

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of Phusion Projects, LLC, et al., File No. 112 3084

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Phusion Projects, LLC, Jaisen Freeman, Christopher Hunter, and Jeffrey Wright (the “respondents”). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw the agreement or make final the agreement’s proposed order.

This matter involves the marketing for Four Loko, a fruit-flavored malt beverage product. Four Loko contains 11% to 12% alcohol by volume (“ABV”) and is sold in a 23.5 oz can. The respondents promoted Four Loko through product packaging, Internet advertising including fan photo contests, and print solicitations to potential distributors.

According to the FTC complaint, the respondents represented in its marketing materials that a 23.5 oz can of 11% or 12% ABV Four Loko: (a) contains the alcohol equivalent to one or two regular, 12 oz beers, and (b) could safely be consumed in its entirety on a single occasion. The complaint alleges that both claims are false or misleading because a 23.5 oz can of 11% ABV Four Loko contains alcohol equivalent to 4.3 regular beers and a 23.5 oz can of 12% ABV Four Loko contains alcohol equivalent to 4.7 regular beers. In addition, the complaint alleges that the respondents’ failure to disclose these facts was deceptive, in light of their representation that a can of Four Loko contained a single serving.

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future. Parts I and II apply to the defined term, “covered flavored malt beverages.” Part I prohibits the corporate respondent and controlling respondents (generally defined as the individual respondents, when such individual(s) is, or collectively are, a significant shareholder or directly or indirectly manage or control any entity) from offering for sale, selling, or distributing Four Loko or any other covered flavored malt beverage in a container that provides more than 1.5 oz of ethanol (approximately two and one half (2 1/2) regular beers) unless the label discloses, clearly and conspicuously, the following statement:

“This can [or bottle] has as much alcohol as [] regular (12 oz, 5% alc/vol) beers.”

Part I sets forth specific approved fonts and font sizes, placement requirements (for both cans and bottles larger and smaller than 12 oz), and a formula for calculating the number of regular beers in the container. This part also provides that the second set of brackets shall be replaced by the number of 0.6 oz servings of ethanol in the product. Part I is designed to address the allegedly false representation that Four Loko contains the alcohol equivalent to one or two regular, 12 oz beers. The disclosure requirement is designed to alert consumers to the actual number of servings of alcohol in the container.

Part II of the proposed order further prohibits, commencing six (6) months after date of issuance of the order, the corporate respondent and controlling respondents from offering for sale, selling, or distributing Four Loko or any other covered flavored malt beverage in a container that provides more than 1.5 oz of ethanol unless the container is resealable. Together, Parts I and II of the proposed order are designed to address the allegedly false representation that Four Loko can safely be consumed on a single occasion. The disclosure requirement is designed to alert consumers to the number of servings of alcohol in the container, and the resealability requirement makes it possible for consumers to drink a portion of the container's content and to save some for later.

Part III of the proposed order prohibits the respondents from misrepresenting the alcohol content of any alcohol beverage product. Part III also prohibits the respondents from depicting in advertising any alcohol beverage product containing more than 1.5 oz of ethanol being consumed directly from the container. This provision also addresses the respondents' representation that a can of Four Loko can be safely consumed on a single occasion. This prohibition provides a clear standard for compliance by the respondents and for enforceability by the FTC.

Part IV of the proposed order states that the order does not prohibit the respondents from making any representation about any alcohol beverage product that is specifically required by regulation or order by the U.S. Department of Treasury Alcohol and Tobacco Tax and Trade Bureau pursuant to the Federal Alcohol Administration Act.

Parts V through IX of the proposed order require the respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in any of the individual respondents' business or employment that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.