

Draft Document Not For Publication But For Discussion Purposes Only – Nothing contained herein represents a final position or opinion of the State and Local Advisory Council. Readers should neither rely on any information herein nor make any inferences about final interpretations of member states or the Governing Board from the statements contained herein as this is a draft only and may change in response to comments and input from the public or private sector.

State and Local Advisory Council Candy Definition

On August 13, 2009 the Compliance Review and Interpretations Committee (CRIC) determined that an interpretation based on Mr. James Tilton's request RI09012 should be granted. The request for interpretation was assigned to the State and Local Advisory Council (SLAC) for purposes of providing information and a recommendation for a response to the interpretation request. The 60-day public comment period for the request for interpretation of the definition of candy began August 27, 2009.

Question: Are breakfast cereals and breakfast bars whose ingredient labeling does not contain a specific listing for flour "candy" as the term is defined in the Streamlined Sales and Use Tax Agreement?

Breakfast cereals that contain sugar, honey, or other natural or other artificial sweeteners and whose ingredient labeling does not contain a specific listing for flour include: Honey Smacks, Cocoa Krispies, Golden Crisp, Special K, Fruity Pebbles, Kellogg's Raisin Bran, Wheaties, and Cheerios.

Breakfast bars that contain sugar, honey, or other natural or other artificial sweeteners and whose ingredient labeling does not contain a specific listing for flour include: Rice Krispie Treats and Carmel Corn Rice Cakes.

Background

The Streamlined Sales and Use Tax Agreement, Appendix C, Part II, defines "candy" as follows:

"Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. "Candy" shall not include any preparation containing flour and shall require no refrigeration.

Two Interpretative Opinions 2007-03 and 2009-04 of the definition of candy have been approved by the Governing Board prior to this request.

2007-03 adopted September 20, 2007 provides, "A product does not contain flour unless the product label specifically lists "flour" as an ingredient."

2009-04 adopted September 29, 2009 provides, "The definitions in the Agreement are meant to be objective tests to determine the classification of an item and the intent of the user is not relevant. Baking ingredients such as M&M's Baking Bits meet the definition of candy and should be classified as such."

One of the more significant problems in adopting a candy definition was distinguishing between a cookie, which states wanted to continue to treat as food, and candy. In adopting this definition in 2002, states realized that certain products such as Kit Kat, Twix, Reese Sticks, and licorice would no longer be candy under the Agreement definition because these products ingredient labels contains a specific listing for flour. In addition, states were aware that granola bars, Slim-Fast Bars and similar breakfast bars and nutrition bars would be considered candy when the product ingredient labeling did **not** contain a specific listing for flour because they are sold in the form of bars and do not require refrigeration.

Similarly, there are no historical records that demonstrate the work group and member states were looking to define candy based on the percentage of sugar content.

The definition of candy was crafted for the purpose of providing an objective or bright-line test for determining whether food products such as cookies and baking ingredients are included in the subcategory of food and food ingredients as candy or whether they are just in the broader category of food and food ingredients. No member state currently classifies breakfast cereal as candy.

According to interpretative opinion 2009-04 an objective analysis must be made of the application of the definition to determine the classification of an item.

- Many breakfast cereals do contain sugar, honey and other natural and artificial sweeteners. Breakfast cereals that do not contain sugar, honey and other natural and artificial sweeteners are classified as food and food ingredients.
- Breakfast cereals that include sweeteners also include chocolate, fruits, nuts or other ingredients or flavorings in combination with the sweeteners depending on the specific ingredients of a specific brand of breakfast cereal. Some breakfast cereals may even have labeling that lists an ingredient that meets the definition of candy such as for example, milk chocolate morsels, or marshmallows.
- Breakfast cereals do not require refrigeration.
- Breakfast cereals are made of grains (such as wheat, oats, rice, corn, barley, etc.) but not all ingredient labeling for all breakfast cereals include a specific listing for flour when flour may actually be contained in the breakfast cereal. Breakfast cereals that have ingredient labeling that includes a specific listing for flour are not classified as candy pursuant to Interpretative Opinion 2007-03.
- Breakfast cereals are not sold in the form of bars or drops. Many breakfast cereals are a loose mixture of ingredients and it is the combination of the loose mixture of ingredients in such breakfast cereals that make up the breakfast cereal product not the individual ingredient pieces. Other breakfast cereals may be sold in the form of flakes or puffs. Breakfast cereals are not sold in the form of pieces.

Breakfast bars that contain: 1) natural or artificial sweeteners, 2) in combination with chocolate, fruits, nuts or other ingredients or flavorings, 3) that does not require refrigeration, and 4) has ingredient labeling that does not contain a specific listing for flour is classified as candy. The breakfast bars are obviously in the form of bars as specified in the candy definition. Rice Krispie Treats and Carmel Corn Rice Cakes are therefore classified as candy.

The Lightly Salted Rice Cakes included in the interpretation request do not appear, from the ingredient labeling, to contain natural or artificial sweeteners and therefore are not classified as candy but are classified as food and food ingredients.

Proposed Answer:

(1) Breakfast cereals are **not** candy because they are not sold in the form of bars, drops or pieces.

(2) Natural or artificially sweetened breakfast bars, Carmel Corn Rice Cakes, and Rice Krispie Treats that do **not** have ingredient labeling specifying flour and do **not** require refrigeration are candy. These products are sold in the form of bars and meet the objective test in the definition of candy.

(3) Lightly Salted Rice Cakes that do not contain natural or artificial sweeteners according to the ingredient labeling are food and food ingredients and are not classified as candy.