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ALCOHOLIC BEVERAGES CONTROL COMMISSION (“ABCC”) ADVISORY TO § 12 AND § 15 RETAILERS REGARDING ALCOHOL-INFUSED ICE CREAM

In response to several inquiries from licensees, the Alcoholic Beverages Control Commission provides the following Advisory to §12 and § 15 retailers 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.¹ 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.”² 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 § 12 and § 15 retailers is that a retailer cannot lawfully purchase alcohol-infused ice cream from a § 18 wholesaler because it is both unlawful for a § 18 wholesaler to sell alcohol-infused ice cream, and it is also unlawful for § 12 and § 15 retailers to sell it to the public without the appropriate TTB label / permit classifying it as an approved nonbeverage product.

¹ Ice cream containing alcohol is, however, alcohol, which is defined as “all alcohol other than denatured alcohol or [methyl alcohol or wood oil].” M.G.L. c. 138, §1. Such alcohol is regulated by the Liquor Control Act under M.G.L. c. 138, §2 (“No person shall manufacture, with intent to sell, sell, or expose or keep for sale, store, transport, import, or export alcoholic beverages or alcohol, except as authorized by” c. 138).

² An alcohol-infused ice cream that is classified as a nonbeverage product when the TTB considers it a “food product.” Alcohol-infused ice cream is a “food product” where only “sufficient spirits are used for flavoring purposes.” See 27 CFR § 17.133. Ice cream containing more than a trace amount of alcohol would not fall under this exception.

The ABCC cautions all retailers against purchasing alcohol-infused ice cream from an unlicensed business unless the business provides a copy of the TTB classification of each product the retailer intends to purchase. Should a retailer purchase alcohol-infused ice cream from an unlicensed business that does not have this TTB classification, the retailer would be in violation of M.G.L. c. 138, § 2, and would be subject to sanctions, up to and including revocation of its license.

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.

(Issued 9/22/16)