



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 use¹ and budgetary shortfalls.² 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 who 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."³ 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.⁴ (*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,⁵ 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.⁶ 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”⁷ or “runny”⁸ 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 alcohol 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 alcohol beverages, specifically considered to be distilled spirits specialty products, and are therefore subject to [regulation by the TTB].”⁹ 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.”¹⁰ Though other language in the ABC law has been interpreted as meaning only alcohol in beverage form can be regulated,¹¹ 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

¹ <http://www.dhs.wisconsin.gov/stats/pdf/title.pdf> (Accessed on January 31, 2011)

² <http://www.jsonline.com/news/statepolitics/109998884.html> (Accessed on January 31, 2011)

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.

⁶ http://en.wikipedia.org/wiki/Whipped_cream#cite_note-GPO-0 & <http://www.foodsci.uoguelph.ca/dairyedu/whcream.html> (Accessed on January 19, 2011)

⁷ See Appendix 1, Screenshot 1.

⁸ See Appendix 2, Screenshot 3.

⁹ http://www.ttb.gov/main_pages/alcohol_infused.shtml (Accessed on January 19, 2011)

¹⁰ Wis. Stat. § 125.01.

¹¹ Wis. Stat. § 125.02. The definitions for alcohol in Wisconsin are in fact limited to beverages.

(1) "Alcohol beverages" means fermented malt beverages and intoxicating liquor.

(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.

* * *

(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".

APPENDIX A

Screenshot 1

FAQ - Mozilla Firefox
http://www.whippedlightning.com/faq.jsp

WHIPPED LIGHTNING®
The world's first alcohol-infused whipped cream

HOME FLAVORS RECIPES FAQ NEWS DOWNLOADS CONTACT

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 serve rather muddy. 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 Whipahol from the can while the can is pointing up or sideways gas will be wasted. This could result in all of the gas being used up before all the Whipahol is dispensed from the can. In order to

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<http://www.whippedlightning.com/faq.jsp> (Accessed on January 26, 2010)

Screenshot 2

WHIPPED LIGHTNING®
The world's first alcohol-infused whipped cream

HOME FLAVORS RECIPES FAQ NEWS DOWNLOADS CONTACT

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 Whipahol from the can while the can is pointing up or sideways gas will be wasted. This could result in all of the gas being used up before all the Whipahol is dispensed from the can. In order to make sure you enjoy every ounce please turn the can completely upside down before spraying.

Would you ever leave your dog in a hot car?
Of course not, and you should never leave a can of Whipped Lightning in a hot car either. Any aerosol product can become over pressurized by the heat in a parked car. This could cause the valve to fail and Whipahol will end up all over your upholstery rather than where it belongs, in your mouth.

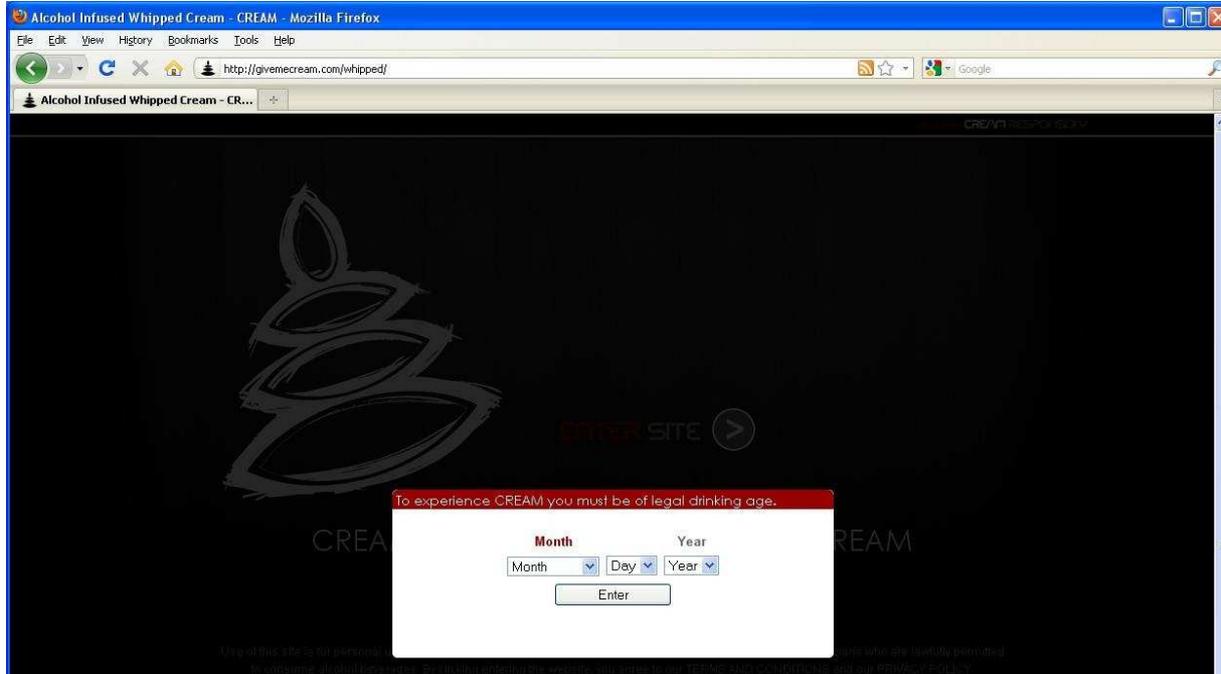
How many calories are in a serving?
We've never had Whipped Lightning tested to determine how many calories are in a serving. Whipahol is not a food product and is not subject to FDA labeling requirements; it is an alcoholic beverage. You should consume Whipahol in moderation, please enjoy it responsibly.

If you have any questions about Whipped Lightning send us an email at:
info@whippedlightning.com

<http://www.whippedlightning.com/faq.jsp> (Accessed on January 26, 2010)

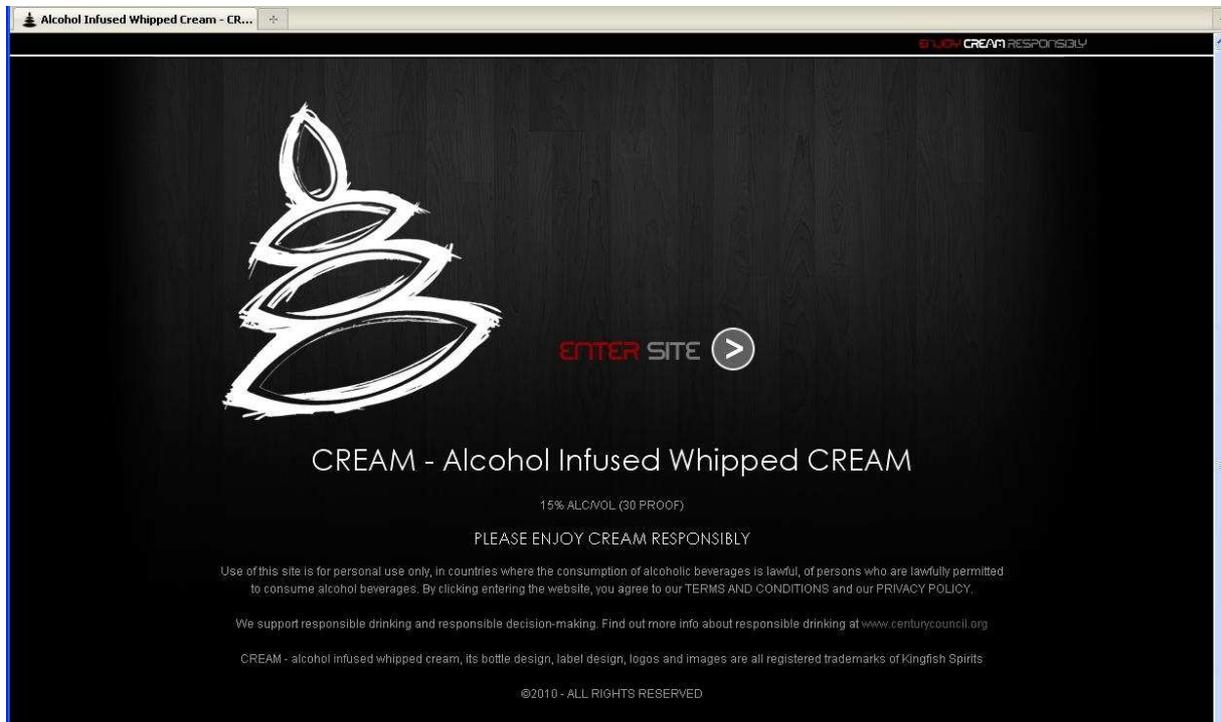
APPENDIX B

Screenshot 1



<http://givemecream.com/whipped/> (Accessed on Accessed on January 26, 2010)

Screenshot 2



<http://givemecream.com/whipped/> (Accessed on Accessed on January 26, 2010)

Screenshot 3

The screenshot shows a Mozilla Firefox browser window displaying the FAQ page for CREAM's Alcohol Infused Whipped Cream. The browser's address bar shows the URL: http://givemecream.com/whipped/index.php?option=com_content&view=article&id=2&Itemid=2. The website header features the CREAM logo, a navigation menu (HOME, PRODUCTS, RECIPES, PHOTOS, VIDEOS, FAQ, LOCATIONS, CONTACT, RETAILERS, NEWS), a search bar, and social media links. The main content area is titled "F.A.Q." and contains several questions and answers regarding the product's use, storage, and availability. A "NEWSLETTER SIGNUP" form is located on the right side, with fields for Username and Password, a "Remember Me" checkbox, and a "LOGIN" button. Below the form are links for "Forgot your password?", "Forgot your username?", and "Create an account". A vertical banner on the right side of the page features the CREAM TEAM logo and a photo of a woman holding a CREAM can, with a "click here to join" button. At the bottom of the page, there are social media links for Facebook and Twitter, and a section for "CREAM ONLINE RETAILERS" with a "Purchase CREAM online" button.

FAQ - Alcohol Infused Whipped Cream - CREAM - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://givemecream.com/whipped/index.php?option=com_content&view=article&id=2&Itemid=2

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CREAM ALCOHOL INFUSED WHIPPED CREAM

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F.A.Q

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

Q. How Does CREAM work?
A. Well, if you have ever used an aerosol whipped cream before, and I'm sure that most of us have...it's the same basic concept. Shake well before each use, and make sure to hold the can completely upside down when dispensing. Always shake vigorously for 30-45 seconds, especially before initial use to remix ingredients. Also, be sure to clean out the nozzle tip with hot water after each use.

Q. Does CREAM have to be kept refrigerated?
A. No, CREAM is a completely shelf-stable product, and should NOT be refrigerated. CREAM can be stored on a shelf with the rest of your booze. Because there is alcohol in CREAM, refrigeration breaks apart the alcohol which may cause CREAM to come out runny. Don't worry though...if this happens, just let CREAM sit at room temperature until its back to normal.

Q. CREAM came out a little runny...Why is this?
A. First, make sure you shake CREAM before each time you use the can, and also that you are holding the can completely upside down when you are dispensing. If CREAM is still coming out a little runny, then it may have been exposed to extreme hot or cold temperatures, and needs to be brought back to room temperature.

Q. How strong is it?
A. CREAM is 15% alcohol by volume (30 Proof). CREAM flavors allow for a smooth and satisfying taste with a little bit of a bite.

Q. There is still some CREAM left in the can...Why won't it dispense?
A. This happens when CREAM is not properly dispensed. Be sure that the can is completely upside down when you are dispensing the product. The nozzle facing down. If cream is not properly dispensed, then the air propellant inside the can escapes without product, causing a little bit of CREAM to be left in the can. Also, be sure to always shake the can before each use.

Q. Where can I find CREAM?
A. Visit the Find CREAM Near You link and you can search for the nearest CREAM retailer.

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CREAM ONLINE RETAILERS

Purchase CREAM online

NEWSLETTER SIGNUP

Username

Password

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- Forgot your username?
- Create an account

CREAM TEAM

click here to join

http://givemecream.com/whipped/index.php?option=com_content&view=article&id=2&Itemid=2
(Accessed on January 26, 2010)