

A motion by Wisconsin & Minnesota to adopt a rule relating to the definition of Food & Food Ingredients and Candy

Rule 327.6 Food and Food Ingredients Definitions

“Food and food ingredients” is defined in Part II of the Library of Definitions, along with definitions of “candy,” “dietary supplements,” “soft drinks,” “bottled water,” and “prepared food,” which are categories of products that a member state may choose to exclude from the definition of “food and food ingredients.”

“Candy,” “dietary supplements,” “soft drinks,” and “bottled water” are intended to be mutually exclusive of each other.

Rule 327.6.1 Candy Definition

- A. “Candy” is defined in Part II of the Library of Definitions to mean 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.

This definition is intended to be used when a person is trying to determine if a product that is commonly thought of as “candy” is in fact “candy.” For example, the definition would be applied in a situation where a person is trying to determine if a product is “candy” as opposed to a cookie. The definition is not intended to be applied to every type of food product sold. Many products, such as meat products, breakfast cereals, potato chips, and canned fruits and vegetables are not commonly thought of as “candy.” The candy definition is not applicable to products such as these since they are not commonly thought of as candy.

Each member state shall follow the classification of products as indicated in Appendix 1. If a specific product is not included in the list in Appendix 1, member states shall use the list as guidance in classifying products.

- 1) **Preparation.** Candy must be a “preparation” that contains certain ingredients, other than flour. A “preparation” is a product that is made by means of heating, coloring, molding, or otherwise processing any of the ingredients listed in the candy definition. For example, reducing maple syrup into pieces and adding coloring to make maple candy is a form of preparation.
- 2) **Bars, drops or pieces.** Candy must be sold in the form of bars, drop, or pieces.
 - a) A “bar” is a product that is sold in the form of a square, oblong, or similar form.

Example – Company A sells one pound square blocks of chocolate. The blocks of chocolate are “bars.”

- b) A “drop” is a product that is sold in a round, oval, pear-shaped, or similar form.

Example – Company B sells chocolate chips in a bag. Each individual chocolate chip contains all of the ingredients indicated on the label. The chocolate chips are “drops.”

- c) A “piece” is a portion that has the same make-up as the product as a whole. Individual ingredients and loose mixtures of items that make-up the product as a whole are not pieces. Exception: If a loose mixture of different items that make up the product as a whole are all individually considered candy and are sold as one product, that product is also candy.

Example 1 – Company C sells jellybeans in a bag. Each jellybean is made up of the ingredients indicated on the label. Each jellybean is a “piece” or “drop.”

Example 2 – Company D sells trail mix in a bag. The product being sold (e.g., trail mix), is made up of a mixture of carob chips, peanuts, raisins, and sunflower seeds. The individual items that make-up the trail mix are not “pieces,” but instead are the ingredients, which when combined, make up the trail mix. Therefore, the trail mix is not sold in the form of bars, drops, or pieces.

Example 3 – Company E sells a product called “candy lover’s mix.” “Candy lovers mix” is a product that is made up of a loose mixture of jellybeans, toffee, and caramels. Individually, the jellybeans, toffee, and caramels are all candy. The sale of the mixture is the sale of candy since all of the individual items that make up the product are individually considered to be candy.

- 3) **Flour.** The term “flour” means a ground powdery substance made from a grain. Grains include wheat, oats, rice, corn, barley, rye, sorghum, and millet. For purposes of the definition of candy, “flour” does not include a product that can be called “flour” under the Food and Drug Administration’s food labeling standards if the product is not grain based. If only the word “flour” is listed on the product label, it is assumed that the product contains grain based flour. However, if the word “flour” on the label is preceded by a modifier used to describe the product the “flour” was made from and the modifier is not a type of grain, then the product is not considered to contain “flour” for purposes of the definition of candy. For example, flour substitutes or products that are not made from grain but which are finely milled so that they meet the Food and Drug Administration’s definition of “flour,” such as “peanut flour” or “cocoa flour” are not “flour” for purposes of this definition.

Many products that are commonly thought of as “candy” contain flour, as indicated on the ingredient label and therefore are specifically excluded from the definition of “candy.” Ingredient labels must be examined to determine which products contain flour and which products do not contain flour. For example, a Twix® bar that contains flour is excluded from the definition of “candy.” See Appendix 1 for a list of other products and whether or not they meet the definition of “candy.”

Example 1 – The ingredient list for a breakfast bar lists “flour” as one of the ingredients. This breakfast bar is not “candy” since it contains flour.

Example 2 – The ingredient list for a breakfast bar lists “whole grain” and “peanut flour.” This breakfast bar is candy because it does not contain grain based flour since a peanut is not a grain.

Example 3 – Company E sells a box of chocolates that are not individually wrapped. The ingredient list on the label for the box of chocolates identifies flour as one of the ingredients. The box of chocolates is not candy since flour is identified as one of the ingredients on the label.

Example 4 – Company F sells a box of chocolates that are not individually wrapped. The ingredient list on the label for the box of chocolates does not identify flour as one of the ingredients. The box of chocolates is candy.

- 4) **Other ingredients or flavorings.** “Other ingredients or flavoring” as used in this definition means other ingredients or flavorings that are similar to chocolate, fruits or nuts. This phrase includes candy coatings such as carob, vanilla and yogurt, flavorings or extracts such as vanilla, maple, mint, and almond, and seeds and other items similar to the classes of ingredients or flavorings. This phrase does not include meats, spices, seasonings such as barbeque or cheddar flavor, or herbs which are not similar to the classes of ingredients or flavorings associated with chocolate, fruits, or nuts, unless the product otherwise meets the definition of “candy.”

Example 1 – Retailer A sells barbeque flavored peanuts. Sweetened and flavored or coated nuts are commonly thought of as candy. The ingredient label for the barbeque flavored peanuts indicates that the product contains peanuts, sugar and various other ingredients, including barbeque flavoring. The barbecue flavored peanuts contain a sweetener and nuts. The label indicates they do not contain flour or require refrigeration. The barbeque peanuts meet the definition of “candy.”

Example 2 – Retailer B sells barbeque potato chips. Potato chips are potatoes, a vegetable, and are not commonly thought of as candy. The barbeque potato chips are food and food ingredients and not candy. The fact that the ingredient label for the barbeque potato chips indicates that the product contains barbeque seasoning which

contains a sweetener does not change the fact that the barbeque potato chips are not commonly thought of as candy.

- 5) **Sweeteners.** The term “natural or artificial sweeteners” is an ingredient of a food product that adds a sugary sweetness to the taste of the food product and includes, but is not limited to, corn syrup, dextrose, invert sugar, sucrose, fructose, sucralose, saccharin, aspartame, stevia, fruit juice concentrates, molasses, evaporated cane juice, rice syrup, barley malt, honey, maltitol, agave, and artificial sweeteners.
- 6) **Refrigeration.** A product that otherwise meets the definition of “candy” is not “candy” if it requires refrigeration. A product “requires refrigeration” if it must be refrigerated at the time of sale or after being opened. In order for a product to be treated as requiring refrigeration, the product label must indicate that refrigeration is required. If the label on a product that contains multiple servings indicates that it “requires refrigeration,” smaller size packages of the same product are also considered to “require refrigeration.” A product that otherwise meets the definition of “candy” is “candy” if the product is **not required** to be refrigerated, but is sold refrigerated for the convenience or preference of the customer, retailer, or manufacturer.

Example 1 – Company A sells sweetened fruit snacks in a bag that contain multiple servings. The label on the bag indicates that after opening, the sweetened fruit snacks must be refrigerated. The sweetened fruit snacks “require refrigeration.”

Example 2 – Company A sells sweetened fruit snacks in single serving containers. Other than for packaging, the sweetened fruit snacks are identical to the sweetened fruit snacks in Example 1 above. However, since this container of sweetened fruit snacks only contains one serving, it is presumed that it will be used immediately, and the label does not indicate that after opening, the product must be refrigerated. Even though the label does not contain the statement that after opening the sweetened fruit snacks must be refrigerated, these sweetened fruit snacks are considered to “require refrigeration.”

Example 3 – Company A sells chocolate truffles. The label on the truffles indicates to keep the product cool and dry, but does not indicate that the product must be refrigerated. Since the chocolate truffles are not required to be refrigerated, even though the label indicates to keep them cool, the chocolate truffles do not “require refrigeration” and therefore are still considered “candy.”

- B. **Bundled transactions.** “Bundled transaction” is defined in Part I of the Library of Definitions as the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable and (2) the products are sold for one non-itemized price.

- 1) Products that are a combination of items that are defined as “candy” and items that are defined as “food and food ingredients” are “bundled transactions” when the items are

distinct and identifiable and are sold for one non-itemized price. For example, a bag of multiple types of individually wrapped bars that is sold for one price is two or more distinct and identifiable products sold for one nonitemized price. For purposes of determining whether such a bag of individually wrapped bars is a “bundled transaction” the following rules apply:

- a) 1. If a package contains individually wrapped bars, drops, or pieces and the product label on the package separately lists the ingredients for each type of bar, drop, or piece included in the package, those bars, drops, or pieces that have “flour” listed as an ingredient are “food and food ingredients” and those bars, drops, or pieces which do not have “flour” listed as an ingredient are “candy.” The determination of whether the product as a whole meets the definition of a bundled transaction is based on the percentage of bars, drops, or pieces that meet the definition of “food and food ingredient” as compared to the percentage of bars, drops, or pieces that meet the definition of “candy.”
2. For purposes of determining the percentage of the sales price or purchase price of the bars, drops, or pieces that meet the definition of “candy” as compared to all of the bars, drops, or pieces contained in the package, the retailer may presume that each bar, drop, or piece contained in the package has the same value.
3. A retailer may presume that there is an equal number of each type of product contained in the package, unless the package clearly indicates otherwise.

Example 1: Retailer A sells a package that contains 100 total pieces of food and food ingredients. There are 10 different types of foods and food ingredients in the package. Eight of the types of food and food ingredients included in the package meet the definition of “candy,” while two of the types included do not meet the definition of “candy.” It is a reasonable presumption that 20 (2/10 times 100) of the pieces are not “candy” and 80 (8/10 times 100) of the pieces are “candy.” Therefore, since 80 percent of the product is “candy,” the retailer shall treat the entire package as a sale of “candy.”

Example 2: Retailer B sells bulk food and food ingredients by the pound. Some of the food and food ingredients are “candy” and some of them are not because they contain flour. However, regardless of the items chosen, the retailer charges the customer \$3.49/lb. Customer C selects the food and food ingredients he wants and puts them in a bag. If any of the items in the bag are “candy,” the retailer shall treat the entire package as the sale of “candy,” unless the retailer is able to ascertain that less than 50 percent of the items in the bag are “candy.”

- b) If a package contains individually wrapped bars, drops, or pieces and all of the ingredients for each of the products included in the packages are listed together, as opposed to being listed separately by each product included as explained in a., above, and even if the ingredient lists “flour” as an ingredient, the product will be treated as “candy,” unless the retailer is able to ascertain that 50% or less of the products are “candy.”
1. The retailer may presume that each bar, drop, or piece contained in the package has the same value.
 2. The retailer may presume that there is an equal number of each type of product contained in the package, unless the package clearly indicates otherwise.
- 2) Products whose ingredients are a combination of various unwrapped food ingredients that alone are not candy, along with unwrapped food ingredients that alone are “candy,” such as breakfast cereal and trail mix with candy pieces, are considered “food and food ingredients,” but not “candy.” Sales of these products are not “bundled transactions” as that term is defined in Part I of the Library of Definitions, because there are not two or more distinct and identifiable products being sold. The combination of the ingredients results in a single product. Examples of combination products are included in the list in Appendix 1.