

National Alliance to Prevent Underage Drinking

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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex D)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Public Comment to Constellation Brands, File No. 0923035
Filed electronically at: <https://secure.commentworks.com/ftc-ConstellationBrands>

Dear Sir or Ms:

We commend the Federal Trade Commission's (FTC's) decision to investigate the marketing practices associated with Constellation Brands' Wide Eye Schnapps, an Alcoholic Energy Drink (AED) containing distilled spirits, sugar and stimulants, including caffeine and guarana. Federal action is urgently needed to address the health and safety risks associated with AEDs, particularly as they affect youth alcohol problems.

Unfortunately, we are submitting these comments in opposition to the proposed Consent Order. We do not believe that it is a sufficient response by the FTC given the scope of the problem posed by Wide Eye and similar products on the market and the deceptive and unfair nature of Constellation Brands' marketing practices. As discussed below, we believe FTC should prohibit the premixing of alcohol and stimulants such as caffeine as an unfair and deceptive business practice.

Health and Safety Risks of AEDs

Nonalcoholic energy drinks containing high levels of caffeine constitute a rapidly growing segment of the beverage market, particularly among teenagers and young adults. Recent scientific studies have raised concerns about the health and safety risks these products pose, particularly for youth.¹ A popular trend has been to mix these energy drinks with alcohol. Many alcohol producers, including Constellation Brands, noted this trend and began marketing pre-mixed AEDs using many of the youth-oriented marketing strategies associated with nonalcoholic energy drinks. In particular, AED marketers claim or imply that AEDs increase a person's stamina or energy level, may include youth-oriented messaging and graphics, and rely on unmeasured media and viral marketing techniques (e.g., text messaging, message boards on

¹ Reissig, C. Strain, E., Griffiths, R., 2009. Caffeinated energy drinks—A growing problem. *Drug & Alcohol Dependence* 99: 1-10.

Internet website, etc.).² The marketing frequently promotes consumption as a means to staying up longer and drinking more.

The risks associated with mixing alcohol and caffeine and other stimulants are now well documented in the scientific literature. Of particular concern is the research finding that stimulants mask the subjective feeling of intoxication, which increases the possibility that consumers, particularly inexperienced drinkers, will engage in heavy drinking and incorrectly believe they are capable of potentially dangerous activities and tasks, including driving.³ Recent surveys have shown that mixing alcohol with energy drinks is popular with college students, particularly among those who engage in frequent binge drinking.⁴ College students who combine alcohol and caffeine are twice as likely to experience alcohol-related injuries, including sexual assault and are twice as likely to drive with someone who has been drinking as those students who do not consume alcohol and stimulants in this manner.

Investigations, Litigation and Settlements Involving MillerCoors and Anheuser-Busch

In response to these risks, the Attorneys General of 13 States and the City and County of San Francisco initiated an investigation of the two leading manufacturers of AEDs: MillerCoors Brewing Company (the producer of Sparks) and the Anheuser Busch Company (the producer of Tilt and Bud Extra). The Attorneys General initiated their investigation because of their concern that the marketing of these products may constitute an unfair and deceptive business practice under many State laws. The Center for Science in the Public Institute (CSPI) independently filed lawsuits against the two beer producers that made similar allegations. Each company entered into an Assurance of Voluntary Compliance with the Attorneys General agreeing to discontinue the mixing of alcohol with caffeine and other stimulants. The MillerCoors agreement included strict marketing guidelines for Sparks once it was reformulated. Anheuser-Busch also entered into an agreement with CSPI that had terms similar to those agreed to with the Attorneys General.

AED Marketing and Federal Regulation

Other manufacturers, including Constellation Brands, are filling the void in the marketplace left by the MillerCoors and Anheuser-Busch agreements. It is not practical for State law enforcement officials to address the problem on a product-by-product or State-by-State basis. Rather, Federal action is needed. To this end, numerous health and safety organizations have approached both the US Alcohol and Tobacco Tax and Trade Bureau (TTB) and the Federal Food and Drug Administration (FDA).

TTB issued its announcement of May 18, 2005, regarding misleading health-related statements made by AED producers. TTB warned the producers of malt beverage-based AEDs that their

² Simon, M., Mosher, J., 2007. *Alcohol, Energy Drinks, and Youth: A Dangerous Mix*. Marin Institute, San Rafael, CA. <http://www.marininstitute.org/alcopops/resources/EnergyDrinkReport.pdf>.

³ Ferreira, S., de Mello, M., Pompeia, S., de Souza-Formigoni, M., 2006. Effects of energy drink ingestion on alcohol intoxication. *Alcoholism: Clinical & Experimental Research*, 30: 598–605; Marczynski, C., Fillmore, M., 2006. Clubgoers and their trendy cocktails: Implications of mixing caffeine into alcohol on information processing and subjective reports of intoxication. *Experimental & Clinical Psychopharmacology* 14: 450–458.

⁴ O'Brien, M., McCoy, T., Rhodes, S., Wagoner, A., Wolfson, M., 2008. Caffeinated cocktails: Get wired, get drunk, get injured. *Academy of Emergency Medicine*. 15: 453–460. Malinauskas, B, Aeby, V., Overton, R., Carpenter-Aeby, T., Barber-Heidal, K., 2007. A survey of energy drink consumption patterns among college students. *Nutrition Journal* 6: 35.

advertisements may not “imply that consumption of certain alcoholic beverages will have a stimulating or energizing effect, or will enable consumers to drink more of a product without feeling the effects of the alcohol.”⁵ TTB issued a similar announcement regarding advertisements for distilled spirits-based AEDs on August 2, 2005.⁶ In both instances, TTB stated that it would take appropriate enforcement action if it found that advertisements contained misleading health-related statements in violation of the Federal Alcohol Administration Act or its implementing regulations.

The only enforcement action TTB has announced publicly involved the Sparks brand, then produced by McKenzie River Corporation. Per a TTB order dated July 13, 2007, the company’s wholesaler basic permit was suspended for seven days for using the term “alc/energy” in its advertising. However, the order did not address Sparks’ other marketing tactics that suggested stimulating or energizing effects (e.g., images of batteries and space ships and the use of terms such as “powered by” and “ignited”). These tactics continued after conclusion of the TTB proceeding and until the Attorneys General’s agreement, which required MillerCoors to not only to discontinue these and other marketing practices but to cease premixing of alcohol and stimulants.

The FDA to date has not announced any activity regarding AEDs. This is in spite of the fact that the practice of mixing stimulants such as caffeine and guarana and alcohol appears to violate the Federal Food, Drug and Cosmetic Act (FDCA), which prohibits the adulteration of any food in interstate commerce.⁷ Adulteration occurs when a food contains an “unsafe” food additive.⁸ The FDA determines whether a food additive is safe through its Generally Recognized As Safe (GRAS) exemptions. A food additive must be listed as GRAS by the agency under the conditions of its intended use. To obtain a GRAS exemption, manufacturers must establish that the additive is safe for its intended use based on published scientific literature and demonstrate that there is a consensus in the scientific community regarding its safety.⁹ FDA has stated that “it is the use of a substance, rather than the substance itself, that is eligible for the GRAS exemption.”¹⁰ The FDA has approved caffeine as GRAS only for use in non-alcoholic beverages. It has not approved caffeine for use in alcoholic beverages.¹¹ Nor has guarana received a GRAS exemption for use in alcoholic beverages. AED manufacturers clearly cannot meet this burden, since the consensus in the scientific literature is that adding caffeine to alcohol creates significant health and safety risks, as noted above.

The Proposed Consent Agreement is an Inadequate Response to the Problems Posed by the Wide Eyes Brand and AEDs Generally.

With the proposed Consent Order, FTC joins TTB and FDA in failing to enforce Federal laws and prohibit alcohol manufacturers from adding caffeine and other stimulants to their products.

⁵ TTB Announcement: *Advertising Malt Beverages Containing Ingredients Associated with Non-Alcohol Energy Drinks*, May, 18, 2005. http://www.ttb.gov/announcements/051805energy_beer.pdf.

⁶ TTB Announcement: *Advertising Distilled Spirits Containing Ingredients Associated with Non-Alcohol Energy Drinks*, Aug. 2, 2005. <http://www.ttb.gov/announcements/080205energydsgenericletter.pdf>.

⁷ 21 U.S.C. § 331(b).

⁸ 21 U.S.C. §§ 342(A)(2)(C); 348(a).

⁹ 21 CFR §§ 170.3, 170.30.

¹⁰ 62 Fed. Reg. 18939 (April 17, 1997).

¹¹ 21 C.F.R. § 182.1180.

Pre-mixing alcohol and caffeine is an unfair and deceptive business practice under Federal law that is administered by FTC.¹² This practice violates the FDCA, it poses unreasonable, hidden risks to consumers, particularly youth, and there are no countervailing benefits to consumers or to competition. Each of the three Federal agencies – FTC, FDA, and TTB – has the authority to follow the State Attorneys’ General lead and require AED manufacturers to remove all stimulants from alcoholic beverages. We therefore urge the FTC to reject this proposed Consent Order and begin action immediately (either on its own or in collaboration with TTB and FDA) to require Constellation Brands to remove all stimulants from the Wide Eye brand and require similar action by other AED manufacturers.

Even if one were to assume that the combination of alcohol and stimulants in Wide Eye does not in itself constitute an unfair and deceptive business practice, the proposed Consent Order is too vague and unenforceable. Unlike the Attorneys General agreement with MillerCoors, it does not specify what marketing practices constitute a representation that the consumers who consume the product will remain alert or that the stimulants will counteract the effects of alcohol consumption. Such specific guidelines are critical. For example, a reasonable interpretation of the Consent Order is that the name of the product itself –Wide Eye – is a violation, since it implies that consumers will have “wide eyes” when it is consumed, a clear representation that the product will keep you awake and alert. We urge the FDA to use the Attorney General agreement with MillerCoors as a model for developing an effective Consent Order with Constellation Brands.

The proposed Consent Order is not only unenforceable because of its vagueness; it also imposes no penalty on Constellation Brands for its illegal, deceptive, and unfair marketing tactics. The Exhibits to the Consent Order demonstrate the company’s outrageous advertising practices. The TTB, in its decision regarding Sparks, and the Attorneys General, in their agreements with Anheuser Busch and MillerCoors, included financial payments as part of their settlements. Constellation Brands is a large multinational company. Without a financial punishment, the Consent Order provides no disincentive to Constellation Brands for continuing to violate Federal law and Commission policy.

Respectfully submitted,

[Organizations]

¹² 15 U.S.C. §§ 45(a)(1), (n). The Commission has the authority to prohibit unfair or deceptive business practices. A business practice is unfair if it is likely to deceive the consumer, likely to cause substantial injury to consumers which are not reasonable avoidable by consumers themselves and are not outweighed by countervailing benefits to consumers or to competition.