



November 30, 2011

## Federal Trade Commission

600 Pennsylvania Avenue, NW  
Washington, DC 20580

### “Phusion Projects, File No. 112 3084”

I write as an advocate for consumer choice. I am in broad agreement with the contours of the settlement agreement between the Federal Trade Commission (FTC) and Phusion Projects. This matter involves the marketing of Four Loko, a flavored malt beverage with 12% alcohol by volume. The proposed agreement contains several provisions designed to address issues raised by the FTC regarding Phusion’s marketing.

Although Phusion’s marketing of its products appears to be similar to that of other malt beverage manufacturers, the company has proactively agreed to modify both the product and the marketing strategy to address the FTC’s concerns. Phusion has confronted these allegations and concerns of the FTC directly and has shown itself to be a good corporate citizen with its willingness to be responsive to the regulatory community in general and the FTC in particular. Moreover, the FTC should tread very carefully in the area of tipping the scales of the competitive marketplace. It is all too common a practice for competitors to try to regain lost market share brought about by regulatory action.

While I am in broad agreement with the settlement, as an advocate for consumer choice and individual liberty, there are some specifics of the proposed agreement that may go beyond the scope of the FTC’s mission to prevent deceptive marketing practices.

Indeed, the FTC has a mandate to ensure that products and marketing techniques are not deceptive. However, regulators must be careful that any steps taken in order to enforce the FTC’s mandate do not unduly intrude upon the freedom of companies and consumers to have

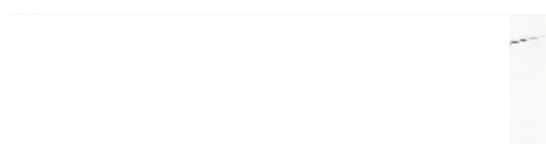
access to products that are desirable and that can be consumed safely and responsibly. Particularly in the area of alcohol consumption, there should be a specific degree of caution exercised so as not to tilt legitimate regulatory protections against deceptive practices into a full-bore abolitionist assault on alcohol access and use by adults 21 and older. We need look no further than the early 20<sup>th</sup> century and Prohibition to see the consequences of the excessive anti-alcohol movement to understand why balance in this area is particularly important.

The marketing and placement provisions of the agreement encapsulate the existing-good faith effort that Phusion has undertaken early on with its marketing plan and represent the outer limits of a constructive regulation of Phusion's adult beverages that were already clearly labeled as containing alcohol and, therefore, intended only for adults of legal drinking age.

The FTC would be well advised not to add additional marketing restrictions or to adopt additional revisions that would further limit legitimate adult access.

In conclusion, it is my hope that the FTC will take these comments into consideration and will approve this agreement establishing provisions for continued adult access to Phusion's products. I appreciate the chance to provide the FTC with these comments. If you have any questions or concerns, please do not hesitate to contact me at [horace.cooper@instituteforliberty.org](mailto:horace.cooper@instituteforliberty.org) or (202) 261-6592

Sincerely,



Horace Cooper  
Director  
Center for Law and Regulation  
Institute for Liberty