



NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Thomas Farley, MD MPH
Commissioner

December 2, 2011

<https://ftcpublic.commentworks.com/ftc/phusionprojectsconsent>

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Sir or Madam:

This letter presents comments regarding the proposed FTC consent order with Phusion Projects, LLC, (File No. 112 3084). The proposed order requires the respondent to label any flavored malt beverage containing more than 1.5 ounces in a way that clearly and conspicuously states the equivalent in standard beers and to package and advertise them in a manner intended to indicate that they are not single-serving containers. This proposed agreement is intended to address the deceptive business practices pursued by Phusion and the complaint that equivalency has been consistently misstated.

The New York City Department of Health and Mental Hygiene congratulates the Federal Trade Commission on recognizing the dangerous nature of the product and its advertising strategy. However, this proposed consent order, while improving accuracy in marketing, may contribute to negative public health consequences. An appropriate and effective consent order here should accomplish two results: First, it should take concrete steps to reduce the intentional and inadvertent overconsumption of alcohol by those who purchase Phusion products. Second, the consent order should adhere to the guiding health principal of *primum non nocere* ("first, do no harm"). Respectfully, the New York City Department of Health and Mental Hygiene has concerns that the proposed consent order achieves neither of these objectives. Specifically, our recommendations to improve the proposed consent order are as follows:

Limit the size of containers instead of requiring large containers to be resealable. As stated in the original complaint, “In truth and in fact, an individual cannot safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion.” The main problem with the Four Loko product involves the container size, which is designed as a single serving and, if consumed as intended by the manufacturer, constitutes binge drinking. However, requiring that the bottles be resealable does not solve the problem. To wit, soda in resealable bottles has been common for years, but as Coca-Cola’s introduction of smaller cans last year illustrates, even beverage manufacturers recognize that bottles are rarely re-sealed.ⁱ We question upon what, if any, research and data the FTC based its conclusion that requiring resealable containers would reduce the amount of beverage consumed. Rather, the order should limit the serving size of the container to two “servings” of alcohol.

Do not require a conspicuous statement of alcohol content. Young people increasingly report getting drunk as motivation for drinking.^{ii,iii} Youth and young adults are increasingly turning from low alcohol beverages such as beer toward stronger beverages.^{iv} In New York City, 42% of adults who drink and 52% of underage youth who drink, binge drink^v – consuming five or more drinks in one sitting. In such an environment, stating that a beverage is the equivalent of several standard beers is likely to increase its appeal and the intoxication of consumers, rather than contributing to moderate consumption.

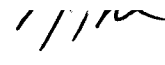
Broaden advertisement and placement restrictions instead of requiring advertisements to present beverage as not a single-serving. Prohibiting images that show individuals consuming entire bottles is simply not an effective manner of protecting the public health. The restrictions in the order should go in the other direction. We recommend that the order prohibit advertisements from promoting the amount of alcohol contained in the product. Moreover, the order should prohibit Phusion from directing retailers to display the 23.5 oz. cans in refrigerated cases alongside other lower alcohol, single serve beverages as highlighted in Exhibit C-2 of the complaint.

Include a restriction on user-generated content on websites. Adolescence is naturally a period of experimentation and risk-taking. Studies show that impulsivity, lack of foresight, poor decision-making, and risk-taking are common among adolescents.^{vi,vii} Peer attitudes often outweigh information in the adolescent decision-making process and self-regulation is a sign of

maturity.^{viii} Marketing strategies such as the use of social media provide just the sort of peer influence most likely to encourage risky behaviors by young people. Those who irresponsibly consume the product and share their photos online are not bound by the same restrictions as the company. This enables them to display and, as a result, normalize unsafe levels of consumption. As such, we recommend that the FTC restrict or prohibit the posting of user-generated content on corporate websites, such as that shown in Exhibits B1-B4 of the complaint.

The New York City Department of Health and Mental Hygiene encourages the FTC to revise the proposed consent agreement consistent with our recommendations and to provide for a more structured monitoring of the implementation of the measures to ensure initial and continuing compliance. Moreover, we urge the FTC to remain vigilant in scrutinizing youth-targeted, alcohol-related promotion, advertising and marketing practices by the industry. Thank you for your consideration.

Respectfully submitted,

Thomas Farley, MD MPH 
Commissioner

ⁱ Black J. A new Coke? Well, it's smaller. *Washington Post*. October 19, 2009. Accessed 10-31-2011 from: <http://voices.washingtonpost.com/all-we-can-eat/food-politics/a-new-coke-well-its-smaller.html>

ⁱⁱ Wechsler, H, Isaac N. 'Binge' Drinkers at Massachusetts Colleges: Prevalence, Drinking Style, Time Trends, and Associated Problems *JAMA*. 1992;267(21):2929-2931

ⁱⁱⁱ Marczinski, CA. Alcohol Mixed with Energy Drinks: Consumption Patterns and Motivations for Use in U.S. College Students. *Int J Environ Res Public Health*. 2011 August; 8(8): 3232-3245.

^{iv} Siegel MB, Naimi TS, Cremeens JL, Nelson DE. Alcoholic beverage preferences and associated drinking patterns and risk behaviors among high school youth. *Am J Prev Med*. 2011 Apr;40(4):419-26.

^v SAMHSA, Office of Applied Studies. National Survey on Drug Use and Health, NYC results for 2007-2008.

^{vi} Steinberg L. Cognitive and affective development in adolescence. *Trends in Cognitive Sciences*. 2005;9:69-74..

^{vii} Crone EA. Executive functions in adolescence: inferences from brain and behavior. *Developmental Science*. 2009;12:825-830

^{viii} Steinberg L. A Social Neuroscience Perspective on Adolescent Risk-Taking. *Developmental Review*. 2008. 28, 78-106.