



Office of the Secretary

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

February 6, 2013

*In the Matter of Phusion Projects, LLC; Jaisen Freeman; Christopher Hunter;
and Jeffrey Wright, FTC File No. 112 3084, Docket No. C-4382*

Thank you for your comment on the Federal Trade Commission's complaint and proposed order in the above-titled proceeding. Your letter was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission. As is further described below, the Commission has determined that the public interest would best be served by issuing the order as proposed, with two modifications.

The FTC complaint alleged that respondent Phusion Project LLC's packaging and marketing for Four Loko made an implied representation that Four Loko has as much alcohol as one or two beers and could safely be consumed on a single occasion. In fact, a 23.5 ounce, 12% alcohol by volume ("ABV") can of Four Loko has as much alcohol as four or five beers, and drinking just one constitutes unsafe binge drinking. The proposed order with Phusion, accepted for public comment on October 3, 2011, required that labels for Four Loko and other flavored malt beverages containing more than 1.5 ounces ("oz") of pure alcohol (2½ servings) disclose, on the front of the can, the amount of alcohol in the product (Part I)¹ and be resealable (Part II). Additionally, it prohibited respondents from misrepresenting the alcohol content of any beverage alcohol product (Part III.A), and from depicting any alcohol product containing more than 1.5 oz of pure alcohol being consumed directly from the container (Part III.B).

The Commission received numerous public comments on the proposed order. Many commenters argued that the FTC should have banned Four Loko, or limited its size or potency; they suggested that the Commission's action represented an "approval" of 23.5 oz, 12% ABV Four Loko. The FTC, however, has no jurisdiction to force a change in the size or potency of a

¹ Under the originally proposed order, the disclosure for a 23.5 oz, 12% ABV Four Loko would have been, "This can contains as much alcohol as 4½ cans of regular (12 oz, 5% ABV) beers."

product that has been approved for distribution in the United States by the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). TTB has approved the distribution of 23.5 oz, 12% ABV Four Loko.² Thus, the FTC's action in this matter, consistent with our statutory authority, is designed to prevent consumer deception arising from the marketing of this existing product.

Commenters also expressed concern that, because the order did not limit the size of Four Loko containers, the Commission had altered the definition of a "serving" of alcohol. In fact, both the originally proposed order and the final order make clear that 0.6 ounces of pure alcohol constitutes a "serving." This is the standard set forth in the U.S. Dietary Guidelines and in guidance issued by the National Institute on Alcohol Abuse and Alcoholism.³

Some commenters argued that that the order would inhibit the efforts of states to address concerns about products such as Four Loko. Under the 21st Amendment to the Constitution, the states have broad authority over the importation, sale, and distribution of alcohol beverages within their borders. An FTC order in this case will not prevent a state from taking additional action with regard to the distribution of Four Loko or similar products, if it so chooses.⁴

Two issues raised by commenters, however, caused the Commission to modify the order. First, some commenters argued that the originally proposed disclosure in Part I could be used to signal that Four Loko is an efficient, inexpensive way to become inebriated. Others were concerned that the proposed order was insufficiently broad, because the provisions of Parts I, II, and III.B applied only to beverages containing more than 1.5 oz of ethanol (2½ servings).

In response to these comments, the Commission has modified Part I of the final order to require a back-of-can "Alcohol Facts" disclosure. This disclosure sets forth the alcohol content of the product in terms of ABV; the number of servings per can, and the serving size in ounces. Additionally, the disclosure states that, "According to the U.S. Dietary Guidelines, a serving contains 0.6 ounces of pure alcohol." This definition of a "serving" will drive the mathematical calculations as to the number of servings in a can, and serving size per ounces. The order

² TTB discharges this responsibility by issuing a Certificate of Label Approval, or COLA. TTB does not have the authority to prohibit issuance of a COLA for a malt beverage based on its container size or alcohol content.

³ This is the amount of alcohol contained in a 12 oz, 5% alcohol by volume (ABV) serving of beer, a 1.5 oz 40% ABV serving of distilled spirits, or a 5 oz 12% ABV serving of wine. U.S. Departments of Agriculture and Health and Human Services, *Dietary Guidelines 2010*, <http://health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf>, at 21; National Institute on Alcohol Abuse and Alcoholism, "What Counts as a Drink," http://pubs.niaaa.nih.gov/publications/Practitioner/CliniciansGuide2005/clinicians_guide13_p_mats.htm.

⁴ For example, some states limit malt beverages to a maximum of 6% ABV.

specifies the parameters of the disclosure in terms of fonts, font sizes, etc., which will vary slightly depending on the size of the container. Phusion is required to seek TTB approval to display this disclosure on its products, and to display the label within 90 days of obtaining such approval. This back-of-can disclosure will effectively remedy the deception alleged in the complaint, allow consumers to better gauge their alcohol intake, and provide alcohol content information in a format analogous to the familiar "Nutrition Facts" labels found on foods. Further, the disclosure provisions in Part I, and the provision in Part III.B. that prohibits Phusion from showing consumers drinking alcohol product directly from the container, now apply to beverages containing 1.2 ounces of pure alcohol (2 servings) or more. The requirement in Part II that any flavored malt beverage containing more than 1.5 ounces of ethanol be resealable, commencing 6 months from the effective date of the order, remains unchanged.

It helps the Commission's analysis to hear from a variety of sources in its work, and we thank you again for your letter.

By direction of the Commission, Chairman Leibowitz and Commissioner Wright not participating.

Donald S. Clark
Secretary