

**Opinion No. 353.****Food and Drugs—Dairy Products—  
Ice Cream.**

**HELD:** The manufacture and sale of a product which contains less than 10% fat, and which is used solely as a base in malted milk and milk shakes, is not prohibited by Section 2620.4, R. C. M. 1935. Such a product, however, may not be sold as ice cream.

---

September 22, 1936.

Mr. B. F. Thrailkill  
Chief, Dairy Division  
The Capitol

You ask for an opinion in relation to ice cream as defined by Chapter 39 of the Laws of 1931, which is Section 2620.4, R. C. M. 1935.

This section defines ice cream and contains the statement that ice cream shall contain not less than ten per centum of milk fat, and not less than thirty-three per centum total solids. It also provides: "French ice cream, French custard ice cream, cooked ice cream, ice custard, parfaits and all similar frozen products, excepting sherbets and water ices, are varieties of ice cream." This statute quite definitely defines what is ice cream as same is commonly disposed of to the public in ice cream cones, by the dish or in larger quantities.

You advise that certain producers are producing a product which contains less than 10% fat, and which is used for a base in malted milk and milk shakes, and inquire whether or not such product shall be considered as ice cream, and the sale of which is prohibited by law. So far as we are advised from your letter, it is not

claimed that the substances to be used in malted milk or milk shakes are injurious to public health.

As to such products manufactured either by a manufacturer or by a retail establishment, and which are to be used solely as a constituent of malted milk or in other drinks, it is my judgment that the manufacture and sale of same for this purpose are not prohibited by the law. It was not intended by such statute to fix the contents of drinks by standard for the manufacture of ice cream for general consumption. Therefore, it is our judgment that you permit the sale of such products for this purpose. If same are sold at retail as ice cream the person who makes such sale at retail could be dealt with as a violator of this statute.