February 3, 2011

Secretary Richard Chandler
Wisconsin Department of Revenue
(via email)

Re: Proper classification of alcohol-infused whipped cream

Dear Secretary Chandler:

Founded in 1987, Marin Institute is a nonprofit organization whose mission is to protect the public from alcohol related harm. We are writing to express our opinion on your agency’s decision to not regulate so-called alcohol-infused whipped cream products.

Wisconsin’s classification of alcohol-infused whipped cream as a food represents a failure on the part of the state to (1) prevent underage access to alcoholic beverages and (2) collect the taxes due on the sale of alcohol. Like the rest of the nation, Wisconsin faces ongoing problems involving alcohol use and budgetary shortfalls. If alcohol-infused whipped cream is classified as a food then it can be sold to underage youth and will not be taxed at the rates applied to alcohol. We therefore request that the Department of Revenue reevaluate the status of alcohol-infused whipped cream to ensure that these products are sold only at licensed outlets and are appropriately taxed.

As will be established below, alcohol-infused whipped cream is an alcoholic product and must be regulated as such. Producers of these products, food scientists, and the federal government all agree: alcohol-infused whipped cream is not a food; it is intended only for consumption by persons that have attained the legal drinking age. By classifying these products as a food, the state is: allowing underage access to alcohol, losing tax revenue, and creating conflicts between state and federal law. Accordingly the state can, and must, regulate the alcohol contained in alcohol-infused whipped cream as an alcoholic beverage.

Producers The makers of alcohol-infused whipped cream consider their product to be alcoholic beverages intended for consumption by persons that have attained the minimum legal drinking age of 21. For example, the manufacturer of CREAM requires visitors to its website verify that they are of legal drinking age and understand that use of the site is only for persons “who are lawfully permitted to consume alcohol beverages.” In addition to reaffirming that its product is an alcoholic beverage, the producer of Whipped Lightning (aka Whipahol) explicitly states its product is not a food. In the Frequently Asked Question section the company states:

*How many calories are in a serving?*

We’ve never had Whipped Lightning tested to determine how many calories are in a serving. Whipahol is not a food product and is not subject to FDA labeling requirements; it is an alcoholic beverage. You should consume Whipahol in moderation, please enjoy it responsibly. (emphasis added)
Though in no way dispositive, the fact that the producers of alcohol-infused whipped cream consider their own products to be alcoholic beverages rather than food cannot be ignored. Moreover the producers are seeking to avoid defining their product as a food to avoid disclosing the nutritional information of their product. Because alcoholic beverages are not subject to the Food and Drug Administration (FDA) labeling requirements, it appears that Wisconsin is creating a legal conflict by not classifying alcohol-infused products as an alcoholic beverage.

Science When on the store shelf, a can of alcohol-infused whipped cream contains liquid alcohol and can certainly be served as a beverage. In its latent form, whipped cream is a liquid. To make whipped cream air is introduced into cream. The fat in the cream traps the air bubble resulting in an emulsion with a volume much greater than that of the original liquid. Classifying alcohol-infused whipped cream as a food ignores the physical form and chemical state of product at the time of sale. The can contains in liquid form, alcohol, cream, and other flavorings. Only after vigorously shaking the can to mix its contents—introducing nitrogen during expulsion of the mixture through the nozzle—does the product become “whipped cream.”

At all times before dispensed, the product is little more than a can of alcohol-infused cream. In fact, if these steps (as well as other directions) are not followed, the product may not properly dispense. Unlike its non-alcoholic cousin, alcohol-infused whipped cream is not to be refrigerated because cold temperatures will cause the alcohol to separate from the cream. Refrigeration will lead to a “muddy” or “runny” product which is actually liquid alcohol and partially “whipped” cream and other flavorings. When produced, shipped, sold, and even potentially after dispensing, alcohol-infused whipped cream is a liquid that should be regulated as an alcoholic beverage. Moreover, if the product is not properly refrigerated, anyone (including minors) can consume it as a beverage, either as a mixer or just straight.

Federal Government The Alcohol and Tobacco Tax and Trade Bureau (TTB) considers alcohol-infused whipped cream to be a distilled spirit. In addition to collecting excise taxes, the TTB regulates the labeling and advertising of alcoholic beverages. On its website the TTB specifically asserts its jurisdiction over alcohol-infused whipped cream stating that “[t]hese products currently in the marketplace are alcoholic beverages, specifically considered to be distilled spirits specialty products, and are therefore subject to [regulation by the TTB].” TTB regulations include the requirements that alcohol beverage labeling must not be deceptive or mislead the consumer, provide information as to the identity and quality of the product, the alcohol content, and its contents.

The TTB also regulates the advertising of alcohol beverage products. Before an alcohol beverage product can be entered into the marketplace it must submit a label to the TTB. In addition, if the federal Food and Drug Administration (FDA) considered the product a food, it would require nutrition labeling. But as mentioned above, this is not the case. Because the TTB asserts its authority over alcohol-infused whipped cream and the distilled spirits it contains, (while FDA does not) Wisconsin should follow suit.

Wisconsin Law The Wisconsin legislature clearly states that the purpose of the Alcohol Beverage Control (ABC) law is, in part, to advance the state’s interest in “preventing alcohol sales to underage [persons], . . .[and the] efficient and effective collection of tax.” Though other language in the ABC law has been interpreted as meaning only alcohol in beverage form can be regulated, there is more than sufficient evidence to support a finding that alcohol-infused whipped cream is an alcoholic beverage. Even if Wisconsin insists on classifying these products as food, they are still alcoholic beverages.

The spirit of the ABC law demands that regulators not take such a limited and rigid view of the law, with such a negative outcome result. Lawmakers cannot anticipate every advance from
science, technology, or marketing when drafting a law. Thus, laws must be flexible in their interpretation and application if they are to remain effective in achieving their purpose over time. Strictly construing the legislature’s use of the term “beverage” to mean that the state only regulate those alcohol-products that are consumed as a drink ignores the broader purpose of the ABC law and the nature of lawmaking. It is clear that the legislature intended for the ABC law to prevent underage access to alcohol and apply taxes on its sale, not exempt an alcohol novelty. Refusing to regulate these products will result in a failure of this clearly stated purpose. Accordingly, the state can, and must, regulate alcohol-infused whipped cream as an alcohol product, even if the state also continues to classify these products as food.

Conclusion Whatever the form of alcohol, whether liquid, gel, frozen, or contained in a can to be sprayed as cream, the chemical remains the same, as does the potential danger, especially to youth. Preventing underage access to alcohol and properly taxing alcohol are of significant importance to Wisconsin. Continuing to classify alcohol-infused whipped cream as a food and not alcohol is a mistake that will result in negative outcomes. The Department of Revenue must reevaluate the status of alcohol-infused whipped cream so that these products are only sold at properly licensed outlets and are appropriately taxed.

Thank you for your attention to this matter.

Sincerely,

Michele Simon, JD, MPH
Research and Policy Director
Marin Institute

cc: Secretary Ben Brancel
Wisconsin Department of Agriculture, Trade and Consumer Protection
(via email)

REFERENCES

3. See Appendix 2, Screenshot 1 and 2.
4. See Appendix 1, Screenshot 2.
5. As described above the TTB is charged with regulating alcoholic beverages. As a result alcoholic beverages do not need meet the food nutrition labeling requirements imposed by the FDA. http://en.wikipedia.org/wiki/Whipped_cream#cite_note-GPO-0 & http://www.foodsci.uoguelph.ca/dairyedu/whcream.html (Accessed on January 19, 2011)
6. See Appendix 1, Screenshot 1.
7. See Appendix 2, Screenshot 3.
9. Wis. Stat. § 125.01.
10. Wis. Stat. § 125.02. The definitions for alcohol in Wisconsin are in fact limited to beverages.
11. (1) “Alcohol beverages” means fermented malt beverages and intoxicating liquor.
12. (6) “Fermented malt beverages” means any beverage made by the alcohol fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.
13. (8) “Intoxicating liquor” means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more of alcohol by volume, which are beverages, but does not include “fermented malt beverages”. 3
APPENDIX A

Screenshot 1

Do I have to refrigerate Whipped Lightning?
Should I shake the can?
The can stopped spraying and all the Whipahol did not come out.
Would you ever leave your dog in a hot car?
How many calories are in a serving?
If you have any questions about Whipped Lightning send us an email at:

Do I have to refrigerate Whipped Lightning?
No, Whipped Lightning does not need to be refrigerated, ever. As a matter of fact refrigeration will cause the alcohol to separate from the cream and Whipahol will severe rather rapidly. Don’t worry though, refrigeration won’t hurt it. Just let it return to room temperature and all will be fine. Whipahol is infused with grain alcohol and pressurized inside a sterile environment. Although it will not go bad sitting out on a hot summer day we recommend trying to keep it somewhere around 70 degrees.

Should I shake the can?
You should shake Whipped Lightning vigorously before serving. This will help to mix up all the tasty ingredients.

The can stopped spraying and all the Whipahol did not come out.
This is the most common complaint with any whipped cream product. If you spray Whiphahol from the can while the can is pointed up or sideways gas will be wasted. This could result in all of the gas being used up before all the Whiphahol is dispensed from the can. In order to


Screenshot 2

APPENDIX B

Screenshot 1


Screenshot 2

F.A.Q

Find the answers to commonly asked questions about CREAM, the alcohol infused whipped cream.

Q. How Does CREAM work?
A. Unlike other commercial whipped cream products, which are made with liquid nitrogen to achieve a fluffy texture, CREAM is created by whipping air directly into the liquid base. This process creates a light, fluffy texture without the need for liquid nitrogen.

Q. Where can I buy CREAM?

Q. How does CREAM last?
A. CREAM is a perishable product and must be refrigerated to maintain its quality. We recommend storing it in the refrigerator until use.

Q. How strong is CREAM?
A. CREAM is 15% alcohol by volume (30 Proof). CREAM 15% is a balanced blend of alcohol and cream, providing a smooth and satisfying taste.

Q. Is the alcohol in CREAM really whipped cream?
A. The alcohol in CREAM is not added after whipping, but is infused into the cream before the whipping process. This ensures that the alcohol is evenly distributed throughout the cream.

Q. Why is CREAM so expensive?
A. CREAM is a handcrafted product that requires careful attention to detail to ensure the optimal flavor and texture. The high-quality ingredients and labor-intensive process contribute to its higher cost compared to commercial whipped cream.

Q. What is the serving size of CREAM?
A. The serving size of CREAM is approximately 1 cup (8 fluid ounces) per serving. To maintain the proper texture, CREAM should be served immediately after it has been whipped.

Q. Where can I find more information about CREAM?
A. Visit the CREAM website at [http://givemecream.com/whipped/index.php?option=com_content&view=article&id=2&Itemid=2](http://givemecream.com/whipped/index.php?option=com_content&view=article&id=2&Itemid=2) for more information, including FAQs, FAQs, and the latest news about CREAM.

Q. How can I store CREAM?
A. CREAM is best kept in the refrigerator until use. Store it tightly sealed in the original container to maintain its freshness.

Q. How do I use CREAM?
A. CREAM can be used as is, or mixed with other ingredients to create unique and delicious dishes. It is recommended to use CREAM within 2 weeks of purchase to ensure the best quality.

Q. Can I freeze CREAM?
A. Yes, CREAM can be frozen. However, it is recommended to freeze it in its original container to maintain its quality. Thaw it in the refrigerator before use.

Q. What are the ingredients in CREAM?
A. CREAM is made with cream, sugar, and alcohol. The exact ingredients are proprietary and not disclosed to the public.

Q. What is the shelf life of CREAM?
A. CREAM has a shelf life of 2 weeks from the date of purchase. After this period, the quality and flavor may start to deteriorate.

Q. Can CREAM be shipped internationally?
A. CREAM can be shipped internationally, but it is recommended to contact the manufacturer directly for specific shipping information and to ensure the product arrives in good condition.