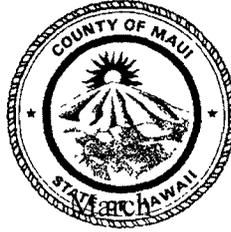


MICHAEL P. VICTORINO  
Mayor

PATRICK K. WONG  
Acting Corporation Counsel

EDWARD S. KUSHI, JR.  
First Deputy

LYDIA A. TODA  
Risk Management Officer  
Tel No (808) 270-7535  
Fax No (808) 270-1761



DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
FACSIMILE: (808) 270-7152

March 22, 2019

**MEMORANDUM**

**T O:** Glenn Mukai,  
Director, Department of Liquor Control

**F R O M:** Gary Y. Murai,   
Deputy Corporation Counsel

**SUBJECT: REQUEST FOR LEGAL OPINION REGARDING WHETHER A  
FROZEN MALT BEVERAGE PRODUCT WITH AN ALCOHOL  
CONTENT OF 8 PER CENT BY VOLUME IS SUBJECT TO  
REGULATION BY THE DEPARTMENT OF LIQUOR**

We respond to your memorandum dated March 6, 2019, regarding the sale of a frozen malt beverage product with an 8% ABV (alcohol by volume).

I. Questions Presented

Specifically, you ask:

A. Whether a product with an 8% ABV sold in frozen form as a popsicle would be regulated?

B. If frozen, is the product a food and not regulated by under the liquor laws of Hawaii?

C. May a product with an 8% ABV be sold in liquid form?

D. Whether there is any size or packaging requirement?

II. Brief answer

Frozen ice pops made from a malt beverage with an alcohol content of 8% ABV are subject to regulation under §281, H.R.S., whether sold in frozen or liquid form.

III. Background

You informed us that the Department of Liquor Control received an email correspondence posing questions regarding the regulation of a malt beverage with an alcohol content of 8% alcohol by volume (ABV) sold in solid form as a popsicle.<sup>1</sup>

We considered the following legal authorities:

A. Chapter 281-1, Hawaii Revised Statutes and Rule §04-101-5 of the Rules of the Liquor Commission each define “liquor” or “intoxicating liquor” as follows:

“Liquor” or “intoxicating liquor” includes alcohol, brandy, whiskey, rum, gin, okolehao, sake, beer, ale, porter, and wine; and also includes, in addition to the foregoing, any spirituous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, in whatever form and of whatever constituency and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use or may be used or readily converted for use for beverage purposes.<sup>2</sup>

B. Chapter 281-2, H.R.S. lists items excepted from §281, H.R.S., and provides in pertinent part as follows:

Excepted articles, penalty. The articles enumerated in this section shall not, after having been manufactured and prepared for market, be subject to this chapter if they correspond with the following descriptions and limitations, namely: “

(1) Denatured alcohol;

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<sup>1</sup> Popsicle is a Unilever brand of ice pop consisting of flavored, colored ice on a stick (unileverusa.com).

<sup>2</sup> See, also, §244D-1, H.R.S., Liquor Tax Law, which provides a definition for liquor by referring to §281-1, H.R.S. and also provides definitions for beer, or “intoxicating liquor,” distilled spirits, draft beer, sparkling wine, still wine, and wine. The definitions are intended for purposes of taxation, and do not conflict with those provided elsewhere in the Hawaii Revised Statutes, or the Rules of the Liquor Commission.

- (2) Medicinal preparations;
- (3) Patented medicines that are unfit for use for beverage purposes
- (4) Toilet, medicinal and antiseptic preparations that are unfit for use for beverage purposes;
- (5) Flavoring extracts and syrups that are unfit for use for beverage purposes;
- (6) Vinegar and preserved sweet cider; and
- (7) A food which is a confectionery and contains alcohol of five per cent or less by weight.

C. Chapter 328-1, H.R.S. defines “food” as:

- (1) Articles used for food or drink by humans, dogs, or cats;
- (2) Chewing gum, or
- (3) Articles used for components of any such article.

D. Chapter 328-6(20), H.R.S. Prohibited acts, prohibits confectioneries containing alcohol as follows:

(20) The sale to a person below the age of twenty-one years of any food which is a confectionery which contains alcohol in excess of one-half of one per cent of alcohol by weight.

#### IV. Analysis

A. Whether a product with an 8% ABV sold in frozen form as a popsicle would be regulated?

Frozen ice pops with an 8% ABV fall within the definition of “liquor” or “intoxicating liquor” as the product may be used or readily converted for use for beverage purposes.<sup>3</sup> Unlike other foods or confectioneries containing alcohol, a frozen product is especially amenable to use or conversion for beverage purposes.

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<sup>3</sup> Chapter 281, H.R.S. and the Rules of the Liquor Commission do not provide a definition of “beverage,” however, §339-1, H.R.S., Litter control, provides a definition of beverage that includes “beer or other malt beverages ... in liquid form intended for human consumption.”

B. If frozen, is the product a food and not regulated by under the liquor laws of Hawaii?

We considered whether frozen ice pops may be considered a food or confectionery product, and if so, whether such a product is subject to regulation. A confectionery may not have an alcohol by weight (ABW) greater than 5%. (§281-2(7), H.R.S.) A product with an ABW of 5% is approximately equivalent to 6.25% ABV.<sup>4</sup> Therefore, even if frozen ice pops may be considered a confectionery or food product, as the 8% ABV of the subject confectionery or food product exceeds 5% ABW, such products would be subject to regulation.

C. May a product with an 8% ABV be sold in liquid form?

A malt beverage product with an 8% ABV sold in liquid form falls within the definition of “liquor” or “intoxicating liquor” found in §281-1, H.R.S. and is not among the exceptions listed in §281-2, H.R.S. Therefore, it would be subject to regulation under Hawaii liquor laws, as it

Chapter 281-2(7), H.R.S. provides that a food which is a confectionery and contains five per cent or less of alcohol by weight (ABW) is an excepted article. After conversion from ABV to ABW, an 8% ABV is approximately equivalent to 6.25% ABW, which exceeds the 5% ABW limit in §281-2(7), H.R.S.<sup>5</sup>

D. Whether there is any size or packaging requirement?

There is no size or packaging requirement based on Hawaii liquor laws or Maui Liquor Commission administrative rules. However, there may be such requirements in Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations, which are beyond the scope of this memorandum.

## V. Conclusion.

We answer question I.A. in the affirmative. We answer question I.B. in the negative. We answer question I.C. in the positive, provided that such product is sold by a seller with the appropriate class of liquor license to persons aged 21 or older. As to question I.D., we are not aware of any applicable size or packaging requirement in Hawaii liquor statutes or Maui liquor rules for the product described herein.

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<sup>4</sup> Values for alcohol by weight may be converted to alcohol by volume by multiplying the ABW by a factor of 1.25. Values for alcohol by volume may be converted to alcohol by weight by multiplying the ABV by a factor of .80. Therefore, 5% alcohol by weight equals approximately 6.25% alcohol by volume.

<sup>5</sup> *Id.*

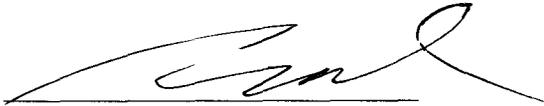
Glenn Mukai  
March 22, 2019

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Please contact me if you have any questions.

GYM/lo

APPROVED FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read 'E. Kushi', written over a horizontal line.

EDWARD S. KUSHI,  
First Deputy Corporation Counsel