Youth and Community Action Team

289 Independence Boulevard • Pembroke 3, Suite 109
Virginia Beach, VA 23462
Phone: (757) 385-0803 • Fax: (757) 490-0287

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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 about 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.

The Youth and Community Action Team, (YCAT) is the substance abuse prevention coalition for the city of Virginia Beach. Our city has the dubious reputation of having the highest arrest rate for driving under the influence in the state. Additionally, we have the second highest rate in the state for alcohol related crashes among drivers 15 – 24 years of age. Our coalition is very concerned about marketing and developing of alcopops. Last year there was a local, high profile case of a teen passenger being killed; he and the driver, his best friend, had purchased and consumed Four Loko before the crash. YCAT is writing in reference to and support of a letter submitted by James F. Mosher, JD, a Senior Policy Advisor at The CDM Group Inc.

FTC's attention to these products and the 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.

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:

- 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 to improve the consent order.

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. We agree that the labeling and resealability remedies are unlikely to alter usage pattern of these products, which create serious risks of harm. 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. Adopting this limit is particularly important because of the popularity of these products with young people and the heightened risks associated with binge drinking.

II. Strict Standards for Drink Size

The need for strict standards regarding drink size is particularly important 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. 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. Thereby reaffirming its commitment to the moderate drinking guidelines established by the federal government.

III. 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. 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 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.

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 implies that the product contains four plus standard drinks and will facilitate binge drinking.

IV. Need for Continue Investigations and Imposition of Financial Penalties

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. 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. 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 them describing the marketing of caffeinated alcoholic beverages. Many of these incidents have led to lawsuits being filed. In light of these facts, to impose minimal requirements on the company with no financial penalty could amount to a tacit acceptance of future problematic practices.

V. 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) 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) 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 will at least 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. 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.

VI. 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 subsequent risks. 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 could use these materials as part of an expanded investigation.

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. An updated investigation is clearly warranted in light of the 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 result from youth consumption.

Respectfully submitted,

Pat Barner, BCETS,CP,CIMI
YCAT Chair