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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 Sir or Ms:

This letter provides comments regarding the proposed consent order to resolve charges against Phusion Projects and its principal officers regarding the marketing of Four Loko, a fruit-flavored alcopop (also referred to as a Flavored Malt Beverage) in 23.5 ounce containers with 11% or 12% alcohol by volume.[1] As Director of the Wythe County, Virginia Department of Social Services, and as Chairperson of the Planning District Three and Wythe County Substance Abuse Coalitions, our agency has seen the impact of substance abuse in dramatically increasing incidences of child protection complaints, court involvement and foster care caseloads. I write in reference to and support of a letter, the contents of which are included below, submitted by James F. Mosher, JD, a Senior Policy Advisor at the CDM Group, Inc., in regard to the aforementioned consent order.

FTC's attention to these products and their close association with binge drinking is well justified. The Centers for Disease Control and Prevention (CDC) has recently documented the adverse health and safety consequences of binge drinking as well as the economic costs – approximately $170 billion for the nation in 2006 alone.[2]

We commend FTC for focusing on both implied and explicit representations by Phusion Project regarding the nature and use of its products and the decision to develop specific requirements to address the unfair and deceptive practices alleged in the complaint. We also endorse FTC's findings that:

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[1] These products typically contain distilled spirits and are properly classified as distilled spirits rather than beer in many states. Mosher, J. and D. Johnnson, "Flavored alcoholic beverages: An international marketing campaign that targets youth" *Journal of Public Health Policy* 26(3): 326-342 (2005). "Flavored Malt Beverages", the term used by the industry, deceptively suggests that the products are beer when in fact, as documented by the U.S. Alcohol and Tobacco Tax and Trade Bureau, they have little or no similarity to beer and associated malt products. Flavored Malt Beverages and Related Proposals. *Federal Register*, Vol. 68, No. 56, p. 14292, March 24, 2003 (available at: http://www.gpo.gov/fdsys/pkg/FR-2003-03-24/pdf/03-6855.pdf). A unique production process is used to create them to strip away most or all beer characteristics. *Id.* Because of their similarity with soft drinks and their popularity with underage drinkers, public health and safety experts typically refer to them as "alcopops," the term used in these comments.

[2] Bouchery, M. et al. Economic costs of excessive alcohol consumption in the U.S., 2006. *American Journal of Preventive Medicine*, forthcoming; CDC, *Vital Signs: Binge Drinking*. Available at: http://www.cdc.gov/vitalsigns/BingeDrinking/.

- An individual cannot safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion because it contains the equivalent of 4.7 regular beers, and consuming it constitutes binge drinking;
- Binge drinking can lead to a variety of adverse health and safety outcomes and Phusion Projects' marketing and packaging practices encourage consumption of its products in a manner that increases the risks of this dangerous consumption pattern;
- Through its packaging and marketing Phusion Projects has made both implied and explicit representations that Four Loko's 23.5 oz. cans are single servings – designed to be consumed on a single occasion;
- Phusion Projects has failed to disclose to consumers the relevant facts regarding the amount of alcohol contained in its 23.5 oz. cans;
- These marketing and packaging activities by Phusion constitute unfair and deceptive business practices under the FTC Act.

The consent order includes at least three requirements that will assist in addressing the unfair and deceptive business practices on the part of Phusion Projects:

- Requirement that Phusion Projects not depict consumers drinking the company's products directly from the container if the product contains more than 2.5 standard drinks;
- Requirement that containers be resealable;
- Requirement that that Phusion Projects not misrepresent, either expressly or by implication, the alcohol content of its Four Loko product line.

We offer the following comments to build on the foundation that FTC has set with its findings and improve the consent order so that Phusion Projects' deceptive and unfair business practices are adequately addressed.

I. Limit Serving Size of Alcopop Containers Should be Primary Remedy

As noted in the FTC complaint, the primary problem with the Four Loko product involves the container size, which is designed as a single serving and, if consumed as intended by the producer, will result in binge drinking. As discussed below, the labeling and resealability remedies are unlikely to alter usage pattern of these products, which create serious risks of harm for youth as well as young adults.

Phusion Projects, along with United Brands, revolutionized the marketing of alcopops by introducing 23.5 ounce cans and increasing the alcohol content of the product to 12 percent. Prior to these market innovations, alcopops containers were typically 12 ounces and the alcohol content was typically under 6 percent. This previous industry standard should be adhered to. The appropriate and primary remedy for addressing Phusion Projects' deceptive and unfair practices is to limit the container sizes of its products to no more than 1.4 standard alcohol servings, a definition of for a single serving container used by FTC in a case involving Cisco Wine.[3] This remedy will insure that consumers are not misled regarding the contents of the product and will limit risks that the product will result in binge drinking. Adopting this limit is

[3] *In the Matter of Canandaigua Wine Company*, 116 F.T.C. 349 (1991). See discussion, *infra*.

particularly important in this case because of the popularity of these products with young people and the heightened risks associated with binge drinking among underage youth (see discussion below).

II. Inadequacy of Proposed Remedies

Assuming FTC will not adopt a serving size limit as the primary remedy in this case, the proposed order needs to be substantially strengthened if it is to prevent the unfair and deceptive marketing practices documented in the FTC complaint.

1. Revise definition of "single serve"

By exempting containers with the equivalent of 2.5 standard drinks or less from the consent order requirements, FTC is establishing a precedent that 2.5 standard drinks constitute a single serving, even when the products have clear youth appeal. The FTC complaint in this case (paragraphs #9 and #10) states that Phusion Projects "represented, expressly or by implication, that a 23.5 oz can of 11% or 12% ABV Four Loko contains alcohol equivalent to one or two regular, 12 oz beers" and that these representations are false and unfair. Based on the complaint, at a minimum corrective action is needed for all containers with greater than 2 standard drinks, not just those with 2.5 standard drinks or greater.

Setting a precedent that 2.5 standard drinks constitutes a single serving sets a disturbing precedent that would undermine federal guidelines for moderate drinking, defined as no more than 2 drinks a day for men and 1 drink a day for women.[4] These definitions are widely accepted by federal, state and local agencies as well as public health groups. Research shows that consuming more than these recommended amounts can lead to serious adverse health and safety outcomes.[5]

FTC referenced these moderate drinking guidelines positively in its submission of comments to the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) regarding drink size labeling.[6] In that submission, FTC noted the importance of providing consumers information on the number of standard drinks in all alcohol containers as a means for consumers to adhere to the moderate drinking standards. Further FTC urged TTB to consider including an "intake limit" labeling requirement based on the guidelines. Defining a container with 2.5 standard drinks as a single serving contradicts FTC's comments to TTB and undermines consumers' ability to determine the amount of alcohol in specific containers.

The 2.5 standard drink size limit also contradicts FTC's previous ruling regarding the marketing of Cisco Wine, produced by Canandaigua Wine Company.[7] In that case, the Canandaigua was marketing a 20 percent fortified wine in a container similar to wine coolers but containing three to five times the amount of alcohol found in wine coolers. As in this case, the FTC concluded

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[4] U.S. Department of Agriculture, Dietary Guidelines for Americans, 2010. Available at: http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf

[5] CDC, note 2 *supra.*

[6] Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages Notice No. 41: Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, January 27, 2008. Available at: http://www.ftc.gov/os/2008/01/080128ttb.pdf

[7] *In the Matter of Canandaigua Wine Company*, 116 F.T.C. 349 (1991).

that the producer was representing its product as a single serving despite having multiple servings of alcohol that could lead to binge drinking. The FTC ordered Canandaigua to desist from representing, directly or by implication, that any product containing from 14 to 24 percent alcohol is a single serving "*unless the contents of said container are 100 milliliters or less*" (emphasis added). The restriction on single serve containers in that case translates to between .8 and 1.4 standard drinks.

The need for strict standards regarding drink size is particularly important in this case because the alcopops produced by Phusion Projects are popular with underage drinkers, including girls and young women, whose moderate drinking limit is a single drink per day.[8] The FTC should continue to apply the standard found in the Canandaigua case by applying the .8-1.4 standard drink size for single serve containers. By doing so, it will reaffirm its commitment to the moderate drinking guidelines established by the federal government.

2. Conduct research to determine impact of proposed labeling requirements

As noted in FTC's filing with the TTB[9], labels that state the number of standard drinks in a container in general provides important, accurate consumer information. However, in the absence of requirement for such labeling for all alcoholic beverages products, FTC should exercise caution in requiring them only for these products. There is no scientific basis for relying on drink size labeling as a means to cure the deceptive and unfair marketing practices documented in this case.

In fact, they may be counter-productive. We are aware of only one study (from Australia) that has examined the impact of drink size labeling on the drinking behavior of young binge drinkers, a primary consumer group for these products.[10] It concluded that, absent other prevention strategies, young people may use the information to calculate the cheapest means to binge drink. While hardly definitive, the study highlights the potential risks of using this strategy as a means to address Phusion Projects' deceptive and unfair business practices. Indeed, the producer may well embrace the label as a means to encourage consumers to consume the product as a single serving that facilitates binge drinking.

In general, we support standard drink labeling for alcoholic beverages and believe this should be required for all alcohol products. However, we urge caution in relying on such labeling in this case as a means to correct past deceptive and unfair marketing practices. At a minimum, FTC should require research be conducted regarding the impact of the proposed drink size labeling as an integral part of the consent order.

3. Define "resealable" and conduct research to determine consumer behavior regarding the resealable option

The consent order requires Phusion Projects to make its supersized containers resealable but does not define this term. A clear and precise definition of "resealable" is required includes a

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[8] Mosher, J. Joe Camel in a Bottle: Diageo, the Smirnoff Brand, and the Transformation of the Youth Alcohol Market. *American Journal of Public Health*, forthcoming.

[9] Note 5, *supra.*

[10] Jones, S. and P. Gregory, The impact of more visible standard drink labeling on youth alcohol consumption: Helping young people drink (ir)responsibly? 28 *Drug and Alcohol Review* 230-234 (May 2009).

requirement that the container can be sealed with a stopper that is non-detachable, prevents spillage, and prevents loss of carbonation.

As with the labeling requirements discussed above, there is no scientific basis for concluding that packaging of supersized alcopops in a resealable can will alter the public perception and use of the product as a single serving container. At a minimum, FTC should require research be conducted regarding the impact of the use of resealable cans on consumer behavior as an integral part of the consent order.

4. Expand prohibition of implied and express representations regarding single serve containers

The Consent Order requirements that Phusion Projects not misrepresent the alcohol content of its Four Loko products and not depict imbibers consuming the product directly from the container are good first steps. However, they do not address adequately the company's unfair and deceptive marketing practices documented in FTC's complaint. The FTC complaint lists specific marketing practices by Phusion Projects used to promote a public perception that the product is in fact a single serve container, that it facilitates binge drinking, and that binge drinking should be encouraged and enjoyed. The proposed consent order does not address many of these practices. Other products such as Joose and Colt 45 Blast engage in similar deceptive and unfair marketing practices that would not be addressed by the consent order.

For example, the proposed consent order would not prohibit Phusion Projects from continuing to use internet promotions that include pictures of Four Loko consumers in conjunction with promotional materials describing the intoxicating results of drinking one, two or more cans. It would not prohibit Phusion Projects from portraying consumers with the cans in their hands in poses and situations that clearly suggest the product should be consumed as a single serving. See for example, Exhibit B4, a screen shot from the Four Loko webpage portraying three Four Loko drinkers, each appearing more intoxicated than the next, with one drinker holding (but not imbibing) a can of Four Loko. The caption reads: "First guy drank 1, second guy drank 2, third guy drank 3, fourth guy was on the ground." It appears that this photo and caption would not be prohibited under the consent order despite its obvious representation of the product as a single serve container.

The Consent Order should be expanded to prohibit any express or implied representation by Phusion Projects that its products are single servings that facilitate binge drinking or that binge drinking is to be encouraged and enjoyed. This includes the use of the product name "Four Loko" which itself impliedly and arguably expressly represents that the product contains four plus standard drinks and will facilitate binge drinking (will make consumers "loko").[11]

III. Need for Continued Investigations and Imposition of Financial Penalties

[11] The Urban Dictionary recognizes this very fact. It now includes the following definition of "lok'd": "The act of getting drunk and crazy off of the alcoholic beverage Four Loko." Urban Dictionary, available at: http://www.urbandictionary.com/define.php?term=Lok'd.

It is our understanding that Sections 5(a) and 12 of the Federal Trade Commission Act (the basis of the current complaint) do not permit the imposition of fines. Because of the egregious nature of the violations in this case, FTC should continue its investigation pursuant to other federal regulatory and statutory provisions (including joint investigations with other federal agencies) to determine whether additional violations have occurred that authorize the imposition of financial penalties.

Phusion Projects has engaged in these deceptive and unfair business practices for years, resulting in spectacular growth in sales and profits. Prior to the specific practices addressed herein, Phusion Projects marketed products containing high levels of caffeine, a practice determined by FDA, FTC and ATF to violate relevant federal law and regulations. Phusion Projects has put consumers, particularly youthful consumers, at serious risk for harm as a result of these deceptive and unfair business practices. Numerous reports have documented deaths, serious injuries, unintended poisoning, among other consequences as a direct result of consuming Phusion Projects' products. The FTC documented many of these reports in its warning letter to Phusion Projects regarding the illegal marketing of caffeinated alcoholic beverages.[12] Many of these incidents have led to lawsuits being filed. Phusion Projects has had notice of the harms caused by its deceptive and unfair business practices and has failed to take any remedial action voluntarily. In light of these facts, to impose these minimal requirements on the company at this late date with no financial penalty amounts to a tacit acceptance of future deceptive and unfair business practices.

IV. Importance of Strengthening Order

Strengthening the consent order is critical to the future health and safety of those under the legal drinking age as well as young adults. The FTC order establishes an important precedent for the entire alcopop industry. The standard set here will likely be adopted by other producers. Miller/Coors Company (Sparks) has voluntarily agreed to reduce the serving sizes of its products to no more than 8 percent alcohol content in 16 ounce cans. Anheuser-Busch Company (Tilt) has agreed to reduce the content of its alcopop products to no more than 8 percent alcohol content in 16 and 24 ounce cans. While still inadequate, these smaller serving sizes reduce the deceptive and unfair nature of the containers and reduce the likelihood that the products will result in binge drinking.

Under the FTC consent order, these companies may have to adopt the relatively weak requirements described above but are free to increase the size of the containers to remain competitive with other producers. To do so will result in a net increase in deceptive marketing. At the very least, FTC should require all producers to limit the size of the containers to those adopted by these companies on a voluntary basis.

FTC's action may also deter states from taking independent action on the basis that FTC has agreed to a new, much weaker, standard of deceptive and unfair business practices than it had previously adhered to.

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[12] Federal Trade Commission, letter to Phusion Projects' attorneys regarding Notice of Potentially Illegal Marketing of Caffeinated Alcohol Products, p. 2, note 3, November 17, 2010, available at: http://www.ftc.gov/os/closings/warnings/phusionletter.pdf

V. Need for Additional FTC Investigation and Action

1. Disclosure of youth marketing practices should be included in the proposed consent order.

The proposed order does not address the special appeal Four Loko has for youth and the enhanced risks the product poses because of this special appeal. Phusion Projects should be required to provide FTC with relevant marketing memoranda and other documentation regarding its marketing practices as it relates to the youth market it has attracted. FTC should use these materials as part of an expanded investigation by FTC regarding the deceptive and unfair business practices of this company.

2. Four Loko and similar products constitute a special danger to youth.

In 2003, the FTC conducted an investigation of alcopops marketing and concluded that the products were not targeted to underage drinkers.[13] Without conceding the accuracy of this conclusion at the time of the report, a new investigation is clearly warranted in light of these new forms of alcopops and the aggressive, youth-oriented marketing practices employed by Phusion Projects and producers of similar products (e.g., Pabst Brewing Company's Colt 45 Blast). This investigation should be in addition to FTC's monitoring of industry compliance with FTC's 28.4% "proportional" placement standard. The investigation should include assessment of the popularity of Four Loko and similar products among youth and the adverse health and safety consequences that have resulted from youth consumption.

Respectfully submitted,

A. Michael Hall, ACSW
Director

[13] Federal Trade Commission, *Alcohol Marketing and Advertising: A Report to Congress*, 2005. Available at: http://www.ftc.gov/os/2003/09/alcohol08report.pdf