



ADMINISTRATOR

DEPARTMENT OF THE TREASURY  
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU  
WASHINGTON, D.C. 20220

DEC 2 2011

The Honorable Donald S. Clark  
Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex D)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

RE: Phusion Projects, File No. 112 3084

Dear Mr. Clark:

The Alcohol and Tobacco Tax and Trade Bureau (TTB) submits this comment in response to the Federal Trade Commission's (FTC's) proposed consent agreement with Phusion Products, LLC, et al., which was published in the **Federal Register** (76 FR 62066) on October 6, 2011.

The proposed consent agreement involves the marketing of Four Loko, a fruit-flavored malt beverage product. The FTC alleges that the respondents (Phusion Projects, LLC, Jaisen Freeman, Christopher Hunter, and Jeffrey Wright) have represented in their marketing materials that a 23.5 oz can of 11% or 12% alcohol by volume (ABV) Four Loko contains an amount of alcohol that is equivalent to one or two regular, 12 oz beers, and that it could safely be consumed in its entirety on a single occasion. The FTC further alleges that both claims are false or misleading because a 23.5 oz can of 11% ABV Four Loko contains an amount of alcohol equivalent to 4.3 regular beers and a 23.5 oz can of 12% ABV Four Loko contains alcohol equivalent to 4.7 regular beers. See 76 FR 62,067 (October 6, 2011).

Subject to final approval, the FTC has accepted an agreement with a consent order from the respondents. The consent order contains provisions that are designed to prevent the respondents from engaging in similar acts and practices in the future. Among these provisions is a label disclosure requirement comparing the alcohol content of the product to that of "regular (12 oz, 5% alc/vol) beers." This requirement would apply to Four Loko and any other covered flavored malt beverages sold by the respondents in containers that contain more than 1.5 fluid ounces of alcohol. The FTC requests comments on the agreement on or before December 2, 2011, at which time the FTC will again review the agreement and the comments received, and will decide whether it should withdraw the agreement or make final the agreement's proposed order.



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Secretary, Federal Trade Commission

TTB is responsible for the promulgation and enforcement of regulations with respect to the labeling and advertising of distilled spirits, wines, and malt beverages under the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. § 205(e) and (f). Accordingly, the FTC consulted with TTB during the development of its proposal to ensure that the FTC's proposed consent agreement did not mandate a labeling statement that is inconsistent with TTB regulations. TTB advised the FTC that we do not believe that the proposed labeling disclosure, "This can [or bottle] has as much alcohol as [ ] regular (12 oz, 5% alc/vol) beers," in the specific context in which it would be presented, would violate TTB's labeling regulations.

TTB has long recognized that any labeling disclosure comparing the alcohol equivalency of this product to "regular" beers could foreseeably result in the unintended consequence of attracting consumers who seek to purchase malt beverages based upon their high alcohol content. Like the State Attorneys General, TTB is concerned about the current lack of data on how the proposed label disclosure will influence the purchasing and consumption decisions of consumers.

Accordingly, TTB will monitor any available data that demonstrates the use and impact of any final labeling statement that is implemented under the consent agreement. TTB will also monitor the advertising of any product bearing a statement, on the advertised product's label or otherwise, that compares the product's alcohol content to that of other malt beverages to ensure that advertisements do not depict the alcohol strength of the product in a manner that violates TTB regulations. If TTB determines that an approved labeling statement or an advertisement is being used to promote the sale of malt beverage products, or compete with other malt beverage products, on the basis of their high alcohol content, TTB will take appropriate action pursuant to its authority under the FAA Act.

In the event that the FTC decides to modify or amend the proposed label disclosure, TTB will work with the FTC to ensure that any statement it requires is consistent with the regulatory requirements for labels approved by TTB under the FAA Act.

Sincerely yours,

✓  
John J. Manfreda  
Administrator