BEER INSTITUTE

December 2, 2011

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

These comments are made on behalf of the Beer Institute[1] regarding the Proposed Consent Agreement In the Matter of Phusion Projects, LLC, Jaisen Freeman, Christopher Hunter; and Jeffrey Wright ("Respondents"); FTC File No. 112 3084. The undersigned understands that the Commission intends the proposed consent agreement with Respondents to settle alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The undersigned respects the Commission's authority to prohibit commercial practices that are deceptive or unfair. Nevertheless, the undersigned believes the Commission should reconsider the Proposed Consent Agreement as ill advised because:

(1) it conflicts with and effectively negates the labeling requirements carefully promulgated by the Alcohol and Tobacco Tax and Trade Bureau (TTB) and the states, which have had and should continue to have primary authority to regulate the labeling of beer, wine and spirits;

(2) it will lead to inconsistent labeling practices in the malt beverage industry;

(3) it requires a claim of comparative alcohol strength;

(4) it requires a potentially misleading label disclosure; and

[1] The Beer Institute (BI) is a U.S. trade association representing large and small brewers, beer importers and industry suppliers. BI was organized in 1986 to represent its members before Congress, state legislatures and public forums across the country. It is committed to developing sound public policy that focuses on community involvement and personal responsibility. BI members are dedicated to preventing and reducing alcohol abuse, including illegal underage drinking and drunk driving, because responsible consumption of alcohol is a priority for them.

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(5) the Commission is acting without adequate research or evidence.

A. The Proposed Label Disclosure Undermines TTB Labeling Authority.

The Commission should reconsider the proposed Consent Agreement because it effectively negates the labeling requirements carefully promulgated by TTB, and arguably undermines the Bureau's long-standing and respected authority over labeling of alcohol beverages. Alcohol beverage manufacturers and importers rely on TTB regulations to ensure uniformity in labeling and certainty regarding permissible labeling conduct. The proposed Consent Agreement will bring about less consistent labeling and foster uncertainty regarding permissible labeling practices.

By the Federal Alcohol Administration Act ("FAA Act"), Congress authorized the Secretary of the Treasury to exercise authority over labeling of alcohol beverages, subject to the standards and limitations set forth in the Act. *See* 27 U.S.C. § 205. Sections 105(e) and 105(f) of the FAA Act, codified in the United States Code at 27 U.S.C. 205(e) and 205(f), set forth standards for regulation of the labeling and advertising of wine (containing at least 7 percent alcohol by volume), distilled spirits, and malt beverages. The sections governing labeling – which have remained unchanged since 1935 – were novel at the time as a federal consumer protection mandate. They remain relevant today to provide consistency in terms of display of alcohol content, and a means to prevent consumer confusion, among other purposes.

The Act's legislative history provides some insight as to the general purpose of the labeling provisions:

> * * * the provisions of this bill show that the purpose was to carry that regulation into certain particular fields in which control of interstate commerce in liquors was paramount and necessary. The purpose was to provide such regulations, not laid down in statute, so as to be inflexible, but laid down under the guidance of Congress, under general principles, by a body which could change them as changes were found necessary.
>
> Those regulations were intended to insure that the purchaser should get what he thought he was getting, that representations both in labels and in advertising should be honest and straight-forward and truthful. They should not be confined, as the pure-food regulations have been confined, to prohibitions of falsity, but they should also provide for the information of the consumer, that he should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle.

See Hearings on H.R. 8539 before the Committee on Ways and Means, House of Representatives, 74th Cong., 1st Sess. 10 (1935).

TTB has a clear, multifaceted, and ongoing administrative and regulatory mission with respect to labeling and public disclosure of information about alcohol beverages. The discharge of this mission has served well the retail customers of our industry and consumers who choose to drink beverage alcohol products.

TTB's regulatory authority over labeling and formulation of alcohol beverages includes statutory pre-approval processes and testing designed for consumer protection and tax classification purposes. Each year, over 100,000 alcohol beverage label and container designs are submitted by domestic producers and importers to TTB, which reviews them to ensure that "packaging, marking, branding, and labeling and size and fill of container" will not deceive consumers and that statements and other information on each product are not likely to mislead consumers.[2] TTB also publishes informational pamphlets expressly designed "to educate the American public about how to read an alcohol beverage label." *See e.g.*, TTB P 5190.3, "What You Should Know About Malt Beverage Labels."[3] These pamphlets include information about alcohol content statements. The Commission should not undermine TTB's authority or efforts to protect and educate consumers by imposing different labeling requirements on any alcohol beverages.

B. The Proposed Label Disclosure is Unnecessary.

The proposed disclosure is unnecessary because TTB regulations already address alcohol content disclosures on flavored malt beverage labels. While a statement of alcohol content is optional for most malt beverages unless required by state law, TTB requires an alcohol content disclosure for malt beverages that contain any alcohol derived from added flavors or other added nonbeverage ingredients (other than hops extract). *See* 27 CFR § 7.22(a)(5). Respondents' flavored malt beverage products fall within this definition. To ensure consistency in labeling, TTB regulations also mandate the form of the alcohol content statement, and only allow alcohol content on the label of a flavored malt beverage or any other malt beverage when expressed as a percentage of alcohol by volume. 27 CFR § 7.71.

The proposed settlement, if adopted in its current form, would result in Respondents' products having two different presentations of alcohol content on the same container. This would effectively negate the TTB's efforts to ensure consistency in labeling. There is no reason to take such action, which is likely to confuse consumers, where there is no evidence that TTB labeling regulations or efforts at informational outreach are inadequate to protect the public. The Commission's proposed settlement is also ill-advised because it undermines the TTB's role in providing what Congress intended – a means to ensure to ensure that the purchaser should get what he thought he

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[2] 27 U.S.C. 205(e).

[3] TTB also publishes informational brochures explaining to consumers how to read wine and spirits labels. *See* TTB P 5190.1, "What You Should Know About Grape Wine Labels," and TTB P 5190.2, "What You Should Know About Distilled Spirits Labels."

was getting, and that representations both in labels and in advertising are honest, straightforward and truthful.

C. The Proposed Settlement Interferes With an On-Going TTB Rulemaking.

The Commission should also reconsider the proposed settlement because it interferes with an on-going TTB rulemaking. TTB has a rulemaking underway that would amend current alcohol content disclosure requirements and, for the first time, require all alcohol beverage labels to include nutrient information.[4] TTB has invested several years of careful effort, analysis and agency resources in the "Serving Facts" rulemaking, and it has done so within the broader context of other labeling challenges, some of which are unique to alcohol beverages and to TTB's statutory authority. TTB has studied various methodologies and approaches to disclosure of both nutrient information and alcohol content in a manner that is workable for thousands of alcohol beverage brands sold in the United States and sought public comment on the same.[5] No final rule has been published at this time; therefore, action by the FTC to establish a comparative alcohol content disclosure standard, even in the context of a settlement with a single company, creates uncertainty about the "Serving Facts" rulemaking and the possibility of inconsistent standards. The FTC should take no action that interferes with TTB's rulemaking authority or seeks to predetermine the outcome of the current rulemaking, or that has the tendency to create confusion for the industry and the consuming public regarding alcohol content disclosures on labels.

D. The Proposed Consent Agreement Impinges Upon the Rights of the States.

The Commission should also reconsider the proposed Consent Agreement because it impinges upon and undermines the traditional rights of the states in terms of regulating alcohol content disclosures. The role of the states in this regard is both important and consistent with the broad grant of authority they have under the Twenty-first Amendment and the FAA Act to establish an orderly marketplace for alcohol beverages. In the case of malt beverages, the labeling and advertising provisions of the FAA Act apply only if the laws of a relevant state impose similar requirements. 27 U.S.C. § 205(e). Some states regulate alcohol content disclosures while others do not.

The Commission has no authority to disregard the rights of the various States to prohibit or restrict alcohol content disclosures on labels and cannot require States to permit an alcohol content disclosure or any particular form of alcohol content disclosure. The Commission should not act without carefully considering whether the proposed settlement has implications for state policy, and before seeking input from state alcohol regulatory officials. Indeed, presidential executive orders and public statements dealing with federalism stress the need for executive departments and agencies to show respect for the prerogatives of the states and to provide opportunities for input from state officials

[4] 72 Federal Register 41860, July 31, 2007.

[5] 70 F.R. 22275, April 29, 2005.

on issues with implications for state policy. *See e.g.*, E.O. 13132, "Federalism," August 4, 1999 and White House Memorandum for Heads of Executive Departments and Agencies, May 20, 2009.

The required disclosure statement in the proposed settlement conflicts with several states' laws. Many states specify the manner in which a brewer or importer may permissibly show alcohol content information on malt beverage labels. As with TTB regulations and processes, the malt beverage industry follows state regulations and processes for label approval closely. Because the Commission's proposed settlement establishes a different standard for Respondents' labels, it creates doubt about state regulations and processes for label approval.

No states have laws or regulations allow for an alcohol content disclosure to the type mandated under the proposed Consent Order. Most state laws regarding alcohol content disclosures deal with the percentage of alcohol, either by weight or by volume, but they still have different standards in terms of size and placement of disclosure. For example, Arkansas law states that "the alcohol content must be shown as alcohol by volume" and the alcohol content information may *not* "be more prominent than any other information contained upon the label." *See* Code Ark. R. 006 02 001. This is in contrast with the proposed settlement, which requires that the alcohol content information appear in "prominent" black type and in a "prominent" location on the container, in contrast with "all other printed material on the container."

Similarly, Mississippi law provides that "[i]t shall be unlawful . . . to sell any such commodity with any statement in conflict with the provisions of this section, with reference to the alcoholic content of such beverage or beverages, except that a statement of alcoholic content may be expressed on any light wine or beer label in terms of volume or weight." *See* Miss. Code Ann. § 27-71-509. Oregon does allow for a disclosure in conspicuous type on the label or container of "all malt beverages exceeding 6% alcohol by volume," but the disclosure is limited to "alcoholic content by volume." *See* ORS 471.448. Oregon law provides as well that "[n]o person may alter or remove a label on malt beverages produced, bottled or for sale in Oregon, except to add labeling to comply with federal or state laws." *See* OAR 845-010-0205. It is thus doubtful whether Oregon would recognize or accept a label disclosure requirement coming from a settlement agreement, not a state or federal law.

To provide the consumer with additional information regarding the alcohol content" and "as a means to reduce potential consumer confusion," California requires that all containers of flavored malt beverages bear a "distinctive, conspicuous, and prominently displayed label, or firmly affixed sticker containing the following:

> A. The percentage alcohol content of the beverage by volume.
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> B. The phrase "CONTAINS ALCOHOL" in bold capitalized letters at least three millimeters in height, as specified.

See California Business and Professions Code § 25.205. In imposing a comparative alcohol strength claim on Respondents' product label, the Commission's proposed settlement impinges upon California's right to regulate alcohol beverages and determine the best "means to reduce potential consumer confusion" within that state.

E. The Proposed Consent Agreement Would Lead to Inconsistent Labeling Practices.

The Consent Agreement, if approved, would lead to inconsistent labeling practices and create confusion within the malt beverage industry and among consumers regarding acceptable labeling practices, especially with respect to claims of alcohol strength. This confusion would likely result from inconsistent labels for flavored malt beverage products in the marketplace. Respondents' products would have the disclosure required by the proposed settlement and the disclosure required by TTB regulations. Some producers may follow suit, and others may not, especially when considering the inconsistency between the requirements of the Consent Agreement and applicable TTB and state regulations.

This probable result will undermine a central goal of TTB label initiatives: to ensure uniformity in labeling wherever possible (given the states' general and specific grants of authority under the Twenty-first Amendment and the FAA Act). A company should be entitled to rely on established label approval processes by TTB (and/or the states) and not have to interpret and chose among potentially inconsistent standards based on unilateral Commission action suggesting that different label requirements may be necessary or appropriate for one product in certain circumstances.

F. The Proposed Label Disclosure is Flawed and Misleading.

The proposed settlement requires a disclosure that is flawed and misleading to consumers. The proposed required disclosure that Respondents must include on covered flavored malt beverage products states "[t]his can [or bottle] has as much alcohol as [x] regular (12 oz, 5% alc/vol) beers." On Respondents' 23.5 oz. can, the disclosure would read, "This can has as much alcohol as 4 ½ regular (12 oz, 5% alc/vol) beers." As previously stated, a disclosure requiring the manufacturer to compare the alcohol content of one product against the alcohol content of another product is unprecedented in U.S. alcohol labeling history.

The proposed disclosure is flawed and potentially misleading in part, because there is no federal or state precedent for a disclosure of this type; no current federal or state alcohol beverage law or regulation purports to define a "regular" beer – or a regular "drink" of any kind, whether beer, wine or spirits.

The disclosure is also flawed and misleading to consumers because although there are beer brands with 5% alcohol by volume ("alc/vol" or "ABV"), beers sold in the United States have a wide range of alcohol content. Some have as little as 2-3% alcohol by volume and other beers have alcohol content by volume higher than 5%. Considered in terms the beers that consumers purchase in the greatest volume, the national weighted

alcohol content by volume *average* for 2009 and 2010 was 4.6%.[6] Using 4.6% ABV as the comparative measure, a 23.5 oz can of Respondents' flavored malt beverage product contains as much alcohol as 5.1 beers, not 4.5 beers. The proposed label disclosure is thus incorrect when considered in terms of the national weighted ABV *average*. For the top ten beers sold in the US in 2009 and 2010,[7] the average alcohol content by volume is even lower – 4.4%. A comparison of Respondents' 23.5 oz. can based on a 4.4% ABV translates to as much alcohol as 5.3 beers, which is almost a full beer more than the proposed disclosure statement.

A consumer would likely assume that this label disclosure gives them all the information they need to compare the alcohol content of Respondents' flavored malt beverage products against the alcohol content of the beer they ordinarily purchase and consume. For example, a consumer who regularly drinks light beer with a 4.2% ABV may mistakenly believe that a single 23.5-ounce can of Respondents' 12% alcohol by volume flavored malt beverage product is equal to 4.5 of their preferred light beer product when the real comparative number is actually 5.6 beers.[8] Given that four of the five top selling beers by volume in this country are light beers, each with an ABV of 4.2%,[9] there is a strong likelihood that the proposed disclosure statement will not adequately inform large numbers of consumers.[10]

Consumer may be particularly under-informed by the proposed disclosure in four states where Respondents' products are available -- Oklahoma, Kansas, Colorado, and Minnesota. Supermarkets and convenience stores in these states only sell beer that is 3.2 alcohol by weight beer (ABW) or lower. A beer that is 3.2 ABW is 4.0% ABV. While 3.2 beer makes up about 2% of US market share by volume, 89.7 % of the beer sold in Oklahoma in 2010 was 3.2 beer. The proposed label disclosure completely fails to inform a 3.2 beer consumer that a single 23.5 oz. can of Respondents' 12% alcohol by volume flavored malt beverage product translates into 5.8 12 ounce, 3.2 beers.

The proposed label disclosure is equally flawed and misleading because it compares one alcohol beverage against another based on serving size. Serving sizes for

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[6] This figure is calculated as an average of ABVs of the 60+ largest brands in the US weighted by volume of sales. These 60+ brands account for approximately 90% of total US volumes of beer sales. *See* Simmons Market Research Bureau; Fall 2007 Study of Media and Markets.

[7] The top ten beer brands by volume of sales account for over 60% of the total US volumes of beer sales annually.

[8] A 4.2% ABV translates to 5.6 beers.

[9] The four top selling light beers are Bud Light, Coors Light, Miller Lite and Natural Light, each with an ABV of 4.2%.

[10] Some consumers prefer lower calorie light lager beers like Miller Genuine Draft 64, which has a 2.8% ABV or Bud Select 55, which has a 2.4% ABV. Using the Commission's proposed disclosure statement formula, a 23.5 ounce 12% ABV flavored malt beverage equals 8.3 12 ounce, 2.8% ABV beers or 9.8 12 ounce, 2.4% ABV beers. The proposed disclosure statement has no utility for these consumers.

alcohol beverages vary considerably; they are not equivalent. Serving size is not consistent for all brands and packages even within the category of beer.[11] Any disclosure that suggests that there is such a thing as a standard drink of beer might mislead consumers into believing that similar standards exist for all forms of alcohol.[12]

Rather than requiring Respondents to employ a disclosure comparing their flavored malt beverage products with beer in a way that is likely to confuse or mislead consumers, the Commission should defer to the TTB's well-reasoned regulations on alcohol content disclosures. There is certainly nothing to indicate that consumers do not understand alcohol by volume measurement, in use for decades. There is also no evidence that the existing standard is confusing for consumers. Concentration by volume is easy to compare for those who want to know the relative alcohol content of different alcohol beverages. These are direct, obvious, and simple comparisons to make and to apply to everyday situations. TTB, as well as other federal agencies, have utilized this method for decades. Absent evidence that consumers are actually deceived by Respondents' existing label disclosures about alcohol concentration by volume, the Commission should not risk creating consumer confusion by suggesting the adoption of an additional standard for comparison on the same label.

G. The Proposed Consent Agreement Requires a Comparative Alcohol Strength Claim.

The Commission should reconsider the proposed Consent Agreement because it departs from current TTB and state labeling practice by requiring Respondents to make an alcohol content disclosure expressed not as a percentage of alcohol by volume, but as a claim of comparative alcohol strength. For example, for a 23.5-ounce can of Four Loko with 12 percent alcohol by volume, Respondents must disclose that the alcohol content of that product is equal to or compares with the alcohol content of 4 ½ "regular" (12 oz. 5% alc/vol) beers. There is a legitimate concern that the required disclosure is a claim of comparative alcohol strength, which would set Respondents' label apart from any label currently approved by TTB or the states. TTB regulations simply do not provide for comparative alcohol strength disclosures for malt beverages other than to prohibit the use of terms such as "strong," "full strength," or "high test" on labels. *See* 27 CFR 7.29(f). Comparative alcohol strength claims are not favored. Indeed, no malt beverage company currently compares in advertising and on product labels the relative strength of its products against other alcohol beverages

As a comparative alcohol strength claim, the proposed disclosure is particularly troubling since it would represent the first ever Federal Government-mandated comparative alcohol strength claim. The Government has taken the exact opposite

[11] While 12-ounce bottles or cans account for 80% of all beer sold in the United States, larger or smaller container sizes ranging from 7 to 40 ounces make up 11% of the total volume of beer sold in this country. Draft beer, which accounts for about a 9% share of the overall beer market, is served in a variety of different sized cups and glasses.

[12] Defined serving sizes are misleading unless they are based on amounts actually poured and consumed, not on fictitious volumes designed to equalize the absolute alcohol content of beer, wine and liquor.

position for many years, arguing that it has a significant interest in protecting the health, safety and welfare of its citizens by preventing brewers in particular from competing based on alcohol strength. The Government took this position of concern for "a particular type of beer drinker--one who selects a beverage because of its high potency--from choosing beers solely for their alcohol content. In the Government's view, restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483-484 (1995). The Government found support for its assertion in the legislative history of the FAA Act to wit, "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer." *See* Testimony of Ralph W. Jackman, Wisconsin State Brewers Association, Federal Alcohol Administration Act: Hearings Before the Ways and Means Committee, HR8539, 74th Cong., 1st Sess. (1935). The Government has also previously pointed to hearing testimony "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with lower alcohol content." *Id.*

H. The Commission is Acting Without Adequate Research or Evidence.

Concern about the imposition of new labeling requirements is particularly acute given that the Commission seems to be acting without evidence that the existing labeling regime is inadequate or that a new and different disclosure is required to aid consumers. There is simply no evidence that TTB erred in approving Respondents' current label under the standard set forth in 27 CFR § 7.71, or that the TTB regulations, which require Respondents to include on their labels alcohol content statements expressed in percentage of alcohol by volume, are themselves inadequate. There is also no evidence that consumer do not understand the existing alcohol by volume measurement – in existence and use for decades. There is simply no need for an additional method of displaying alcohol content on flavored malt beverage labels.

The record is also bereft of supporting research going to the question of what message consumers might take from the proposed label disclosure. It is impossible to tell whether the proposed label disclosure would have a positive, negative, or neutral effect on consumers. Would the average consumer of Respondents' products see this label disclosure and conclude that they should consume an entire 23.5 oz. 12% ABV flavored malt beverage slowly over time? Alternatively, might they see the statement as an advertisement of the potency of the drink, and thereby a positive attribute of the product? Would they see the statement as an exhortation to buy this particular container because it is expressly equal to but less expensive than 4.5 regular (12 oz. 5% alc/vol) beers? Would they understand how the disclosure statement might be different depending on the ABV of the beer they prefer? Perversely, the adoption of the Commission's Proposed Consent Agreement could have the unintended consequence of encouraging the precise sort of potentially harmful consumer behavior that the Agreement presumably seeks to curb. The Commission should not adopt an untested label disclosure going to the issue of relative product strength without any knowledge of the disclosure's actual effect on consumers.

Conclusion

While the undersigned supports the Commission's role in curbing false and deceptive advertising, we encourage the Commission to defer to the TTB and the States on matters involving alcohol beverage labeling practices. We also believe that it would be ill advised for the Commission to adopt the Consent Agreement, which departs from existing labeling practice by requiring a misleading disclosure of comparative alcohol strength that is unsupported by research or evidence of its likely effect on consumers. Careful study would seem to be a public policy necessity before requiring any comparative alcohol strength claim that could unintentionally undermine other long-standing legislative and regulatory principles and potentially create unfair or deceptive circumstances for the consuming public the Commission seeks to protect. The Commission should certainly consider whether the proposed disclosure statement might lead to the potential unintended consequence of making the product more attractive based on strength.

Respectfully submitted,

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President
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