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Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Secretary Clark:

On behalf of our physician and medical student members, the American Medical Association (AMA) appreciates the opportunity to comment on the Proposed Consent Agreement in the Matter of Phusion Projects. This matter involves allegedly deceptive claims related to the marketing of Four Loko, a fruit-flavored malt beverage product that contains 11 percent to 12 percent alcohol by volume and is sold in a 23.5 ounce can.

While we applaud the Federal Trade Commission's (FTC) investigation into deceptive marketing practices by Phusion Projects, we have significant concerns regarding the proposed consent order. We are encouraged that the FTC acknowledges both the implied and explicit representations made by Phusion Projects regarding the nature and use of its product, and agree with the following findings and/or allegations:

- Phusion Projects represented in its marketing materials that a 23.5 ounce can of Four Loko containing 12 percent alcohol by volume (ABV) is the alcohol equivalent of one or two regular 12 ounce beers and could safely be consumed in its entirety on a single occasion.
- Such claims are false or misleading because a 23.5 ounce can of Four Loko containing 11 percent ABV is the alcohol equivalent of 4.3 regular beers and a 23.5 ounce can of 12 percent ABV Four Loko contains the alcohol equivalent of 4.7 regular beers.
- Phusion Projects' failure to disclose the actual amount of alcohol contained in its drinks "was deceptive, in light of their representation that a can of Four Loko contained a single serving."
- An individual cannot safely consume a 23.5 ounce can of 11 percent or 12 percent ABV Four Loko on a single occasion because it contains the equivalent of 4.3 or 4.7 regular beers, and "consuming a single can of Four Loko on a single occasion constitutes binge drinking."
- Phusion Projects' marketing and packaging practices encourage consumption of its products in a manner that increases the risks of binge drinking.

- Such excessive drinking typically raises a person's blood alcohol concentration to 0.08 percent or more and "typically results in acute intoxication that can be harmful for a variety of reasons."
- These marketing and packaging practices by Phusion Projects "constitute unfair or deceptive acts or practices, and the making of false advertisements, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act."

Concerns Regarding Serving Size Levels

Given the gravity of these allegations, we are disappointed with the FTC's proposed solution to Phusion Projects' pattern of deceptive marketing. The agreement sets forth labeling and container requirements, but exempts Phusion varieties that contain less than the alcohol contained in 2.5 beers, thus giving the false impression that 2.5 beers is an acceptable amount of alcohol to consume in one sitting. We disagree with this new single-serving drink size standard that FTC appears to be endorsing.

Such a standard defies current federal government drinking guidelines and public health research. The Dietary Guidelines for Americans recommend no more than two drinks per day for men and one per day for women. Decades of research—much of it funded by federal agencies—continue to show that consuming more than these recommended amounts can lead to serious adverse health and safety outcomes. The FTC itself favorably referenced these moderate drinking guidelines in its 2008 comments submitted to the U.S. Alcohol and Tobacco Tax and Trade Bureau regarding drink size labeling.

Moreover, these relatively new products warrant especially conservative drink size standards given their particular characteristics and youth appeal. With all the added sugar and flavors masking the flavor of alcohol, a drinker's ability to self-regulate intake is markedly inhibited.

Concerns Regarding Labeling Requirement and Resealable Containers

The proposed consent order requires Phusion Projects to label its products with the number of alcohol servings. The idea that FTC considers this a viable solution to the company's pattern of deceptive marketing is objectionable for a number of reasons:

- There is no scientific evidence that such labeling will be effective. At the very minimum, the FTC should conduct scientific research to determine whether this labeling is effective before requiring this type of labeling.
- The labeling will not ameliorate the similarities in design, marketing, and price between Phusion Project products and youth-oriented, nonalcoholic beverages such as energy drinks, that are often sold right next to each other in convenience store coolers.
- Given the low price points of these products, such labels will make it easier for youth to calculate how to get the most alcohol for the least money, based on alcohol content.
- It is quite possible that such labeling might actually serve as a marketing device, as opposed to a warning.
- The labeling will not improve or prevent the dangerous effects of consuming 4.7 drinks in one sitting, which an individual will still be able (and likely) to do with this product.

- Such labeling does nothing to address the fundamental implied deceptive practice alleged in the FTC complaint: The high alcohol content in the large single-serving container is itself deceptive.

Similarly, the FTC's proposed requirement that Phusion Projects products be sold in resealable containers is based neither on science nor common sense. We have no evidence that making the can resealable (which is not even specifically defined in the agreement) will discourage drinking the entire container at one time. These are not containers of milk or juice that drinkers put back in the refrigerator after pouring a glass. On the contrary, these are products sold largely in convenience stores which enable immediate consumption, just like a can of Coke or Red Bull. Moreover, a resealable cap will not deter youth from drinking an entire container at once. Again, without conducting any research, such a remedy seems unwise.

Concerns Regarding Industry-Wide Impacts and State-Level Actions

The AMA is also concerned about the broader implications of this consent order. Will this new "FTC-approved" container now become the industry standard? How will other companies making similar products respond? FTC appears to have given the entire industry the green light for large, single-serving containers with high alcohol content, as long as the cans are labeled appropriately and resealable.

Moreover, the political implications at the state level are also potentially problematic. Several states are considering regulation to require that alcoholic products sold in single serve containers be limited to 12 ounce containers with 6 percent ABV. With this consent order, Phusion Projects and the rest of the industry can claim "problem solved" with an-FTC seal of approval. On a practical level, such federal action may do serious damage to state regulatory efforts nationwide.

We believe that the FTC could potentially undermine public safety and health with this proposed consent order, which could be worse than taking no action at all. Therefore, we respectfully request that the FTC withdraw this agreement.

Sincerely,

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