

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

IN RE:

DECLARATORY STATEMENT ON BEHALF
OF FAT TUESDAY/NEW ORLEANS ORIGINAL
DAIQUIRIS,

DABT CASE NO.: 2019-023763
DS 2019-030

Petitioner.

DS 2019-030

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division"), pursuant to Rule 28-105.003, Florida Administrative Code ("F.A.C."), enters this Final Order on the Petition for Declaratory Statement on behalf of Fat Tuesday/New Orleans Original Daiquiris ("Petitioner").

1. The Division is the state agency charged with the administration and enforcement of chapters 561-565 and 567-568, Florida Statutes, commonly referred to as the "Beverage Law." Pursuant to the Beverage Law, the Division supervises the conduct, management and operation of the manufacturing, packaging, distribution, and sale of alcoholic beverages within the state. *See* § 561.02, Fla. Stat.

2. Fat Tuesday/New Orleans Original Daiquiris, is a foreign limited liability corporation authorized to do business in Florida, and its principal address is 1115 N. Causeway Boulevard, Suite 200, Mandeville, Louisiana 70471.

ISSUE PRESENTED

3. Petitioner, pursuant to Rule 28-105, F.A.C., seeks a declaratory statement on four separate inquiries. In particular, Petitioner seeks (1) a broad interpretation of the phrase "for

consumption on or off the premises where sold” as used in section 565.045(1), Florida Statutes; (2) an interpretation of the word “sealed” as used in section 565.045(1), Florida Statutes; (3) a determination on whether Petitioner’s proposed business model to sell frozen daiquiris by the drink for consumption off the premises where sold would be in compliance with section 565.045(1), Florida Statutes, and (4) a determination on whether certain proposed containers, described in the Petition, would satisfy the Division’s interpretation of the “sealed containers” requirement of section 565.045(1), Florida Statutes.

FINDINGS OF FACT

4. On or about May 6, 2019, Petitioner submitted to the Division a petition (“Petition”) requesting that the Division provide a declaratory statement. A copy of the Petition is attached hereto and incorporated by reference as **Exhibit A**.

5. According to the Petition, Petitioner engages in the retail sale of spirituous beverages as defined by the Beverage Law. The Petition identifies multiple issues and presents Petitioner’s preferred interpretation of the Beverage Law regarding each issue. The Petition reads, in pertinent part:

Petitioner operates locations throughout Florida at which it sells to customers, among other items, frozen daiquiris pursuant to valid licenses issued by the Department under [section] 565.02(1)(b)-(f)[, Florida Statutes]. At each such location, Petitioner provides seats for the use of their customers. The subject of this Petition centers on the interpretation of the second sentence of [section] 565.045(1)[, Florida Statutes]. Specifically, Petitioner seeks to sell frozen daiquiris to its customers on its premises which the customer may then take off the premises for consumption.

...

Four declaratory statements are requested:

First, the proper interpretation of [section] 565.045(1)[, Florida Statutes] is that a licensed vendor may sell alcoholic beverages:

- a. by the drink for consumption on or off the premises where sold, *or*
- b. in sealed containers for consumption on or off the premises where sold.

Second, the meaning of “sealed” under [section] 565.045(1)[, Florida Statutes] shall mean:

“to fasten with or as if with a seal to prevent tampering; to close or make secure against access, leakage, or passage by a fastening or coating.”

Third, based on the foregoing, Petitioner, as a licensed vendor under [section] 565.02(1)(b)-(f)[, Florida Statutes], would be in compliance with [section] 565.045(1)[, Florida Statutes] if it were to sell frozen daiquiris at its Florida locations *either*:

- a. by the drink for consumption on or off the premises where sold; *or*
- b. in sealed containers for consumption on or off the premises where sold.

Finally, while Petitioner believes [section] 565.045(1)[, Florida Statutes] allows it to sell its frozen daiquiris “by the drink” for consumption off the premises *without affixing a seal*, Petitioner also recognizes that its customers must comply with the “open container” provisions of Florida law. To enable its customers to do so, Petitioner seeks confirmation that the following would satisfy the Department’s interpretation of the “sealed” requirement within [section] 565.045(1)(b)[, Florida Statutes]:

- a. A plastic covering attached to the container by the application of heat so as to cover the open top of the container, such plastic covering containing no perforations or openings, which the customer must cut, puncture or break in order to access and consume the alcoholic beverage;
- b. A plastic bag into which the alcoholic beverage is placed, such plastic bag sealed by the application of heat and which the customer must cut, puncture or break in order to access and consume the alcoholic beverage (as is often utilized as a means of satisfying section 564.09); and/or
- c. A plastic lid affixed to the container without an opening for a straw but which contains perforations into which the customer may insert a straw thereby breaking the seal

of the lid.

6. On or about May 14, 2019, the Division published notice of its receipt of the Petition in Volume 45, Number 95 of the Florida Administrative Register (“F.A.R.”). On May 15, 2019, the Division published an amended notice of its receipt of the Petition in Volume 45, Number 97 of the F.A.R, correcting a scrivener’s error.

7. The F.A.C. provides that any motions for leave to intervene were required to be filed within twenty-one (21) days after the amended notice was published. *See* Rule 28-105.0027, F.A.C. The Division received no motions seeking leave to intervene within the twenty-one day time period.

8. The conclusions of this Final Order are based on the facts described in the Petition and the particular factual assertions described therein. All of the facts presented in the Petition were duly considered and form the basis of this Order. For the following reasons, Petitioner’s request for a declaratory statement is granted in part and denied in part and answered as set forth below.

CONCLUSIONS OF LAW

9. The Division has jurisdiction over this matter pursuant to sections 120.565 and 561.02, Florida Statutes, as the state agency responsible for the administration, regulation, and enforcement of the Beverage Law. Petitioner’s first and second inquiries seek statements of general applicability interpreting a provision of the Beverage Law.

10. “Declaratory statement proceedings are not appropriate when the result is an agency statement of general applicability interpreting law or policy.” *Mental Health Dist. Bd., II B v. Fla. Dep’t of Health & Rehab. Servs.*, 425 So. 2d 160, 162 (Fla. 1st DCA 1983); *see also Fla. Dep’t of Bus. & Prof’l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm*

Beach, 747 So. 2d 374, 376 (Fla. 1999).

11. The authority of the Division to issue declaratory statements is limited by section 120.565, Florida Statutes, to a determination “as to the applicability of a statutory provision . . . to the petitioner’s particular set of circumstances.” *Lennar Homes, Inc. v. Dep’t of Bus. & Prof’l Regulation, Div. of Fla. Land Sales, Condominiums & Mobile Homes*, 888 So. 2d 50, 53 (Fla. 1st DCA 2004); *see also* rule 28-105.001, F.A.C. (“A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner’s particular circumstances.”).

12. Petitioner’s first and second inquiries seek statements of general applicability. Such statements would be inappropriate within the declaratory statement context, and Petitioner’s requests for a declaratory statement on its first and second inquiries are hereby denied. Accordingly, the Division will only address Petitioner’s third and fourth inquiries which relate to Petitioner’s particular set of circumstances.

13. Petitioner’s third inquiry asks if Petitioner would be in compliance with section 565.045(1), Florida Statutes, if it were to sell frozen daiquiris at its Florida locations **either**:

- a. by the drink for consumption on or off the premises where sold; **or**
- b. in sealed containers for consumption on or off premises where sold.

14. As a vendor licensed under section 565.02(1)(b)-(f), Florida Statutes, Petitioner may operate a place of business “where consumption on the premises is permitted.” § 565.02(1), Fla. Stat.

15. At issue in the Petition is section 565.045(1), Florida Statutes, which provides:

- (1) Vendors licensed under s. 565.02(1)(b)-(f) shall provide seats for the use of their customers. Such vendors may sell alcoholic beverages *by the drink or in sealed*

containers for consumption on or off the premises where sold.

§ 565.045(1), Fla. Stat. (emphasis added).

16. Because vendors licensed under section 565.02(1)(b)-(f), Florida Statutes, operate places of business which permit “consumption on the premises,” the Division interprets section 565.045(1), Florida Statutes, to describe the two methods in which such vendors may sell alcoholic beverages as (1) “by the drink” or (2) “in sealed containers for consumption on or off the premises where sold.” *Id.* In other words, the phrase “for consumption on or off the premises where sold” in section 565.045(1), Florida Statutes, only applies to “sealed containers.” *Id.* It does not apply to beverages sold “by the drink.”

17. As support for this interpretation, the original version of section 565.045(1) provided, “Vendors licensed under Section 5, subsections IV, V, VI, VII, or VII ½, shall provide seats for the use of their customers. Such vendors may sell the beverages herein defined by the drink or in containers for consumption on or off the premises where sold, but when such beverages are sold by the drink or for consumption on the premises where sold, they shall be sold only to customers who shall consume such beverage while seated.” *City of Tampa v. Columbia Rest.*, 194 So. 319, 320 (1940) (quoting s. 11, ch. 16774, Acts of 1935). This original language, which distinguishes between beverages that are sold “by the drink *or* for consumption on the premises where sold,” supports the Division’s interpretation that the current, longstanding phrase “for consumption on or off the premises where sold” only applies to “containers” and not to “drinks.”

18. Restricting the phrase “for consumption on or off the premises where sold” in section 565.045(1), Florida Statutes, to “sealed containers” makes additional sense when read in conjunction with the types of licenses available to different vendors under section 565.02(1),

Florida Statutes. As noted above, vendors licensed under section 565.02(1)(b)-(f), Florida Statutes, such as Petitioner, operate places of business which permit “consumption on the premises.” § 565.02(1)(b)-(f), Fla. Stat. A different license, however, is available under section 565.02(1)(a), Florida Statutes, for a vendor operating a place of business “where beverages are sold only in sealed containers for consumption off the premises where sold.” § 565.02(1)(a), Fla. Stat. Read in conjunction, the more limited license under section 565.02(1)(a), Florida Statutes, to sell beverages “only in sealed containers for consumption off the premises where sold” is appropriately juxtaposed with the more expansive license under section 565.02(1)(b)-(f), Florida Statutes, to sell beverages “in sealed containers for consumption on or off the premises where sold,” pursuant to section 565.045(1). Fla. Stat. § 565.045(1). The latter, more expansive license accounts for the possibility that “consumption on the premises” can include the on-premises consumption of beverages sold in sealed containers, in addition to the on-premises consumption of beverages sold as drinks. With respect to off-premises consumption, however, these statutory provisions contemplate only such consumption in relation to the sale of sealed containers.

19. Other provisions of the Beverage Law support this general interpretation that off-premises consumption only applies to the sale of “sealed containers.” For example, the Beverage Law makes it unlawful for any person to consume any intoxicating liquor at curb or drive-in stands, except within the building of the licensee. § 562.453, Fla. Stat. Elsewhere, the Beverage Law carves out an exception for the off-premises consumption of unsealed wine bottles sold by restaurants. *See* § 564.09, Fla. Stat. (restaurants may permit a patron to remove one unsealed bottle of wine for consumption off the premises, if certain conditions are met). In 2015, the Legislature added an exception to the Beverage Law for vendors to package malt beverages in

growlers (or refill them) at the point of sale, for consumption on or off the premises where sold. § 563.06(6)-(7), Fla. Stat.; Ch. 2015-12, Laws of Florida. These exceptions would be unnecessary and superfluous under the alternative interpretation, favored by Petitioner, that unsealed drinks may be sold for consumption off the premises.

20. The principles of statutory construction require that statutes be given a reasonable interpretation. *Drost v. State Dep't of Env'tl. Regulation*, 559 So. 2d 1154, 1156 (Fla. 3d DCA 1989). Therefore, the Division must construe and interpret the provisions of the Beverage Law and apply said provisions to a stated set of facts in a reasonable manner consistent with the purpose, intent, and spirit of the statutory provisions in order to avoid an absurd, arbitrary, or unreasonable result. *See Fletcher v. Fletcher*, 573 So. 2d 941 (Fla. 1st DCA 1991).

21. For these reasons, drinks poured, mixed, blended, or otherwise offered for sale in any manner other than in a sealed container cannot be sold for consumption off the licensed premises. Thus, Petitioner may not sell frozen daiquiris by the drink for consumption off the premises where sold. *See J. J. Zazz, Inc., v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, Case No. 85-3561RX, (DOAH Jan. 23, 1986) ("There is no statutory authorization for a COP licensee to sell mixed drinks of any size for consumption off the premises; rather, the beverage laws clearly prohibit such a sale.").

22. Petitioner's fourth inquiry asks whether any of Petitioner's three (3) proposed containers would satisfy the Division's interpretation of the "sealed" requirement for containers sold pursuant to section 565.045(1), Florida Statutes.¹ (Petition pg. 4).

¹ Petitioner specifically requests confirmation that the proposed containers would satisfy the Division's "interpretation of the 'sealed' requirement within §565.045(1)(b)." As section 565.045(1)(b), Florida Statutes, does not exist, the Division is responding to Petitioner's inquiry by providing the requested interpretation substituting section 565.045(1), Florida Statutes.

23. The Division interprets the word “sealed,” as used in the Beverage Law, to mean containers sealed by the original manufacturers. *J. J. Zazz*, at *2, *4. Thus, an alcoholic beverage topped with a plastic lid or placed in a heat sealed bag by a vendor licensed under the Beverage Law does not meet the requirement of “sealed” as used in section 565.045, Florida Statutes.

24. According to the Petition, Petitioner is licensed as a vendor under section 565.02(1)(b)-(f), Florida Statutes. Petitioner is not licensed as a manufacturer under the Beverage Law. *See generally* § 561.14, Fla. Stat. (describing Florida’s tiered classification system).

25. Petitioner’s first proposed container is described as:

A plastic covering attached to the container by the application of heat so as to cover the open top of the container, such plastic covering containing no perforations or openings, which the customer must cut, puncture or break in order to access and consume the alcoholic beverage;

26. This proposed container would not satisfy the “sealed” requirement of section 565.045(1), Florida Statutes, as the proposed container does not appear to have been sealed by a manufacturer of alcoholic beverages, licensed under the Beverage Law.

27. Petitioner’s second proposed container is described as:

A plastic bag into which the alcoholic beverage is placed, such plastic bag sealed by the application of heat and which the customer must cut, puncture or break in order to access and consume the alcoholic beverage (as is often utilized as a means of satisfying section 564.09);

28. This proposed container would not satisfy the “sealed” requirement of section 565.045(1), Florida Statutes, as the proposed container does not appear to have been sealed by a manufacturer of alcoholic beverages, licensed under the Beverage Law.

29. Petitioner's third proposed container is described as:

A plastic lid affixed to the container without an opening for a straw but which contains perforations into which the customer may insert a straw thereby breaking the seal of the lid.

30. This proposed container would not satisfy the "sealed" requirement of section 565.045(1), Florida Statutes, as the proposed container does not appear to have been sealed by a manufacturer of alcoholic beverages, licensed under the Beverage Law.

31. Accordingly, none of Petitioner's three (3) proposed containers would satisfy the Division's interpretation of the "sealed" requirement for containers sold pursuant to section 565.045(1), Florida Statutes.

32. Finally, Petitioner raises the issue of whether its customers would be in compliance with the "open container" provisions of Florida Law:

[W]hile Petitioner believes [section] 565.045(1)[, Florida Statutes,] allows it to sell its frozen daiquiris "by the drink" for consumption off the premises *without affixing a seal*, Petitioner also recognizes that its customers must comply with the "open container" provisions of Florida law.

33. This issue is not appropriate for a declaratory statement by the Division.

34. Section 120.565(1), Florida Statutes, provides:

Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a *statutory provision, or of any rule or order of the agency*, as it applies to the petitioner's particular set of circumstances.

(emphasis added). In other words, declaratory statements are means for answering questions concerning the applicability of statutory provisions over which the agency has authority. Rule 28-105.001, F.A.C.

35. In the Petition, Petitioner discusses the definition of "open container" as defined in section 316.1936(1)(a), Florida Statutes. (Petition pg. 3).


36. Chapter 316, Florida Statutes, is not within the Beverage Law and does not deal with any aspect of the manufacturing, distribution, or sale of alcoholic beverages subject to the supervision of the Division. Rather, Chapter 316 is known as the "Florida Uniform Traffic Control Law." § 316.001, Fla. Stat. It is not within the regulatory sphere of the Division, therefore Petitioner's reference to Chapter 316, Florida Statutes, is not an appropriate topic for a declaratory statement by the Division. Thus, the Division declines to interpret section 316.1936(1)(a), Florida Statutes.

CONCLUSION

Having considered the facts and circumstances set forth in the Petition, it is ORDERED that the Division hereby GRANTS IN PART and DENIES IN PART Petitioner Fat Tuesday/New Orleans Original Daiquiri's Petition for Declaratory Statement, and answers Petitioner's inquiries as set forth above. This conclusion is based on the facts described in the Petition. Accordingly, this conclusion has no application in the event that the factual circumstances described herein are incorrect or change. This conclusion relies on the application of the provisions of the Beverage Law in effect as of the date of this Order, and may not apply in the future if provisions of the Beverage Law pertinent to this conclusion are modified.

DONE and ORDERED in Tallahassee, Florida this 13th day of August, 2019.




R. Sterling Whisenhunt, Director
Division of Alcoholic Beverages & Tobacco

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify that the preceding FINAL ORDER has been provided via U.S. Mail to the following party on this 14th day of August, 2019:

Colin Roopnarine
Berger Singerman
313 N Monroe St, Ste 301
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(850) 521-6720
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RONDA BRYAN, AGENCY CLERK
Department of Business & Professional Regulation

Copies furnished to:

R. Sterling Whisenhunt, Director
Ray Treadwell, General Counsel
Beth A. Miller, Chief Attorney

FILED	
Department of Business and Professional Regulation	
Senior Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/6/2019
File #	

PETITION FOR DECLARATORY STATEMENT

BEFORE THE

FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

Fat Tuesday/New Orleans Original Daiquiris (the "Petitioner"), pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, hereby petitions the Florida Department of Business and Professional Regulation (the "Department") to issue a declaratory statement on the matter set forth below.

1. Petitioner's Name, Address and Other Contact Information

DS 2019-030

Name: Fat Tuesday/New Orleans Original Daiquiris
 Address: 1115 N. Causeway Blvd., Suite 200, Mandeville, LA 70471
 Telephone Number: (702) 326-7220
 Email Address: jvitrano@fat-tuesday.com

2. Petitioner's Counsel's Name, Address and Other Contact Information

Name: Berger Singerman LLP, Attention: Dawn M. Meyers
 Address: 350 East Las Olas Blvd., Suite 1000, Fort Lauderdale, FL 33301
 Telephone Number: (954) 712-5147
 Email Address: dmeyers@bergersingerman.com

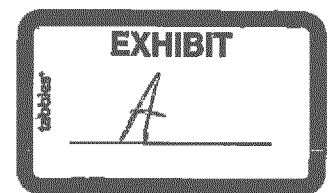
3. The Statutory Provision, Agency Rule, or Agency Order on Which the Declaratory Statement is Sought

Section 565.045(1) states:

(1) Vendors licensed under s. 565.02(1)(b)-(f) shall provide seats for the use of their customers. Such vendors may sell alcoholic beverages by the drink or in sealed containers for consumption on or off the premises where sold.

4. A Description of How the Statute, Rule, or Order May Substantially Affect the Petitioner in the Petitioner's Particular Set of Circumstances

Petitioner operates locations throughout Florida at which it sells to customers, among other items, frozen daiquiris pursuant to valid licenses issued by the Department under §565.02(1)(b)-(f). At each such location, Petitioner provides seats for the use of their customers. The subject of this Petition centers on the interpretation of the second sentence of §565.045(1). Specifically, Petitioner seeks to sell frozen daiquiris to its customers on its premises which the customer may then take off the premises for consumption.



The plain meaning of the second sentence of §565.045(1), including the lack of any punctuation, allows a licensed vendor to sell alcoholic beverages (such as a frozen daiquiri):

- a. by the drink for consumption on or off the premises where sold, *or*
- b. in a sealed container for consumption on or off the premises where sold.

However, after consultation with representatives of the Department, Petitioner has been advised that the Department applies §565.045(1) as if it prohibited licensed vendors from selling alcoholic beverages by the drink for consumption off the premises. Further, Petitioner has been advised by representatives of the Department that the Department interprets §565.045(1) as only permitting a licensed vendor to sell alcoholic beverages for consumption off the premises in a sealed container. The Florida Statutes, as well as the Florida Administrative Code are devoid of a definition of "sealed," and the Department was unable to offer any guidance as to what it considers to be a "sealed" container.

By way of illustration, we offer the following references:

- A. DBPR Rule 61A-1.006(3) provides, in relevant part, that package stores can sell alcoholic beverages "in the original sealed containers." By contrast, the Legislature in §565.045(1) only says "sealed" so the Legislature must not have meant that the seal for purposes of §565.045(1) has to be the "original" seal.
- B. §565.03(2)(c) provides, in relevant part, that craft distilleries can sell branded products distilled on its premises "in factory-sealed containers." By contrast, the Legislature in §565.045(1) only says "sealed" so the Legislature must not have meant that the seal has to be a "factory" seal for purposes of §565.045(1).
- C. §564.09 which deals with wine provides that a bottle of wine ordered in a restaurant but not finished can be taken off premises if it is "securely resealed" and "placed in a bag or other container that is secured in such a manner that it is visibly apparent if the container has been subsequently opened or tampered with." Again, no such guidance or limitations were provided in §565.045(1).
- D. Section 562.452 prohibits the practice of "curb service" as a means of selling alcoholic beverages by the drink. There is, however, no formal definition of "curb service" although some secondary sources describe "curb service" to mean sales to individuals in parked cars and, as such, would not seem to prohibit the sales proposed by Petitioner.
- E. The Division of Administrative Hearings appears to have taken up the issue of the Department's interpretation of "sealed" only once in the case of *J.J. Zazz, Inc. v. Department of Business and Professional Regulation*, 1986 WL 401540. However, this opinion is not relevant to this Petition as it interpreted Rule 7A-1.08 which no longer exists. Interestingly, the now-defunct Rule 7A-1.08 included the phrase "... original sealed containers as received from the distributor ..." No such guiding language presently exists in either the Florida Statutes or the Florida Administrative Code.

- F. We turned to the “open container” criminal provisions for guidance as to what is considered “open.” “Open container” is defined in §316.1936(1)(a) as “any container of alcoholic beverage which is immediately capable of being consumed from, or the seal of which has been broken.” An alcoholic beverage in a container with a seal, therefore, would not violate the “open container” laws.
- G. Absent any guidance in the Florida Statutes or Florida Administrative Code, we sought guidance as to the plain meaning of the word “sealed” from the Merriam-Webster Dictionary which defines it to mean “to fasten with or as if with a seal to prevent tampering; to close or make secure against access, leakage, or passage by a fastening or coating.”

5. Legal Analysis

First, we must determine the proper interpretation of the second sentence of §565.045(1). Florida courts have established that:

“[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated.”

State v. Bodden, 877 So. 2d 680,685 (Fla. 2004) (quoting *Fla. State Racing Comm’n v. Bourquardez*, 42 So. 2d 87,88 (Fla. 1949)). The word “or” is defined as “a function word to indicate an alternative.” Merriam-Webster Dictionary. Courts have also defined “or” this way for purposes of statutory construction. For example, in *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986), the court stated that “the word ‘or’ is generally construed in the disjunctive when used in a statute or rule. The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended.” *Id.* at 895 (citations omitted). “Alternative” is defined as “one or the other of two things; giving an option or choice, allowing a choice between two or more things or acts to be done.” *Black’s Law Dictionary* 103 (rev. 4th ed. 1968) (citing *Malone v. Meres*, 109 So. 677 (Fla. 1926)).

Based on the foregoing, §565.045(1) can only be read as allowing a licensed vendor to sell alcoholic beverages:

- a. by the drink for consumption on or off the premises where sold, *or*
- b. in sealed containers for consumption on or off the premises where sold.

Further, the absence of any definition or guidance either in the Florida Statutes or Florida Administrative Code as to the meaning of “sealed” requires that the plain meaning be adopted for purposes of interpreting §565.045(1). As such, “sealed” can only mean:

“to fasten with or as if with a seal to prevent tampering; to close or make secure against access, leakage, or passage by a fastening or coating.”

6. Matter Status

Petitioner has no matter pending before any other Florida authority having jurisdiction, nor is Petitioner involved in any litigation or appeal regarding the subject matter of this Petition.

7. Declaratory Statement Requested

Four declaratory statements are requested.

First, the proper interpretation of §565.045(1) is that a licensed vendor may sell alcoholic beverages:

- a. by the drink for consumption on or off the premises where sold, *or*
- b. in sealed containers for consumption on or off the premises where sold.

Second, the meaning of “sealed” under §565.045(1) shall mean:

“to fasten with or as if with a seal to prevent tampering; to close or make secure against access, leakage, or passage by a fastening or coating.”

Third, based on the foregoing, Petitioner, as a licensed vendor under §565.02(1)(b)-(f), would be in compliance with §565.045(1) if it were to sell frozen daiquiris at its Florida locations *either*:

- a. by the drink for consumption on or off the premises where sold; *or*
- b. in sealed containers for consumption on or off the premises where sold.

Finally, while Petitioner believes §565.045(1) allows it to sell its frozen daiquiris “by the drink” for consumption off the premises *without affixing a seal*, Petitioner also recognizes that its customers must comply with the “open container” provisions of Florida law. To enable its customers to do so, Petitioner seeks confirmation that the following would satisfy the Department’s interpretation of the “sealed” requirement within §565.045(1)(b):

- a. A plastic covering attached to the container by the application of heat so as to cover the open top of the container, such plastic covering containing no perforations or openings, which the customer must cut, puncture or break in order to access and consume the alcoholic beverage;
- b. A plastic bag into which the alcoholic beverage is placed, such plastic bag sealed by the application of heat and which the customer must cut, puncture or break in order to access and consume the alcoholic beverage (as is often utilized as a means of satisfying §564.09); and/or
- c. A plastic lid affixed to the container without an opening for a straw but which contains perforations into which the customer may insert a straw thereby breaking the seal of the lid.

Thank you for your attention to this matter. Please contact the undersigned if you have any questions or require additional information.

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