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Governor

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Chairman

**LILY M. FAN**  
Commissioner

**GREELEY FORD**  
Commissioner

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ADVISORY #2019-1

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To: All licensees and permittees

Subject: Definition of “alcoholic beverage” under the Alcoholic Beverage Control Law

The State Liquor Authority, through the Alcoholic Beverage Control Law (“ABCL”), regulates the manufacture, sale and distribution of alcoholic beverages throughout the state. As defined in ABCL §3(1), an alcoholic beverage includes any liquid, solid, powder or crystal that: 1) contains alcohol, spirits, wine or beer; and 2) is capable of being consumed by a human being. Under this definition, an alcoholic beverage includes not only “beverages” but food items. Although not specifically set forth in the ABCL, the Authority has adopted the federal standard that an item containing less than one-half of one percent (0.5%) alcohol by volume is not an alcoholic beverage.

Even if an item has an alcohol content of one-half of one percent (0.5%) or more by volume, it may still be exempted from the definition of “alcoholic beverage” and, as a result, the manufacture, sale and distribution of the item is not subject to the ABCL. There are two such exemptions in ABCL §3(1):

A confectionery containing alcohol

A confectionery is not considered an alcoholic beverage if the alcohol content is no more than five percent (5%) by volume. The Authority considers “confectionery” to mean any desserts and/or snack foods that are sweet in nature or primarily sugar, such as cakes, cookies, pastries, candy, sweets, chocolate, chewing gum and glazed fruit. If the confectionery has an alcohol content of more than five percent (5%) by volume, it is no longer subject to the exemption and is considered an “alcoholic beverage.”

Even though it is not designated as an alcoholic beverage, a confectionery that has an alcohol content of at least one-half of one percent (0.5%) by volume but no more than five percent (5%) by volume is subject to the following restrictions:<sup>1</sup>

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<sup>1</sup> Agriculture & Markets Law §200(13)

- a) cannot be sold to any person under the age of twenty-one;
- b) must include a statement that the sale of the product to individuals under twenty-one years of age is prohibited;
- c) must include a statement indicating that the product contains alcohol up to five percent (5%) by volume;
- d) must include the following statement on the label: "Notice: This product contains alcohol used as a flavoring and, as with any product that contains alcohol: (i) women should not consume alcohol during pregnancy because of the risk of birth defects, and (ii) consumption of alcohol impairs your ability to drive a car or operate machinery, and may cause health problems; and
- e) must be sold, either alone or with other confectionery containing less than one-half of one percent (0.5%) alcohol by volume, in quantities of at least one-half pound or in a package or container containing at least twenty-four (24) pieces.

Ice cream and other frozen desserts made with wine, beer or cider.

Ice cream, and other frozen desserts, made with wine, beer or cider with an alcohol content of no more than five percent (5%) is not considered an alcoholic beverage. Even though it is not designated as an alcoholic beverage, if the product has an alcohol content of at least one-half of one percent (0.5%) by volume but no more than five percent (5%) by volume it cannot be sold to any person under the age of twenty-one. In addition, if the product is sold for off-premises consumption, the sale is subject to the following restrictions:<sup>2</sup>

- a) the product must be in the sealed package as received from the manufacturer or distributor; and
- b) the product's package contains statements regarding: the presence of wine, beer or cider in the product; the prohibition regarding sales to individuals under the age of twenty-one; the risk of birth defects if consumed by a woman during pregnancy; the impairment to the ability to drive caused by the consumption by of the product; and
- c) signage in the retail establishment containing the above statements.

Please note that the above exemptions apply only if the alcohol is an ingredient in the confectionery, ice cream or frozen dessert. If the alcohol or alcoholic beverage is separate from the confectionery, ice cream or frozen dessert, the sale of the alcohol or alcoholic beverage (if it has an alcohol content of at least one-half of one percent (0.5%)) is governed by the ABCL. For example, a cake that is baked using an alcoholic beverage is not subject to the ABCL if the alcohol content is no more than five percent (5%). However, if there is no alcohol in the cake, but it is sold with a container of an alcoholic beverage, the sale of that container is subject to the provisions of the ABCL.

Please also note that an alcoholic beverage includes documents such as warehouse receipts, contracts, etc., that related to alcoholic beverages. Any person engaged in the

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<sup>2</sup> Agriculture & Markets Law §200(15)

manufacture (other than an individual for that individual's personal household consumption), distribution or sale of an alcoholic beverage must have the appropriate license or permit issued by the Authority.

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This matter was heard and determined by the Members of the Authority at a Full Board meeting held on January 9, 2019 before Chairman Vincent Bradley, Commissioner Lily Fan, and Commissioner Greeley Ford. The above written advisory was approved by Chairman Bradley on behalf of the Members of the Authority on January 14, 2019.

Dated: 1/15/19

A handwritten signature in black ink, appearing to read "Thomas J. Donohue". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Thomas J. Donohue  
Secretary to the Authority