



December 2, 2011

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

Re: Phusion Projects, File No. 112 3084

Dear Commissioners:

Public Health Law & Policy (PHLP) respectfully submits comments regarding the proposed consent order to resolve charges that Phusion Projects and its principal officers (Phusion) engaged in unfair and deceptive marketing of Four Loko.

PHLP is a team of attorneys, policy analysts, and urban planners dedicated to improving the health of communities nationwide. For over a decade, we have worked to develop legal theories and policy strategies to protect youth from unfair and deceptive marketing of products that cause chronic disease and other serious health harms. The sugary, high-alcohol, large-volume malt beverages known popularly as “alcopops” constitute a clear example of the rare type of product that, even when consumed as apparently intended, presents unacceptable health risks.

We echo the Attorneys General (AGs), James Mosher, and others in calling for the consent order to be strengthened to prevent the marketing of Four Loko as a single serving. While we commend the FTC for investigating this “binge-in-a-can”<sup>1</sup> product that seduces and endangers young people, scientific research compels the conclusion that the proposed remedies are inadequate. Given the uncontradicted evidence about the way Four Loko is actually consumed by young people, Phusion simply should not be permitted to offer its product in containers holding more than two servings of alcohol.

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<sup>1</sup> Binge drinking is generally defined as consuming five or more servings of alcohol per occasion for men, and four or more for women. Wechsler H, Davenport A, Dowdall G, Moeykens B and Castillo S. “Health and Behavioral Consequences of Binge Drinking in College: A National Survey of Students at 140 Campuses.” *Journal of the American Medical Association*, 272: 1672-77 (1994). Four Loko’s 11 percent ABV and 12 percent ABV cans contain 4.3 and 4.7 servings of alcohol, respectively.

## I. Pertinent Scientific Literature

As detailed below, studies regarding on-package labeling and “portion distortion” support the need for strengthening the proposed consent agreement. Additionally, research confirms that alcopops like Four Loko are disproportionately popular with the youngest and most vulnerable drinkers.

### A. Ineffectiveness of Labeling Requirements on Improving Consumer Understanding

Recent studies indicate that the FTC’s proposed labeling requirement will do little to reverse the public perception—strategically established by Phusion’s marketing—that Four Loko can safely be consumed as a single serving. A 2005 study exploring the relationship between consumer understanding and the use of nutrition labeling concluded that while consumers may be able to perform basic calculations and understand simple information, they are much less likely to be able to *interpret* that information adequately.<sup>2</sup> Instead, verbal descriptors and recommended reference values—such as a scaled or ranked system that connects basic nutrition information to health consequences—are needed for consumers to make effective use of package-label disclosures. These findings were recently echoed in the Institute of Medicine report on front-of-package nutrition rating systems.<sup>3</sup>

Applying these findings to the case of Four Loko indicates that the proposed addition of a small label stating that the can contains the equivalent of more than four beers will do nothing to counteract Phusion’s deceptive suggestion that the product is safe to drink as a single serving. The currently proposed label requirement merely provides numerical information that consumers are unlikely to apply toward safe consumption decisions.

The futility of the proposed label requirement is compounded by the fact that alcoholic beverages are not required to contain nutritional information indicating serving size or other nutritional statistics. Any positive effect that changes to the label and cap might have will be trumped by the pre-established messages conveyed by the size of the can, its placement within stores, and the prominence of the on-can branding.

### B. Research on “Portion Distortion” and the Marketing of Super-Sized Products

Scientific research on “portion distortion,” a term used to describe the proliferation and normalization of super-sized portions in food marketing, further indicates that Phusion cannot continue to sell its product in 4-in-1 containers without perpetuating its deceptive marketing practices. Research on the cognitive effects of the advertising of super-sized food and beverages suggests that many people spend little time determining what size portion of a food or beverage is appropriate or healthy.<sup>4</sup> Instead, they rely on consumption norms to develop mental

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<sup>2</sup> Cowburn G and Stockley L. “Consumer Understanding and Use of Nutrition Labeling: A Systematic Review.” *Public Health and Nutrition*, 8(1): 21-28 (2005).

<sup>3</sup> Wartella EA, et al., eds. “Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices.” Washington DC: Institute of Medicine, S-1 (2011).

<sup>4</sup> Wansink B. “Environmental Factors that Increase the Food Intake and Consumption Volume of Unknowing Consumers.” *Annual Review of Nutrition*. 24: 455-79 (2004).

benchmarks to gauge what is an appropriate portion. These consumption norms can be established through package size, advertising displays, the behavior of peers, and other environmental cues.

The very size of Four Loko's 4-in-1 can suggests that it is normal and appropriate to consume Four Loko as a single serving. Additionally, Phusion has instructed merchants to stock Four Loko alongside other similarly packaged cans of beer. These beers, however, generally contain only one or two servings of alcohol, and can be consumed as apparently intended without binge drinking. Phusion has created the false consumption norm that Four Loko should be imbibed as a single serving, and it has used the environmental cues of the container's size and similarity to other, less potent drinks to reinforce that perception. This is precisely the false impression that the FTC has sought to combat in this action, but which its proposed remedies of labeling and cap alteration would fail to address effectively.

### C. Data on Youth Consumption of Alcopops

In crafting the final consent order, the FTC should also bear in mind that minors have been particularly susceptible to the edgy advertising campaigns of alcopop producers like Phusion. The most recent data from the Institute for Social Research at the University of Michigan indicates that sugar-sweetened malt beverages are highly popular with teenagers. In 2010, nearly 50 percent of surveyed twelfth-graders reported drinking an alcopop in the past year.<sup>5</sup> Nearly 25 percent reported consuming an alcopop in the past month, and over 60 percent had consumed an alcopop at some point in their life. Alarming, alcopops are disproportionately popular with the youngest drinkers. A 2005 study showed that 75 percent of eighth-grade drinkers had had an alcopop in the past month, compared to 70 percent of tenth-grade drinkers, and 65 percent of twelfth-grade drinkers.<sup>6</sup>

Because alcopop producers including Four Loko have shrewdly captured the affinity of underage drinkers, the FTC should consider whether the teen market for Four Loko will heed the proposed remedies. PHLP asks the FTC to take into account that underage drinkers, particularly the youngest and least experienced among them, are the most likely population to suffer the harmful consequences of Phusion's deceptive suggestion that Four Loko can safely be consumed in a single serving. A textual label and screw top will do little to reverse this perception. Nor will a restriction on merely one of myriad ways Four Loko is depicted in Phusion's advertising as a tantalizing conduit to drunken carousal. So Phusion will continue to facilitate the high-risk behaviors associated with youth binge drinking.<sup>7</sup>

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<sup>5</sup> Johnston LD, O'Malley PM, et al. "Monitoring the Future: National Survey Results on Drug Use, 1975-2010." Ann Arbor, MI: National Institute on Drug Abuse, National Institutes of Health, 2010, pp.153-54. Available at: [http://monitoringthefuture.org/pubs/monographs/mtf-vol1\\_2010.pdf](http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2010.pdf)

<sup>6</sup> The Center on Alcohol Marketing and Youth. "Underage Drinking in the United States: A Status Report, 2005." Washington, DC: The Center on Alcohol Marketing and Youth, 2006, p.3. Available at: [www.camya.org/bin/c/c/status0306.pdf](http://www.camya.org/bin/c/c/status0306.pdf).

<sup>7</sup> Miller JW, Naimi TS, et al. "Binge Drinking and Associated Health Risk Behaviors Among High School Students." *Pediatrics*. 119(1): 76-85 (2007).

Indeed, the settlement's labeling requirement might actually have the unintended effect of promoting binge drinking by adolescents. Research demonstrates that text-based warning labels on alcohol packaging have not served to reduce consumption.<sup>8</sup> Instead, young binge drinkers may find that the mandated alcohol content disclosure *increases* Four Loko's appeal by clarifying that this single-serving product provides an economical and efficient way to become intoxicated. The proposed labeling requirement practically announces, "Four beers here for the price of one!"

Thus, while the currently proposed remedy will likely do little to inform adult consumers who would otherwise avoid a drinking binge, it may well inadvertently encourage binge-drinking among youth.

## II. The Need for Additional or Alternative Remedies

Only a radical shift in Phusion's marketing strategies would reverse the deceptive public impression it has created that a container of Four Loko can safely be imbibed. The marketing, sale, and public perception of these supersized alcopops as single-serving drinks are unlikely to change upon minimal alterations to the label and seal. Prohibiting the sale of supersized Four Lokos alongside other less potent but similarly packaged beer cans could add a step in the right direction. But such a restriction would be difficult to enforce and might create impracticable burdens for store owners. Therefore, PHLP strongly urges the FTC to adopt the AGs' recommendation to prohibit Phusion from selling its products in containers with more than two servings of alcohol.<sup>9</sup> This could readily be accomplished either by reducing the size of the can or by lowering the concentration of alcohol in the can as currently designed.

PHLP fears that the proposed remedies will establish a dangerously low floor for what constitutes non-deceptive marketing of alcopop products. For example, Anheuser-Busch produces a similar sweetened malt beverage called Tilt. Earlier this year, after facing criticism that its marketing tactics encouraged underage- and binge-drinking, Anheuser-Busch voluntarily chose to reduce the percentage of alcohol in its 24 oz. cans from 12 percent to 8 percent.<sup>10</sup> The current consent agreement might have the perverse effect of discouraging Anheuser-Busch and other similar companies from taking voluntary measures to counteract the public perception that large-volume, high-alcohol beverages can safely be consumed by an individual as packaged.

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<sup>8</sup> Wilkinson C and Room R. "Warnings on Alcohol Containers and Advertisements: International Experience and Evidence on Effects." *Drug Alcohol Review*, 28: 426-35 (2009).

<sup>9</sup> There are other alcoholic beverages that are packaged in containers that hold more servings of alcohol than Four Loko. For instance, bottles of wine and liquor and some handcrafted beers might contain more servings of alcohol per container than a can of Four Loko. However, these products also carry with them additional environmental cues that they are not meant to be consumed by an individual in a single sitting. Four Loko, on the other hand, has engaged in a concerted effort to create the false impression that its product can and should be consumed as a single serving. It is thus reasonable for the FTC to craft a consent agreement that limits the container size of Four Loko without fear that other alcoholic beverage containers necessarily warrant comparable treatment.


<sup>10</sup> Melissa Korn, *Anheuser-Busch Cutting Alcohol in Tilt Malt Drink*, Market Watch, May 24, 2011. Available at: [www.marketwatch.com/story/anheuser-busch-cutting-alcohol-in-tilt-malt-drink-2011-05-24](http://www.marketwatch.com/story/anheuser-busch-cutting-alcohol-in-tilt-malt-drink-2011-05-24).

Additionally, Phusion has engaged in an advertising campaign that glamorizes binge drinking, and its products are uniquely appealing to young drinkers.<sup>11</sup> Should Four Loko continue to be sold as is, the consent order should be expanded to forbid all express or implied representations that Four Loko containers offer single servings that facilitate binge drinking. Moreover, the final order should require that Phusion take adequate measures to ensure that it is not marketing to underage drinkers. For instance, anyone can currently access Phusion's Four Loko website by simply typing in a birth date that indicates a legal drinking age. Phusion should strengthen the website's Adult Verification System by requiring users to prove that they are of legal drinking age, such as by providing a credit card number.<sup>12</sup>

### III. Conclusion

First and foremost, PHLP commends the FTC for its response to Phusion's unfair and deceptive marketing. We believe, however, that the current consent agreement fails to address these problems adequately. Every aspect of Phusion's Four Loko marketing campaign—from the can's size and placement alongside similar but less potent beer, to its photo contest celebrating binge drinking—has worked to create a public perception that 23.5 oz. containers of Four Loko can and should be consumed in a single serving. Simply providing consumers with numerical facts regarding the number of equivalent beers in the can and requiring a screw cap will not effectively reverse this dangerous consumption norm. Moreover, young and inexperienced drinkers are most likely to suffer the greatest harm from Phusion's marketing tactics, the deceptiveness of which will not be cured by merely prohibiting images of consumers drinking straight from the can. For these reasons, PHLP respectfully requests that the FTC amend the proposed consent order to require that Four Loko be packaged in containers holding no more than two servings of alcohol.

Respectfully submitted,

  
Samantha Graff, JD  
Senior Staff Attorney  
Public Health Law & Policy  
2201 Broadway, Suite 502  
Oakland, CA 94612

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<sup>11</sup> See "Complaint" at pp. 2-3 (describing Phusion's packaging, advertisements, and promotions material, including the online photo contest featuring young people drinking Four Loko directly from the can).

<sup>12</sup> Anheuser-Busch, after facing criticism for the lax AVS on its online marketing venture, "bud.tv," strengthened the website's AVS, requiring users to provide information contained on governmental or commercial databases, such as drivers license or credit card numbers. Federal Trade Commission (FTC). "Self-Regulation in the Alcohol Industry: Report of the Federal Trade Commission," Washington DC: FTC, June 2008, p.37, n.104. Available at: [www.ftc.gov/os/2008/06/080626alcoholreport.pdf](http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf).