

From the Chief Legal Officers of:
The State of Connecticut
The State of Maine
The State of Maryland

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex D)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *In the Matter of Constellation Brands, Inc.*, File No. 0923035
Comment on Proposed Consent Order

Dear Sir or Madam:

We are members of the National Association of Attorneys General (NAAG) Youth Access to Alcohol Committee. We write to comment on the consent order proposed by the Federal Trade Commission (FTC) to resolve charges against Constellation Brands, Inc. regarding Wide Eye Schnapps, an alcoholic energy drink (AED) containing distilled spirits and stimulants including caffeine and guarana. Due to time and logistical constraints, not all of the members of our committee were able to sign this comment letter.

State Attorneys General across the country are gravely concerned about the dangers posed by AEDs, particularly as they affect youth. Indeed, as described below, a group of Attorneys General recently secured agreements with the nation's largest manufacturers of AEDs – MillerCoors and Anheuser-Busch -- to cease producing AEDs altogether.

We commend the FTC on its decision to investigate the marketing practices associated with this AED. However, as set forth below, we believe that the proposed consent order will not achieve the FTC's stated goal of preventing the company from engaging in similar acts and practices in the future because it lacks specificity. Accordingly, we urge the FTC to revise the order as set forth below. As set forth below, we also believe that monetary penalties are generally necessary and appropriate in cases comparable to this as they act as a deterrent to similar conduct in the future.

Although the proposed consent order is limited to Constellation Brands' marketing practices, we reiterate our position that AEDs are unsafe products that pose serious health and safety risks to consumers, particularly youth, and should be removed from the marketplace. While state Attorneys General have made important progress in removing these dangerous

products from the marketplace, we believe that federal action is still urgently needed to address the health and safety risks presented by AEDs generally. Our committee will continue to address this concern with the appropriate federal authorities. While we reiterate that we are pleased the FTC has undertaken an investigation of this AED, and while we do have specific comments to the proposed consent order as set forth below, we stress that a critical goal of our committee is to encourage and obtain direct federal involvement in the removal of these dangerous products, action well beyond the terms set forth in the consent order.

The NAAG Youth Access to Alcohol Committee

Since it was first convened in 2004, the Youth Access to Alcohol Committee has worked to reduce youth exposure to alcohol advertising and access to alcohol, and to combat particular alcohol products and marketing campaigns that disproportionately appeal to youth. Most recently, Attorneys General have been particularly concerned about the proliferation of AEDs. In May 2007, Attorneys General of 29 States wrote to Anheuser-Busch expressing serious concerns about “Spykes,” a flavored malt beverage that contained 12% alcohol by volume and caffeine and other stimulants associated with energy drinks, and that was offered in chocolate and fruit flavors. Although Spykes was soon taken off the market, new AED products appeared in its place.

Prompted by grave concerns over the dangers posed by these beverages (discussed below) and lack of action at the federal level, the Attorneys General of 13 States and the San Francisco City Attorney initiated investigations of the two leading manufacturers of AEDs: MillerCoors Brewing Company (the producer of the AED Sparks) and Anheuser-Busch, Inc. (the producer of the AEDs Tilt and Bud Extra). The investigations culminated in each company agreeing to enter into an Assurance of Voluntary Compliance with the Attorneys General to cease producing caffeinated alcoholic beverages altogether. As a result, these products have been removed from the market nationwide. The MillerCoors agreement also included strict marketing guidelines for Sparks once it was reformulated as a non-caffeinated beverage.

The Dangers of Alcoholic Energy Drinks

The health and safety risks associated with mixing alcohol and caffeine and other stimulants are now well documented.¹ Scientific research has confirmed that stimulants mask the subjective feeling of intoxication, increasing the possibility that drinkers, particularly young inexperienced drinkers, will engage in heavy drinking and incorrectly believe they are capable of engaging in potentially dangerous activities, including driving. As a recent study found, college students who consume alcohol and caffeine mixed together are twice as likely to experience alcohol-related injuries, including sexual assault, and are twice as likely to drive with someone who has been drinking as those students who do not consume such a combination.²

¹ Ferreira, S., de Mello, M., Pompeia, S., de Souza-Formigoni, M., 2006. Effects of energy drink ingestion on alcohol intoxication. *Alcoholism: Clinical & Experimental Research*, 30: 598–605; Marczynski, C., Fillmore, M., 2006. Clubgoers and their trendy cocktails: Implications of mixing caffeine into alcohol on information processing and subjective reports of intoxication. *Experimental & Clinical Psychopharmacology* 14: 450–458.

² O’Brien, M., McCoy, T., Rhodes, S., Wagoner, A., Wolfson, M., 2008. Caffeinated cocktails: Get wired, get drunk, get injured. *Academy of Emergency Medicine* 15: 453–460.

Manufacturers of AEDs seek to capitalize on the widespread popularity of non-alcoholic energy drinks among youth. Indeed, AEDs mimic non-alcoholic energy drinks in packaging, marketing, and taste, so much so that store clerks often are unable to differentiate them from non-alcoholic energy drinks when minors attempt to purchase them. AED marketing campaigns claim or imply that such beverages increase a person's stamina or energy level, include youth-oriented messaging and graphics, and rely on youth-targeted media and viral marketing. Much of this marketing promotes consumption of the product as a means to stay up longer and to drink more. However, marketing materials do not mention the potentially severe adverse consequences of mixing caffeine or other stimulants and alcohol.

The FTC Should Strengthen the Proposed Agreement with Constellation Brands

We urge the FTC to revise the proposed consent order to specify the prohibited deceptive marketing practices.

The FTC has alleged that the producer of Wide Eye made unsubstantiated claims, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol. Among the claims cited by the FTC in its complaint are:

- "Wake up @ Wide Eye;"
- "I am your wake up call;"
- "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life"; and
- "Wide Eye is about waking up to life."

The proposed consent order provides that the company "shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such product will remain alert when consuming alcohol" or "that such product or any ingredient therein will counteract the effects of alcohol consumption," unless the representation is true, non-misleading, and at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

However, the proposed order does not specify what marketing practices constitute a representation that the consumers who consume the product will remain alert or that the stimulants will counteract the effects of alcohol consumption. The proposed order further fails to require that all marketing of the product include a warning that the stimulants do not counteract the effects of the alcohol consumption. Such specific guidelines and requirements are critical. For example, a reasonable interpretation of the consent order is that the name of the product itself – Wide Eye – is a violation, since it implies that consumers will have "wide eyes" when it is consumed, a clear representation that the product will keep consumers awake and alert. To avoid any uncertainty, we urge the FTC to revise the consent order to clarify the specific marketing practices that it prohibits, including the product name itself.³

³ In addition to requiring MillerCoors to remove the caffeine from its Sparks brand AED, the States' agreement with MillerCoors specified marketing practices that are prohibited for the reformulated product, including positive (+) and negative (-) symbols on the product label, as

Monetary Penalties

In 2005, the Tax and Trade Bureau notified producers of AEDs (malt beverage as well as distilled spirits-based) that it would take enforcement action under the Federal Alcohol Administration Act if advertisements contained misleading health-related statements, including those that “imply that consumption of certain alcoholic beverages will have a stimulating or energizing effect, or will enable consumers to drink more of a product without feeling the effects of the alcohol.” TTB Announcement: Advertising Malt Beverages Containing Ingredients Associated with Non-Alcohol Energy Drinks, May, 18, 2005; TTB Announcement: Advertising Distilled Spirits Containing Ingredients Associated with Non-Alcohol Energy Drinks, Aug. 2, 2005. In its enforcement action concerning Sparks, TTB imposed monetary penalties on McKenzie-River.

Similarly, the Attorneys Generals' recent settlements with Anheuser Busch and MillerCoors included financial payments. Constellation Brands, a large multinational company, was certainly aware of the TTB Announcements, yet chose to name and market its product using energizing claims. Without a financial penalty, the Consent Order provides no disincentive to Constellation Brands for continuing to violate Federal law and FTC policy, and will not deter other producers from engaging in similar marketing practices. Thus, we believe that monetary sanctions are necessary in cases comparable to this in order to deter similar future conduct.

Respectfully submitted,

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Connecticut Attorney General

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Maine Attorney General

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Maryland Attorney General

well as images of batteries, rockets, on/off switches and lightning bolts in any marketing materials.

cc: David C. Vladeck, Director of the Bureau of Consumer Protection
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