



National Beer Wholesalers Association

December 2, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: FTC File No. 112 3084; Proposed Consent Agreement In the Matter of Phusion Projects, LLC;
Jaisen Freeman; Christopher Hunter; and Jeffrey Wright

Dear Commission:

These comments are submitted on behalf of the National Beer Wholesalers Association (NBWA), an organization representing the interests of 3,300 beer distributors and their 98,000 employees across the country. NBWA writes to express its disapproval of the proposed Federal Trade Commission (FTC) settlement with Phusion Projects, LLC. The proposed settlement reflects an erroneous and truncated understanding of the purposes and concerns of alcoholic beverage regulation.

The proposed settlement was apparently crafted in total disregard of the state's primary role in the regulation of the distribution and sale of alcoholic beverages and undermines state efforts to address the problems associated with these products. Just five years ago when Congress passed the Sober Truth on Preventing Underage Drinking Act (STOP Act), it noted:

“Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale and the Federal Government should support and supplement these State efforts.”

PL109-422

The FTC order also ignores the initiatives in many states that have exercised their regulatory authority to address the underlying issues in this matter. The label contemplated by the proposed settlement could actually serve to entice consumers, especially younger ones seeking high-alcohol, low-priced products, to possibly over consume these products. For this reason, states have long attempted to discourage certain label disclosures that would lead to “strength wars.” In conformity with local norms and standards, states have long debated and legislated in a variety of different ways on this subject.¹

The dangers of the restrictive focus of the FTC order are highlighted by a review of an earlier national policy debate over the dangers of grain alcohol. Many states have banned grain alcohol completely. Other states have required producers to reformulate the product from 190 to 151 proof. These are actions already properly within the states' powers. Similarly, the issues related to the proposed consent order are not an issue in several states as these states have utilized state regulation to address this issue

¹ For example, for a discussion of a debate of this issue in Washington state from 1990;
http://findarticles.com/p/articles/mi_m3469/is_n17_v41/ai_8547576/

in contexts broader than what the FTC order addresses. Nowhere in the Consent Order is an examination of current or past state activities undertaken.

While it is true that if the settlement is approved states could still regulate alcoholic beverage labeling, as is permitted by the 21st Amendment, and state attorneys general could still express their concerns about large-sized, high-alcohol and low-priced beverages, their consumer protection efforts will be undermined by the inevitable argument that because the products are labeled in accordance with the proposed settlement, they pass muster by the FTC and, implicitly, the federal government.

The proposed settlement actually was created without any consideration or study of its possible effects on alcohol abuse and without any consideration of the views of those federal agencies that are involved in alcohol policy and whose statutory mission explicitly includes the regulation of alcoholic beverages and the creation and implementation of policies to reduce alcohol abuse. These agencies include Alcohol Tax and Trade Bureau (TTB), National Institute on Alcohol Abuse and Alcoholism and the Centers for Disease Control.

Mistakes like those reflected in the proposed settlement are unfortunately a common occurrence for the FTC. The FTC routinely intrudes upon state legislative deliberations concerning alcoholic beverage trade practice policies, counseling vehemently against any proposed regulation that in its view does not comport with the widest availability and the lowest price for alcoholic beverages. This perspective, whatever its merits with regard to other products, misses the mark with alcoholic beverages. Because of alcohol's unique characteristics and the potential impact on public health, safety and welfare, regulation of the alcohol industry requires a delicate balance between appropriate control and competition. The FTC focuses exclusively on the latter and ignores the former.

Finally, the FTC failed to defer or even consult with state and federal agencies with expertise in the industry. The Federal Alcohol Administration Act (FAAA) was drafted by Congress and is administered by the Department of Treasury's Alcohol Tax and Trade Bureau (TTB) as the sole agency with power of federal alcohol label approval. Indeed, the TTB has a pending rule on the very subject of labeling.² Again, there is no indication in this Consent Order of coordination within the federal government, let alone acknowledgement of state powers.

For the foregoing reasons, the proposed action of the FTC should be rejected. The FTC should leave alcoholic beverage regulation to the states and federal agencies that are specifically equipped to deal with it and possess an explicit congressional mandate to operate in this area. If the FTC does act, it should be to support, rather than to ignore or oppose, state regulation

Sincerely,

Paul Pisano
Senior Vice President and General Counsel
National Beer Wholesalers Association

² <http://edocket.access.gpo.gov/2007/pdf/E7-14774.pdf>