i-ate-nothing-but-nutella-for-a-week-and-found-my-inner-darkness.

²¹21 C.F.R. § 101.12(a)(7).

Nutella is impressively popular. One reporter described Nutella fandom as “an obsession, a habit, even a cult.”²² Another called eating Nutella “a sort of subcultural ritual.”²³ Yet another prepared a list of “Signs You’re Addicted to Nutella,” describing the food product as “a way of life.”²⁴



Enthusiasts of the dessert product will go to great lengths to obtain this product of desire. Undergraduates at Columbia University were reportedly consuming or hoarding Nutella at a rate of 100 pounds a day, costing the university \$5,000 a week by one estimate.²⁵ “Nutellerias,” food shops specializing in Nutella-based preparations, have appeared in Frankfurt, Cairo, and Brooklyn.²⁶

Indeed, the widespread coverage of this very Request for Information indicates the degree of (with apologies) Nutell-appreciation.²⁷

²²Scattergood, *supra* note 14.

²³Allegretti, *supra* note 20.

²⁴Caitlin Morton, *15 Signs You’re Addicted to Nutella*, BUZZFEED COMMUNITY (June 7, 2013), <http://www.buzzfeed.com/caitlinmorton/15-signs-youre-addicted-to-nutella-a3z1>. Affection for flavored nut-butter spreads is not limited to this particular brand: One commenter here was recently informed about a pistachio–olive oil spread described as “a work of pure magic.” *Pistachio Cream Spread*, MURRAY’S CHEESE, <http://www.murrayscheese.com/pistachio-cream>.

²⁵James Barron, *For Columbia Students, Nutella in a Dining Hall May Be Too Tempting*, N.Y. TIMES, Aug. 15, 2014, at A23, available at <http://www.nytimes.com/2013/03/07/nyregion/for-columbia-students-nutella-in-a-dining-hall-may-be-too-tempting.html>.

²⁶See *Erste nutelleria Deutschlands in Frankfurt eröffnet*, FOOD SERVICE, http://www.cafe-future.net/gastro/branchennews/pages/-Erste-nutelleria-Deutschlands-in-Frankfurt-eroeffnet-_2120.html; *Nutelleria Now Open in Porto Cairo*, CAIRO SCENE (Feb. 8, 2015), <http://www.cairoscene.com/Eats/Nutelleria-Heaven-in-Porto-Cairo>; Marguerite Preston, *Nutelleria Finally Opens in Park Slope, After Wisely Changing Name to Nuteria*, EATER NY (Nov. 4, 2014), <http://ny.eater.com/2014/11/4/7154147/nutelleria-opens-in-park-slope-after-changing-name-to-nuteria>.

²⁷See, e.g., Kathy Lally, *Why the FDA Wants to Know How Much Nutella You Scoop out of the Jar*, WASH. POST (Nov. 5, 2016), <https://www.washingtonpost.com/national/health-science/why-the-fda-wants-to-know-how-much-nutella->

Capitalizing on this fan base, blogger Sara Rosso founded World Nutella Day on February 5, 2007.²⁸ The popular annual tradition, now operated by the Ferrero company, celebrates the world's Nutella enthusiasts, encouraging them to submit fan videos and offering a grand prize of a year's supply of Nutella.²⁹



This evidence suggests that the NHANES data record reporting consumption of 216 grams (5.8 tbsp) of Nutella is perhaps not, contrary to the Citizen Petition, “clearly an outlier.”

Ferrero actively encourages this enthusiasm for Nutella. Besides now sponsoring World Nutella Day, Ferrero operates a Facebook fan page with over 31 million followers;³⁰ the page apparently once had the third largest fan base on Facebook.³¹ On that page, Ferrero hypes up that fan base with exaggerated pitches such as “Whoever said perfection is overrated has not tried Nutella” and “Be with someone who looks at you the way you look at Nutella.”³² (The latter catchphrase indicates that Nutella is marketed toward single adults, rather than the mothers of young children as the Citizen Petition seems to suggest.)

you-scoop-out-of-the-jar/2016/11/04/c8c372de-a1c5-11e6-a44d-cc2898cfab06_story.html; Bill Chappell, *Is Nutella a Dessert Topping or a Spread? The FDA Wants to Know*, NPR NEWS (Nov. 3, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/03/500572459/nutella-spurs-fda-to-ask-americans-if-its-a-dessert-topping-or-a-spread>; Anna Edney, *Nutella Maker Tells FDA, “We’re Not Just for Dessert Anymore”*, BLOOMBERG (Nov. 1, 2016), <https://www.bloomberg.com/news/articles/2016-11-01/nutella-maker-tells-fda-we-re-not-just-for-dessert-anymore>; Angela Chen, *Please Join Me in Telling the FDA that Nutella Is Not Jam*, THE VERGE (Nov. 2, 2016), <http://www.theverge.com/2016/11/2/13491156/fda-nutella-serving-size-jam-dessert-topping>.

²⁸See Sara Rosso, *World Nutella Day: From My Crazy Idea to a Worldwide Movement*, WHEN I HAVE TIME (Feb. 5, 2016), <https://whenihavetime.com/2016/02/05/world-nutella-day-from-my-crazy-idea-to-a-worldwide-movement/>.

²⁹See Jenn Harris, *Want to Win a Year’s Supply of Nutella? Of Course You Do. Here’s How*, L.A. TIMES (Oct. 2, 2015), <http://www.latimes.com/food/dailydish/la-dd-nutella-ambassador-20151001-story.html>.

³⁰*The Official International Nutella Spread Facebook Page*, FACEBOOK, <https://www.facebook.com/Nutella/>.

³¹See Scattergood, *supra* note 14.

³²Nutella, *Whoever Said Perfection Is Overrated Has Not Tried Nutella*, FACEBOOK (Nov. 24, 2016), <https://www.facebook.com/Nutella/posts/10153915097451962>; Nutella, *Be with Someone Who Looks at You the Way You Look at Nutella*, FACEBOOK (Sept. 30, 2016), <https://www.facebook.com/Nutella/posts/10153772776636962>.



Nor is promotion of Nutella-in-excess limited to the online sphere. The company manufactures enormous eleven-pound jars of Nutella, and vends them directly to consumers.³³

And so it is with some disappointment that the commenters note Ferrero's repeated attempts, exemplified in the Citizen Petition and other situations, to recharacterize Nutella as a breakfast product merely for spreading on toast.³⁴ Over the years, Ferrero has sought to use legal means to suppress its diverse and creative fans. It demanded the organizers of World Nutella Day to cease and desist from the celebration, prior to acquiring control of the event.³⁵ It threatened to shut down the Brooklyn Nutelleria shop until the smaller establishment agreed to change its name.³⁶ It has aggressively promoted Nutella, despite the product's high sugar and saturated fat content, as a healthy component of a "balanced breakfast," to the point that the company was forced to settle a false advertising lawsuit for \$3.05 million³⁷ and was investigated by the British Advertising Standards Authority for having "exaggerated the spread's nutritional value."³⁸ The

³³Laura Northrup, *Giant Nutella Jar Isn't a Store Prop, It's a Crappy Deal*, CONSUMERIST (Dec. 9, 2013), <https://consumerist.com/2013/12/09/giant-nutella-jar-isnt-a-store-prop-its-a-crappy-deal/>.

³⁴The undersigned counsel has long engaged in advocacy for primacy of consumer interests in the face of manufacturers' efforts to control how those consumers use and view products. See, e.g., Charles Duan, *How a '90s Tech Company Redefined What Ownership Means Today*, SLATE (Oct. 21, 2016), http://www.slate.com/articles/technology/future_tense/2016/10/how_lexmark_is_redefining_ownership.html.

³⁵See Kristene Quan, "World Nutella Day" to Cease and Desist, TIME (May 21, 2013), <http://newsfeed.time.com/2013/05/21/world-nutella-day-to-cease-and-desist/>.

³⁶See Preston, *supra* note 26.

³⁷See Abby Ellin, *Nutella, After Suit, Drops Health Claims*, ABC NEWS (Apr. 26, 2012), <http://abcnews.go.com/blogs/business/2012/04/nutella-after-suit-drops-health-claims/>.

³⁸Dany Mitzman, *Nutella: How the World Went Nuts for a Hazelnut Spread*, BBC NEWS (May 18, 2014), <http://www.bbc.com/news/magazine-27438001>.

Citizen Petition, which remarks extensively on Ferrero’s promotion of “a balanced breakfast with the inclusion of Nutella,” cannot be seen as anything but a component of this image campaign.

It is the consumers, the users, the eaters of Nutella who choose how and how much they will use. Ferrero may make Nutella, but it does not decide to what ends the product goes once the jars have left the factory. No amount of advertising, information-spreading, or government advocacy by Ferrero can change that.

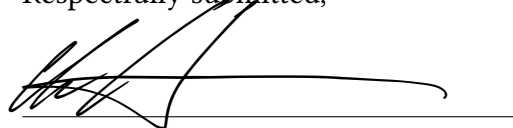
To assess the “major intended use,” the “demographic and socioeconomic characteristics of the relevant population group,” and ultimately the reference amount customarily consumed of Nutella and related flavored nut-butter spreads, the FDA must not rely merely on the survey of the limited demographic of “moms with kids 3–12 years old” that the Citizen Petition proffers. The FDA must seek information on the actual characteristic demographics of Nutella consumers and on the range of uses to which Nutella may be put—a range that, as the examples in this comment show, is remarkably wide. No less than that action will respect the actual public appreciation for this undeniably popular product.

IV. Conclusion

For the foregoing reasons, the FDA should reject the evidence provided in the Citizen Petition and seek further information on the demographics of consumers of flavored nut-butter spreads, the uses to which they put those products, and the amounts they ordinarily consume.

The commenters thank the FDA for providing the opportunity to submit these comments. If there are any remaining questions relating to the matters presented herein, the undersigned would be happy to provide further information as necessary.

Respectfully submitted,



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January 3, 2017

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Nutella bacon: <http://bellalimento.com/2011/02/05/sweet-spicy-bacon-coated-with-nutella/>.

Nutella pyramid: <https://www.youtube.com/watch?v=6N8UfS1cxTY> (at 1:26).

I don't always eat Nutella: <http://knowyourmeme.com/photos/532103-nutella>.

Nutella stretcher knife: <http://www.wmf.com/en/nutella-spreader-bistro.html>.

It's been an eat-Nutella-straight-from-the-jar kind of day: <http://www.someecards.com/usercards/viewcard/MjAxMi03ZjA4ZTdmYmQ0MmVhODI0>.

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APPENDICES

Pursuant to 21 C.F.R. § 10.20(c), copies of all documents cited in this comment are included in these appendices. Irrelevant information has been deleted to the extent possible from those documents. One submitted document is in German. The Google Translate service was used to translate the document. Counsel to this comment verified to the extent possible that the translation is complete and accurate. His name and address are listed in the signature, and his qualifications to make the translation are that he studied German for a year while in law school.

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