

**From:** [Shawn Moser](#)  
**To:** [Alcohol, CED AMCO \(CED sponsored\)](#)  
**Cc:** [CED AMCO REGS \(CED sponsored\)](#)  
**Subject:** Request to Amend Alaska's Alcohol Regulations for Ice Cream and Other Frozen Desserts Containing Alcohol  
**Date:** Friday, March 25, 2022 7:31:04 AM  
**Attachments:** [Revised Proposed New Regulations for Ice Cream and Other Frozen Desserts Containing Alcohol.pdf](#)  
[Alcohol Infused Ice Cream - Supplemental Information.pdf](#)  
[Illinois Liquor Control Commission - Alcohol infused Frozen Products Memorandum - Jan 2019.pdf](#)

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Dear Members of the Alcoholic Beverage Control Board,

I appreciate the opportunity to readdress the ABC Board regarding alcohol-infused ice cream and my request to open a regulation project. My hope is the information provided and the attached proposed regulation amendments address the concerns the Board members raised at the January board meeting, enabling the Board to comfortably move forward with a regulation project.

The following reiterates some of the information previously provided:

According to the Federal Alcohol and Tobacco Tax and Trade Bureau (TTB), ice cream and frozen dessert products with more than 2.0% alcohol by weight (or roughly 2.5% by volume) and/or products made-to-order for customers at the time of purchase would generally be considered "fit for beverage purposes" and treated as an alcohol beverage by the TTB. Furthermore, when asked, the Alaska Department of Environmental Conservation (DEC) does not consider alcohol infused ice cream to be an adulterated food. Because of the alcohol content, DEC would defer to the ABC Board to regulate alcohol-infused ice cream or other frozen desserts if necessary.

Based on this, ice cream and other frozen desserts containing alcohol could presumably be regulated as alcoholic beverages in Alaska, and within the authority granted to the ABC Board.

However, alcohol infused ice cream and other frozen desserts are inherently different from alcoholic beverages and should not be treated the same. They are inherently different in their composition, how they are metabolized, the quantity typically consumed, and in their revenue generating potential. Additionally, a family-friendly ice cream shop with the novelty of alcohol would not be considered and patronized by consumers in the same manner as a bar or other similar drinking establishments.

For these reasons, they should not be regulated or licensed in the same manner as traditional alcoholic beverages. It would be inappropriate to require an ice cream shop with the novelty of alcohol to purchase a cost prohibitive beverage dispensary license. Several states have amended their laws and regulations to differentiate ice cream and other frozen desserts containing alcohol from traditional alcoholic beverages. Strategies (including creating special licenses as well as license exemptions) are being used to successfully permit the manufacture, sale and distribution of ice cream and other frozen desserts containing alcohol. Several of these strategies are described in the attached Illinois Liquor Control Commission's memorandum on alcohol-infused frozen products.

As currently written, SB 9 (the Title 4 rewrite) removes the Board's ability to create new license or permit categories that are not explicitly listed in the revised SB 9 statutes. This effectively eliminates the option to create a special license for ice cream and other frozen desserts containing alcohol.

Therefore, following the alternative strategy of exempting ice cream and other frozen desserts containing alcohol from licensing, I have drafted some proposed regulatory amendments (attached). Modeled after the State of New York's regulations, they provide a sensible and practical approach to deal with ice cream and other frozen desserts containing alcohol in Alaska.

The intent of these proposed regulatory amendments is to distinguish alcohol-infused ice cream and other frozen desserts from alcoholic beverages while providing the necessary controls to ensure infused products are properly sold and served solely to legal adults. The proposed amendments provide a solid starting point for the Board to consider and expound upon, if necessary.

SB 9 adds "*...restrictions on the manufacture, packaging, sale and distribution of products containing alcohol that are intended for human consumption*" to the list of subjects or matters the Board's regulations may cover, but if passed, it will not take effect until January 1, 2024. Given this timeline and the fact the Board will have to address it eventually, I respectfully request the Board consider a regulation project to amend the current regulations to open Alaska to this new and exciting concept prior to 2024.

As previously mentioned, the attached revised proposed regulatory changes are provided to aid as a starting point. Also attached is supplemental information that addresses some of the aforementioned in more detail. Lastly, the attached Illinois Liquor Control Commission's memorandum on alcohol-infused frozen products illustrates how several states have elected to deal with these products.

Please let me know if there are any questions or if I can assist in any way. I appreciate the Board's time and consideration on this matter.

Respectfully,

Shawn Moser

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3 AAC 304 is amended by adding a new section to read:

**3 AAC 304.930. Ice cream and other frozen desserts containing alcohol.** A license or permit shall not required to manufacture, serve, sell, wholesale, transport, deliver, ship or give away ice cream and other frozen desserts made with alcohol, where the alcohol content is 6.0 percent or less by volume, and within the meaning of this title, shall not be defined nor regulated as an “alcoholic beverage” or “beverage”, except they shall

(1) not be served, sold, shipped or delivered to persons under the age of 21 years or persons restricted to purchase alcohol under AS 04.16.160, verified in accordance with AS 04.21.050. Nor shall they be served, sold in, delivered or shipped to any location where such activities would be prohibited for alcoholic beverages.

(2) only be manufactured, mixed, served or delivered by employees or agents 21 years or older who have completed an alcohol server education course compliant with 3 AAC 304.465. Employment of persons between 16-20 years of age by a food establishment shall be permitted and shall comply with AS 04.16.049(c) and (d). In the absence of an owner or employee 21 years of age or older in the food establishment, employees between 16-20 years of age shall not have free access to alcoholic beverages or food products containing alcohol, with the exception of flavor extracts, nor may these products containing alcohol be made or sold.

(3) served or packaged in containers conspicuously marked or labeled with the words “CONTAINS ALCOHOL”.

(4) only be removed or delivered from the food establishment or place of manufacture in a container or package sealed by the manufacturer or an employee, by means of a seal that must be broken or provides evidence of tampering when the container or package is opened.

(5) not be offered for sale, furnished, consumed within the food establishment or delivered between the hours of 5:00 a.m. and 8:00 a.m. each day.

(6) be manufactured, served and sold by a food establishment permitted under 18 AAC 31, and for purposes of this title, the operator of the food establishment shall be permitted to purchase alcoholic beverages for use by the food establishment from a wholesaler licensed under AS 04.11.160. The operator shall also be permitted to stock, warehouse or otherwise store alcoholic beverages within the food establishment or other designated locations which shall be made accessible and subject to inspection, and enforcement of the applicable provisions in this title.

(7) not be sold or served at conventions, picnics, social gatherings, sporting events, or similar affairs held off the premises of the permitted food establishment without an approved caterer's permit obtained in accordance with 3 AAC 304.675 and complying with AS 04.11.230 and 3 AAC 304.685 by the operator, employee or agent of the food establishment.

(Eff. \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

|                   |              |              |              |
|-------------------|--------------|--------------|--------------|
| <b>Authority:</b> | AS 04.06.090 | AS 04.06.100 | AS 04.11.160 |
|                   | AS 04.11.630 | AS 04.16.052 | AS 04.16.160 |
|                   | AS 04.21.025 | AS 04.21.050 | AS 04.21.060 |

3 AAC 304.415 is amended to read:

**3 AAC 304.415. Storing, warehousing and transporting.**

(a) A licensee may not stock, warehouse, or otherwise store alcoholic beverages in a place other than upon the licensed premises except as provided in AS 04.21.060 **and**

**3 AAC 04.930(6).**

(Eff. 11/29/81, Register 80; am 10/24/87, Register 104; \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

**Authority:** AS 04.21.060

## **SUPPLEMENTAL INFORMATION RELATED TO ICE CREAM AND OTHER FROZEN DESSERTS CONTAINING ALCOHOL**

### **Concept:**

Ice cream and other frozen desserts can be infused with alcohol including distilled spirits, beer, wine. Ice cream may be made in the traditional manner with a batch freezer and placed in large tubs in a dipping cabinet from which it can be scooped (as in a typical ice cream shop) or put into smaller containers to be purchased and consumed at home. Additionally, there is a growing trend where ice cream is made-to-order. The customer selects their desired flavor and ingredients, which are then mixed and flash frozen with liquid nitrogen. Alcohol can be added to ice cream using this process as well, similar to mixing a cocktail. Because of alcohol's lower freezing temperature, there is a limit to how much alcohol can be added to ice cream. The rule of thumb is that beyond 3-4 tablespoons of 80 proof alcohol per quart, or 5-7% ABV, the mixture won't properly freeze into ice cream. Consuming a serving of alcohol-infused ice cream or a shake would be comparable to having a single beer. When a food product contains 0.5% ABV or less, the alcohol is considered to be added strictly for flavoring and it is not considered or regulated as an alcoholic beverage. For example, this is how Haagen Dazs' "Spirits" Ice Cream Collection can be sold in grocery stores.

### **Objectives of Proposed Regulation Amendments:**

1. Distinguish ice cream and other frozen desserts containing alcohol from alcoholic beverages, so they do not require a beverage dispensary license costing hundreds of thousands of dollars on the secondary market, which would be cost prohibitive for an ice cream shop.
2. Establish a reasonable alcohol by volume (ABV) threshold, i.e. 6% ABV, that may be incorporated into ice cream and other frozen dessert products.
3. Ensure ice cream and other frozen dessert products containing alcohol are not sold and served to individuals under 21 years of age or those prohibited by law from purchasing alcoholic beverages.
4. Ensure only those 21 years or older, who have completed an approved alcohol server course, may make and deliver ice cream and other frozen desserts containing alcohol.
5. Permit the employment of persons between 16-20 years of age as long as their employment does not involve, dispensing, mixing or delivering ice cream and other frozen dessert products containing alcohol.

6. Permit employees between 16-20 years of age to work in the food establishment without an owner or employee over 21 in the store as long as the employees between 16-20 do not have access to nor work with alcoholic beverages or food products containing alcohol. The intent would be to allow employees between 16-20 to work during hours in which alcohol-infused products are not offered for sale, such as selling espresso during morning commute hours.
7. Ensure products containing alcohol are served and/or packaged in containers marked with the words "CONTAINS ALCOHOL".
8. Permit unaccompanied minors to enter and remain within the food establishment and be served ice cream and other frozen dessert products that do not contain alcohol, like a traditional ice cream shop.
9. Permit the sale of "to-go" orders (from within the store or through a drive-thru) of made-to-order or pre-made/package ice cream and other frozen dessert products containing alcohol if they are properly sealed, so they may be removed from and consumed outside the food establishment.
10. Permit the delivery of ice cream and other frozen desserts containing alcohol by the food establishment or third-party delivery service if the products are properly sealed and the recipient of which is verified to be able to purchase alcohol.
11. Permit the food establishment who makes and sells ice cream and other frozen desserts containing alcohol to purchase alcoholic beverages (used for the making of the products) from a licensed alcoholic beverage wholesaler.
12. Permit the food establishment who makes and sells ice cream and other frozen desserts containing alcohol to store alcoholic beverages (used for the making of the products) within the food establishment or other approved location, which is made accessible and subject to inspection and enforcement.
13. Permit licensed alcoholic beverage wholesalers to sell alcoholic beverages to food establishments making and selling ice cream and other frozen desserts containing alcohol even if the food establishment does not have an alcohol license under 3 AAC 304.
14. Permit the food establishment to wholesale ice cream and other frozen desserts containing alcohol to other permitted food establishments, such as restaurants.
15. Permit the food establishment to cater special and private events where they can sell and/or serve ice cream and other frozen desserts containing alcohol to legal adults.

## Other Statutory/Regulatory Amendment Strategies:

1. Create a special license or permit category specifically for manufacturers and retailers of ice cream and frozen desserts containing alcohol. This is the approach the State of Ohio employed. While Alaska's current alcohol regulations permits this approach, SB 9 is removing this option. A new license or permit category created by the Board now under the current regulations would not be included in SB 9 nor fit its new license, permit and endorsement organizational structure. If and when SB 9 passes, this would create statutory and regulatory conflict and force the Board to revise its regulations and address infused ice cream and other frozen desserts in a different manner.
2. Exempt ice cream and other frozen desserts containing alcohol from licensing or permitting requirements in Title 4 Alcohol Beverages of Alaska statutes. AS 04.11.020 currently lists two situations where a license or permit is not required. A new section could be added to address ice cream and other frozen desserts containing alcohol. The challenge with this approach lies in requesting a new statute amendment in light of an already backlogged legislature, or requesting to amend SB 9 and risking its passage being further delayed. Additionally, as written SB 9 is granting the ABC Board the authority to regulate, "*...products containing alcohol that are intended for human consumption.*" However, given the TTB's position on alcohol-infused ice cream and other frozen desserts and they being considered "fit for beverage purposes", these products should be within the Board's current authority to regulate alcoholic beverages.

## Other Related Information and Considerations:

- **The question has been asked: what does the Alcohol and Tobacco Tax and Trade Bureau (TTB) consider alcohol infused ice cream to be?** That depends if the products are "fit for beverage purposes" as determined by the TTB. Products that are "manufactured" with specific formulations can be submitted to TTB's Nonbeverage Products Laboratory to determine if they qualify as a nonbeverage product. As explained in TTB's distilled spirits FAQ(s), specifically S15, ice cream products are generally unfit for beverage purposes if they contain no greater than 2 percent alcohol by weight for flavoring purposes. However, a product without a specific formulation and made-to-order in the store for customers, would not be eligible to submit to the Nonbeverage Products Laboratory. These products would generally be considered fit for beverage purposes and considered an alcoholic beverage. If

the products are made for customers in the store (similar to a mixed drink) the establishment would likely be required to file an “Alcohol Dealer Registration” with the TTB. A final determination for this scenario is currently being sought with the TTB’s Regulations and Rulings Division.

- **Are ice cream and other frozen desserts containing alcohol considered adulterated food?**

That determination is up to individual states, some of which have determined it is an adulterated food depending on the amount of alcohol contained, while others do not consider it an adulterated food and define and regulate it more as an alcoholic beverage. The State of Florida considers ice cream with up to 5 percent alcohol by volume an adulterated food only if it is sold to minors. Similarly, the State of New York considers ice cream with up to 5 percent alcohol to be an adulterated food, but permit its manufacture and sale under specific conditions. In Alaska, AS 17.20.020 lists confectioneries as adulterated if they contain alcohol in excess of 0.5 percent by volume. No other specific food items, including ice cream and other frozen desserts, are listed in AS 17.20.020 as adulterated foods. When asked, the Alaska Department of Environmental Conservation (DEC) does not consider alcohol infused ice cream to be an adulterated food. Because of the alcohol content, DEC would defer to the ABC Board to regulate alcohol-infused ice cream or other frozen desserts if necessary.



Governor JB Pritzker  
Constance Beard, Chair  
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## Memorandum

Date: January 30, 2019

To: Pam Paziotopoulos

From: Avi Zisook

Re: Alcohol Infused Frozen Products: Ice Cream, Milkshakes, and Sorbet

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**Issue:** Alcohol infused products are becoming more popular in the marketplace. These products are particularly prevalent in bakery items (donuts, cakes, rum balls) and dessert items (ice cream, milkshakes, sorbet, frozen coffee). Is the sale of these products controlled by the Liquor Control Act of 1934.

### **Background:**

The Liquor Control Act of 1934, defines Alcohol as “the product of distillation of any fermented liquid, whether rectified or diluted, whatever may be the origin thereof, and includes synthetic ethyl alcohol. It does not include denatured alcohol or wood alcohol. 235 ILCS 5/1-3.01. The Act further defines Alcoholic liquor as “alcohol, spirits, wine and beer, and every liquid or solid, patented or not, containing alcohol, spirits, wine or beer, and capable of being consumed as a beverage by a human being. The provisions of this Act shall not apply to alcohol used in the manufacture of denatured alcohol produced in accordance with Acts of Congress and regulations promulgated thereunder, nor to any liquid or solid containing one-half of one per cent, or less, of alcohol by volume.” 235 ILCS 5/1-3.05.

The Administrative Rules further define a “solid” as follows: “any substance which, by dilution or processing, becomes an alcoholic beverage.” 11 Ill. Admin. Code 100.10.

It is clear from these definitions that the Liquor Control Act only intends to regulate alcoholic products that meet the following conditions:

1. Capable of being consumed as a Beverage;
2. Contain more than .5% alcohol content;
3. Not considered a denatured alcohol.

The Act further defines combination products in which alcohol and other natural or artificial substance are blended together. The Act defines these blended products as “Alcopops.” Alcopops are defined as:

a flavored alcoholic beverage or flavored malt beverage that includes (i) a malt beverage containing a malt base or beer and added natural or artificial blending material, such as fruit juices, flavors, flavorings, colorings, or preservatives where such blending material constitutes .5% or more of the alcohol by volume contained in the finished beverage; (ii) a beverage containing wine and more than 15% added natural or artificial blending material, such as fruit juices, flavors, flavorings, or adjuncts, water (plain, carbonated, or sparkling), colorings, or preservatives; (iii) a beverage containing distilled alcohol and added natural or artificial blending material, such as fruit juices, flavors, flavorings, colorings, or preservatives; or (iv) an alcohol malt beverage containing caffeine, guarana, taurine, or ginseng, where the beverage constitutes 0.5% or more of alcohol by volume. 235 ILCS 5/6-35.

Additionally, the Administrative Rules have adopted the federal labeling guidelines for products as adopted by The Alcohol and Tobacco Tax and Trade Bureau (TTB). 11 Ill. Admin. Code 100.70(b).

Furthermore, the TTB has adopted 27 CFR Section 17.133 regarding food products that contain alcohol which would not be considered beverages. They have included several examples of food products that have been found to be unfit for beverage purposes:

1. Sauces or syrups. Sauces, or syrups consisting of sugar solutions and distilled spirits, in which the ethanol content is not more than 12 percent by volume and the sugar content is not less than 60 grams per 100 cubic centimeters (also called milliliters).
2. Brandied fruits. Brandied fruits consisting of solidly packaged fruits, either whole or segmented, and distilled spirits products not exceeding the quantity and ethanol content necessary for flavoring and preserving. Generally, brandied fruits will be considered to have met these standards if the container is well filled and solidly packed. The ethanol in the liquid portion cannot exceed 23 percent by volume, and the liquid portion cannot exceed 45 percent of the volume of the container.
3. Candies. Candies with alcoholic fillings, if the fillings meet the standards prescribed for sauces and syrups by paragraph (a) of this

section. The purpose of the ethanol in these products is to flavor the candy.

4. Other food products. Food products such as mincemeat, plum pudding, and fruit cake, where only sufficient distilled spirits are used for flavoring and preserving; and ice cream and ices where only sufficient spirits are used for flavoring purposes. Also food adjuncts, such as preservatives, emulsifying agents, and food colorings, that are unfit for beverage purposes and are manufactured and used, or sold for use, in food.

#### **Status of various alcohol infused products:**

1. *Alcohol infused whip cream*

The TTB issued a December 10, 2012 direction to consumers defining Alcohol Infused Whip Cream as an alcohol product which falls under the TTB jurisdiction. As such, Illinois would accept this definition.

2. *Milkshake*-An alcohol infused milkshake will be considered to generally be an alcoholic liquor which would fall under the Liquor Control Act. An alcohol infused milkshake would generally be produced by blending an ice cream with milk and an alcohol product. The milkshake will most likely meet the three prong test: (1) It is a beverage, (2), it contains more than .5% alcohol, and (3) the alcohol it contains is not denatured. Unless it can be proven that the alcohol content falls below the .5% threshold, it will be considered as an alcoholic liquor product.

Additionally, a milkshake would fall under the definition of an Alcopop. As it would be an alcopop, the labeling and advertising requirements for the milkshake would apply.

3. *Ice cream or Sorbet*-There would be two types of ice Cream or sorbet which may have an alcohol content.

- a. The first being where alcohol is poured over the ice cream or sorbet in the same manner as a syrup would be added. This type of ice cream product would require a depend on the quantity of the liquor used. The alcohol and the ice cream remain independent products. If the liquor used is of a significant amount to constitute a beverage then a license would be required.

- b. The second type of product would be one in which the alcohol has been added to the recipe before the combined product has been frozen into ice cream. At this point, they would be considered one combined product. This product should also require a license. The product must meet the questions of is it a beverage and is more than .5% alcohol content. The product is more than .5% alcohol content. However, is the product a beverage. At first glance, the product would not be considered a beverage and instead would be a food. However, the Act includes the

words “liquid or solid.” The Rules further define liquid as “any substance which, by dilution or processing, becomes an alcoholic beverage.” 11 Ill. Admin. Code 100.10. Ice cream when allowed to melt can and often is consumed as a beverage. As such, it would satisfy the requirement of capable of being consumed as a beverage and therefore, the sale of such a product should require a license.

4. *Cake type items*—If the item is one that will not constitute a beverage, the Liquor Control Act does not regulate the item no matter the alcohol content. For example, a piece of cake may be soaked in alcohol but still retains its status as a food and not a beverage and therefore would not fall under the Act.
5. *Alcohol Candies or Frosting*—In general these would be considered foods and not beverages. See 27 CFR Section 17.133. However, confectionaries containing greater than 5% alcohol by volume are considered to be an adulterated food and may not be sold in Illinois. See 10 ILCS 620/10(c).

#### **Other areas of concern regarding infused dessert products:**

Irrespective of whether the product can be sold by a licensee, several other issues may arise regarding these types of products.

*On-Premises vs. Off-Premises:* A retailer selling the such a product must ensure that the sale is in accordance with their license type. A retailer that only has an on-premises license, would be responsible for ensuring that the product is not removed from the premises. Additionally, they could not sell packaged ice cream to go. Furthermore, if they have a dual license, they would be required to ensure that the product which is leaving the establishment is in a sealed container. For an ice cream type product, this would be particularly of concern as many people do not remain in the store when eating ice cream on a hot summer day.

*Employment of minors:* An ice cream store typically employs individuals of all ages. The store would be required to ensure that those serving alcohol are of the legal age to sell alcohol in the municipality.

*Basset:* Servers would need to be Basset certified.

*Advertising:* Several issues arise with an ice cream type product. These blended products would qualify as alcopops. As such they must comply with the alcopop advertising rules. The statute states as follows:

(b) No entity may advertise, promote, or market any alcopop beverages toward children. Advertise, promote, or market includes, but is not limited to the following:

(1) the use of cartoons and youth-orientated photos in advertising, promotion, packaging, or labeling of alcohol products;

(2) sponsorships of athletic events where the intended audience is primarily children;

(3) billboards advertising alcopops, as defined in items (i), (ii), and (iii) of subsection (a) of this Section, placed within 500 feet of schools, public parks, amusement parks, and places of worship; and

(4) the display of any alcopop beverage in any videogame, theater production, or other live performances where the intended audience is primarily children.

(c) No entity shall sell for consumption an alcohol malt beverage containing caffeine, guarana, taurine, or ginseng, where the beverage constitutes 0.5% or more of alcohol by volume, unless individual containers of the beverage have imprinted on each individual container the following:

(1) the words "contains alcohol"; and

(2) the alcohol content of the beverage.

Based on these rules, the seller of the product would be required to clearly differentiate between the alcoholic products and other similar products so as to not be construed as marketing towards children. In addition, they would have to have separate packaging for any products that contain alcohol and caffeine which comply with the notice requirements of indicating it contains alcohol and the alcohol content. These labelling requirements may serve as a significant hurdle to a small retailer.

Additionally, various TTB guidelines as found in require that alcohol products cannot be labeled or advertised in a manner which is misleading.

*Licensing by IDPH:* The retailer may be subject to the jurisdiction of the Illinois Department of Public Health as IDPH has jurisdiction over the manufacture of dairy products.

## Other State Law:

### *New York:*

New York considers alcohol infused ice cream as an adulterated food that must meet certain requirements in order for it to be sold. New York law states as follows:

14. If it is ice cream or other frozen desserts made with wine, beer or cider bearing or containing more than five percent of alcohol by volume.

15. With respect to the manufacture and sale of ice cream or other frozen desserts made with wine, beer or cider bearing or containing more than one-half of one percent, but not more than five percent of alcohol by volume:

(a) No person shall sell at retail packages of ice cream or other frozen desserts made with wine, beer or cider for consumption off the premises where sold unless:

(i) each package is a sealed package, as received from the manufacturer or distributor;

(ii) each sealed package, as received from the manufacturer or distributor, in a format to be established or approved by the commissioner, prominently bears the following statements, provided that such statements may refer to either wine, beer or cider or a combination thereof:

(A) The sale of this product to individuals under the age of twenty-one years is prohibited.

(B) This product is made with (insert wine, beer and/or cider) and contains alcohol up to five percent by volume.

(C) Notice. This product contains alcohol used as a flavoring and, as with any product that contains alcohol:

(1) women should not consume alcohol during pregnancy because of the risk of birth defects, and

(2) consumption of alcohol impairs your ability to drive a car or operate machinery, and may cause health problems.

(iii) the following advisory, on a sign or poster not less than seven inches by five inches, in a format to be established or approved by the commissioner, is displayed prominently at each location where

packages of ice cream or other frozen desserts made with wine, beer or cider are made available to the public provided that such sign or poster may refer to either wine, beer or cider or a combination thereof:

“THIS AREA CONTAINS (INSERT WINE, BEER AND/OR CIDER) ICE CREAM OR OTHER FROZEN DESSERTS

The sale of (INSERT WINE, BEER AND/OR CIDER) ICE CREAM OR OTHER FROZEN DESSERTS to individuals under the age of twenty-one years is prohibited.

(INSERT WINE, BEER AND/OR CIDER) ICE CREAM OR OTHER FROZEN DESSERTS contain alcohol up to five percent by volume.

NOTICE: (INSERT WINE, BEER AND/OR CIDER) ICE CREAM OR OTHER FROZEN DESSERTS contain alcohol used as a flavoring and, as with any product that contains alcohol:

- (1) women should not consume alcohol during pregnancy because of the risk of birth defects, and
- (2) consumption of alcohol impairs your ability to drive a car or operate machinery, and may cause health problems.

IT IS A VIOLATION PUNISHABLE UNDER LAW FOR ANY PERSON UNDER THE AGE OF TWENTY-ONE TO PRESENT ANY WRITTEN EVIDENCE OF AGE WHICH IS FALSE, FRAUDULENT OR NOT ACTUALLY HIS OR HER OWN FOR THE PURPOSE OF ATTEMPTING TO PURCHASE (INSERT WINE, BEER AND/OR CIDER) ICE CREAM OR OTHER FROZEN DESSERTS.”

(b) No manufacturer and/or distributor of ice cream or other frozen desserts made with wine, beer or cider shall sell such product:

- (i) to a person intending to sell at retail individual servings of ice cream or other frozen desserts made with wine, beer or cider, unless, with each shipment, such manufacturer and/or distributor provides:
  - (A) a written notice that individual servings of ice cream or other frozen desserts made with wine, beer or cider may be sold at retail only where the retailer complies with all of the requirements set forth in paragraph (a) of this subdivision, and
  - (B) a written copy of such requirements; and

(ii) to a person intending to sell at retail packages of ice cream or other frozen desserts made with wine, beer or cider for consumption off the premises, unless, with each shipment, such manufacturer and/or distributor provides:

(A) a written notice that packages of ice cream or other frozen desserts made with wine, beer or cider may be sold at retail only where the retailer complies with all of the requirements set forth in paragraph (a) of this subdivision, and

(B) a written copy of such requirements.

N.Y. Agric. & Mkts. Law § 200 (McKinney)

*Massachusetts:*

The Alcoholic Beverages Control Commission issued the following opinion in September 2016:

In response to inquiries from several Local Licensing Authorities, the Alcoholic Beverages Control Commission provides the following Advisory to Local Licensing Authorities regarding ice cream containing alcohol. Please be advised that M.G.L. c. 138 prohibits the importation, manufacturing, and sale of ice cream that contains alcohol with one limited exception. M.G.L. c. 138, § 1, defines an alcoholic beverage as “any liquid intended for human consumption as a beverage and containing one half of one percent or more of alcohol by volume at sixty degrees Fahrenheit.” Because ice cream containing alcohol is not a liquid intended for consumption as a beverage, is not an alcoholic beverage.<sup>1</sup> Licenses issued under M.G.L. c. 138, including wholesalers and importers under § 18, agents and brokers under § 18A, holders of certificates of compliance under § 18B, manufacturers under § 19, and retailers under § 12 and § 15, are authorized to sell, manufacture, or import “alcoholic beverages.” Because ice cream containing alcohol is not an alcoholic beverage, these licensees are prohibited from importing, selling, or manufacturing such ice cream. Any such action is a violation of M.G.L. c. 138, § 2 and § 64. The only exception to this prohibition is where the Alcohol and Tobacco Tax and Trade Bureau (“TTB”) has classified in writing that a particular product is a “nonbeverage product.”<sup>2</sup> Please be aware that this TTB

classification is specific to each individual product a business manufactures, and not a business's entire line of products. What this means for Local Licensing Authorities: • § 12 and § 15 retailers cannot lawfully sell alcohol-infused ice cream unless the retailer can produce a written classification from the TTB exempting each alcohol-infused ice cream product it sells; • No businesses (such as ice cream parlors and food trucks) can lawfully make and/or sell alcohol-infused ice cream without producing a written classification from the TTB exempting each alcohol-infused ice cream product it sells; if they do so, they are in violation of M.G.L. c. 138, § 2. As a reminder, all licensees must ensure that they are in compliance with the Laws of the Commonwealth of Massachusetts and that sale of alcoholic beverages take place only as authorized by applicable law

Massachusetts does not consider alcohol infused ice cream as a beverage and therefore, liquor license holders cannot sell it unless it is considered a food product as defined by the TTB.

*Louisiana:*

The Louisiana Attorney General issued an opinion on April 9, 2013, in which he determined that under Louisiana Law, wine ice cream would not constitute a beverage but rather a food. However, he opined that as a food product, it would be considered an adulterated food product and therefore prohibited from sale in Louisiana. La. Att'y Gen. Op. No. 12-0227 (Apr. 9, 2013)

*Ohio:*

Ohio permits an A-5 permit holder to sell ice cream with no more than 6% alcohol content.

4303.051 A-5 permit.

(A) Permit A-5 may be issued to a manufacturer of icecream to manufacture icecream that contains not less than one-half of one percent of alcohol by volume and not more than six percent of alcohol by volume, provided that the sale of beer or intoxicating liquor for on-and off-premises consumption is authorized in the election precinct in which the manufacturer is located.

(B) An A-5 permit holder may sell ice cream under this section only for consumption on the premises where manufactured or in sealed containers for consumption off the premises where manufactured. An A-5 permit holder may sell icecream under this section only by in-person transaction at the permit premises. An A-

5 permit holder shall not ship, send, or use an H permit holder to deliver icecream to a personal consumer. An A-5 permit holder shall not sell more than four pints of icecream for off-premises consumption to a personal consumer in any calendar day.

(C) The fee for an A-5 permit is one thousand dollars for each plant.

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