

# **Preliminary Findings of the New York State Senate Standing Committee on Alcoholism and Drug Abuse**



## **Flavored Malt Beverages and New York State's Youth**

**June 2011**

**Senator Jeffrey D. Klein**

**Chairman**

## **I. Introduction**

### The Hearing

On April 12, 2011, the New York State Senate Committee on Alcoholism and Drug Abuse,<sup>1</sup> chaired by Senator Jeffrey D. Klein, held a public hearing to gather information on the possible harmful effects of high alcohol content flavored malt beverages (hereinafter “FMBs”),<sup>2</sup> particularly on New York State’s underage drinkers. Testimony was presented by fifteen witnesses, including Commissioner Arlene González-Sánchez of the New York State Office of Alcohol and Substance Abuse Services (OASAS), Chairman Dennis Rosen of the New York State Liquor Authority, and Commissioner Thomas Farley of the New York City Department of Health. Also in attendance were experts from law enforcement, community groups, and the food industry, as well as the convenience store industry and the Flavored Malt Beverage Coalition who gave testimony on the distribution, marketing and the effect of flavored malt beverages on New York State as a whole.<sup>3</sup> While the list of invited speakers was designed to offer a balanced field of opinion on a wide variety of issues concerning this topic, ranging from economic to health and safety aspects, a notable absence were FMB manufacturers, such as Phusion Projects LLC, a group well known for spearheading the popularity of FMBs among youth.

### What are Flavored Malt Beverages?

FMBs are sweetened and flavored malt-based drinks with high alcohol content. They are generally sold for \$2 to \$3 for a 22 ounce can, containing several servings of alcohol. They have similar packaging to non-alcoholic energy drinks or iced teas, are sold in convenience stores—often alongside similar looking non-alcoholic beverages, and are otherwise marketed in a manner that may be attractive to minors. Phusion’s version of the drink, Four Loko, for example, has a 12 percent alcohol content, while an average beer generally has a 4 to 5 percent alcohol content. The can is a flashy and colorful design. The contents are sweet and flavored with pop culture flavorings such as Watermelon, Blue Raspberry, Lemonade and Grape. They are sold in convenience stores, which are more accessible to underage drinkers and where valid identification is often more easily overlooked than in a liquor store, where similarly packaged non-alcoholic drinks are not also sold.

### Valuable Omission From Hearing

There was time allotted in the schedule for manufacturer attendance to help to arrive at the proper definition of FMBs and to give testimony on this topic. Although they are certain to have exclusive expertise on the process to manufacture FMBs, all manufacturers declined the invitation to testify. Phusion went so far as to post a letter addressed to Senator Klein on their

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<sup>1</sup> The New York State Alcoholism and Substance Abuse Committee is chaired by Senator Klein and also includes Senators Shirley Huntley (ranker), John J. Bonacic, Roy McDonald, Kemp Hannon, and Neil Breslin. Also in attendance were Senators Charles Fuschillo (Ch., Transportation Committee), Diane Savino (Ch., Children and Family Committee) and David Carlucci.

<sup>2</sup> Note that FMBs may also be generally referred to as “alcopops.”

<sup>3</sup> A full list of presenters and their testimony is available at <http://www.nysenate.gov/event/2011/apr/12/allow-committee-fully-explore-high-alcohol-flavored-malt-beverages-proliferation-a>. Also note that the Flavored Malt Beverage Coalition does not represent many of the high alcohol content flavored malt beverages which were the subject of the hearing.

website stating the reasons for declining the invitation.<sup>4</sup> Citing “concern[] that the hearing may not be a fair and balanced discussion of the important issues being considered”, Phusion addressed some of the hearing topics in its public letter, including ease of youth access, or marketing strategies, and packaging that may be attractive to teens and other youth. Such topics were also discussed by the speakers at the hearing. But they could not speak to the direct marketing plan of Phusion or the manufacturing process. Nor could they field difficult questions intended for FMB manufacturers and marketers. The primary products that were in question are as follows:

Product	Manufacturer	Size (fl oz)	Alcohol by Volume	Flavors	Price Point
Blast	Pabst Brewing Company	23.5	12%	Strawberry, Lemonade, blueberry, pomegranate, grape, raspberry, watermelon	\$2.50/can
Four Loko	Phusion Project / Drink Four Brewing Company	11.2 bottle 32 can	Bottle: 8% MaXed: 10% Can: 12%	Lemonade, cranberry lemonade, lemon lime, grape, fruit punch, watermelon, orange, blue raspberry	\$2.29/ can Also available in six and twelve packs
Tilt	Anheuser-Busch	16 or 24	Red: 12% Blue: 11% Green: 10%	Red: Cherry/orange/lime/tropical fruit Blue: Raspberry Green: Lemon lime citrus	\$1.50/can
Joose	United Brands Company, Inc.	12 Bottle 23.5 Can	Bottle: 8.5% Can: 9.9% or 12%	“User Friendly” Bottle: Grape, mango, cherry lime, razlemondae, green apple; Can: lemonade, lime, mango, lemon tea, strawberry, watermelon, fruit punch	\$1.99-2.49 per can Also available in six and twelve packs
Core	Charge Beverage Corporation	23.5 or 32 cans	12%	Triple berry, strawberry, lemonade, spiked punch, grape, orange	\$2.29/can
Sparks	Miller Brewing/ Steel Brewing Company	16	6, 7, and 8%	Citrus, Fruit Flavor, blackberry, cherry/berry, lemon stinger	\$2.29/can

## II. Basis for the Hearing

Incidents surrounding the abuse of consuming flavored malt beverages came to light when, in August 2010, Senator Klein was approached by the Mayors and Police Chiefs of Bronxville and Tuckahoe relaying to him that in one month’s time three local teens had been rushed to hospital emergency rooms after consuming Four Loko. The local police chiefs, in conjunction with the

<sup>4</sup> Letter to Senator Klein, Phusion Media Room, April 12, 2011. Available at [http://www.phusionprojects.com/media\\_lettertoklein.html](http://www.phusionprojects.com/media_lettertoklein.html).

Senator's Office, conducted an undercover operation which caught local convenience stores selling Four Loko to underage drinkers.

In September 2010, Jason Keiran, a sophomore at Florida State, accidentally shot himself after consuming at least three 23.5 oz cans of caffeinated Four Loko.<sup>5</sup> This was in the wake of “several deaths, at least one instance of gang-related torture, [ numerous] alcohol poisoning [incidences] and in many cases hospitalization of teenagers and college students at several campus parties” where Four Loko was consumed.<sup>6</sup> Also in September, a fifteen-year-old boy wandered into traffic and was struck and killed by an SUV after he and his friends bought Four Loko at a gas station and the boy consumed two cans.<sup>7</sup>

Knowing that the undercover operation in Tuckahoe needed to be replicated in other areas and that the incidents occurring across the country were becoming more frequent, Senator Klein reached out to the Bronx Borough Command of the New York Police Department to ask for their assistance in seeing how accessible Four Loko was for underage Bronx teenagers. On the night of November 9<sup>th</sup>, 2010, the NYPD launched an investigation within the three principal precincts of the Senator's district on one night.

An NYPD Bronx Borough Command investigation into three principle precincts of the 34<sup>th</sup> Senate District, including the 45<sup>th</sup> Precinct (serving Throggs Neck, Pelham Bay, Co-Op City, Country Club, Westchester Square and City Island), the 47<sup>th</sup> Precinct (serving Wakefield and Woodlawn, Baychester, Edelwald and Fishkill), and the 49<sup>th</sup> Precinct (serving Morris Park, Van Nest, Allerton, Olinville and Pelham Gardens) sent an undercover volunteer – under the age of 18 years old – into businesses (a combination of bodegas and convenience stores) to attempt to buy Four Loko and other alcoholic beverages. In three precincts, 28 locations were visited and 11 were caught selling to minors.

On November 14, 2010, responding to safety concerns voiced by Senator Klein, the Federal Drug Administration and the State Liquor Authority, arranged a voluntary agreement by which the Retail Beer wholesalers stopped the distribution of Four Loko and similar products in New York State.

Subsequently, on November 17, 2010, the FDA issued Warning Letters to four manufacturers of caffeinated alcoholic beverages (Phusion Projects, LLC, United Brands Co., Inc., Charge Beverages Corp., Inc., and New Century Brewing Co., LLC). The FDA's letters warned that the addition of caffeine to those manufacturers' alcoholic beverages has not been approved by FDA and is an “unsafe food additive.” All four manufactures decided to cease the production of their high alcohol drinks with the inclusion of stimulants such as caffeine.

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<sup>5</sup> *Four Loko Lawsuit: Did Caffeinated Alcohol Cause Death?*, Meredith Melnick, TIME MAGAZINE, HEALTHLAND, NOV. 19, 2010. Available at <http://healthland.time.com/2010/11/19/four-loko-lawsuit-did-caffeinated-alcohol-cause-death/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Four Loko Sued for Death of 15-year-old Virginia Teen*, Nicole Howley, May 23, 2010. Available at [http://www.justicenewsflash.com/2011/05/24/four-loko-sued-for-death-of-15-year-old-virginia-teen\\_201105247640.html](http://www.justicenewsflash.com/2011/05/24/four-loko-sued-for-death-of-15-year-old-virginia-teen_201105247640.html).

However, the ingredients in FMBs are so far not officially determined as “unsafe” food additives under federal law and there is no New York ban on the there is no codified ban stated in New York law on caffeinated alcoholic beverages. Four months after New York State convinced the makers of Four Loko and Joose to pull their caffeinated products off of the shelves, a new reformulated, non-caffeinated version of the products started appearing in New York. Additionally, on March 18<sup>th</sup>, 2011, the makers of Colt 45, Pabst Brewing Company, announced the upcoming release of “Blast”, a fruity flavored drink with 12% alcohol. In order to market the product, the company hired rapper Snoop Dogg to be the face of the new drink and scheduled the release on 4/5 of 2011 to tie into their Colt 45 brand.

These new products, FMBs, are still selling at an average of around \$2.00 dollars a can and contain the equivalent of three cans of beer, sometimes as high as six. Reports across the country minors still drawn to these products as the alcohol content remains high and the flavoring and branding maintain its focus on attracting underage drinkers.

Further, a March 2011 survey of hospitals and law enforcement agencies across New York State conducted by Senator Klein regarding incidents involving high alcohol flavored malt beverages revealed:

1. That at Elmhurst Hospital in Queens, four children were rushed to the Emergency Room with alcohol poisoning due to Four Loko and Joose.
2. A gas station in Pelham, New York was still selling Four Loko in its caffeinated form in spite of a warning from the federal Food and Drug Administration that caffeine used in this way was an “unsafe food additive.”
3. In a survey of colleges, many campus security officers knew of the beverage, were concerned about the high level of alcohol, and had policies in place to deal with not only these products but underage drinking as well.
4. Since January 2011, Canisius College reported ten incidents involving underage consumption of Four Loko, both on- and off-campus.
5. That the University of Buffalo had 821 alcohol violations in 2009, many of which included Four Loko, in residence halls. Since January 2011 there were 16 overdoses due to alcohol.
6. The Downstate Poison Control Center received seven calls reporting seven separate cases of people being hospitalized after consuming Four Loko. Five of these cases involved underage drinkers.
7. In Texas, a 14-year-old girl from Arlington died in a car accident where empty cans of Four Loko were found among other alcoholic beverages<sup>8</sup>

Local Police Captains and Chiefs around NYC and Westchester were also surveyed to determine any police action involving these new high alcohol beverages. On Thursday March 24<sup>th</sup>, it came

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<sup>8</sup> <http://www.the33tv.com/news/kdaf-fda-four-loko-teen-death-ban-schumer-rodriguez-story,0,1564112.story>

to light that on St. Patrick's Day of 2011 police had to break up an underage party in Eastchester involving Four Loko.

With its brightly packaged cans, fruity flavors and low price point, the concern remained that the new version of FMBs, even without the caffeine, may be as dangerous and deceptive as their predecessor caffeinated alcohol beverages.

### **III. Initial Fact Finding**

Concerned with the risks and injuries to youth linked to the consumption of FMBs, Senator Klein drafted legislation designed to limit access to such products. The goal was to protect the youth most at risk due to inexperience by reducing or removing access to FMBs.

To draft legislation, initial research was conducted to determine potential methods of responsible regulation. These researches determined that even though FMBs may have distilled spirits in them and have an alcohol content more similar to wine than beer, they come under the definition of beer and, thus, enjoy a lower tax rate, placement in convenience stores, and more lax advertising to youth between the ages of 13 and 25.

The first alcopops contained 5 to 6% alcohol and often came in 12 oz bottles or cans. Their fruit flavors and sweetness earned them the nickname "cheerleader beer" or "chick beer." This second generation of products now contains up to 12% alcohol and come in 16 to 24 oz cans and 7 to 12 oz bottles. Users commonly refer to them as "Binge in a Can" or "Black-out in a Can". However, the industry often markets them as "progressive adult beverages."<sup>9</sup>

Some aspects of the new generation of FMBs were available through cursory research such as entering bodegas and convenience stores. FMBs often look nearly identical to their non-alcoholic counterparts such as iced teas and energy drinks. This may allow children under the age of 21 to be able to disguise an FMB among a purchase of other innocuous and legal drinks and purchase from an unwary salesperson.

The fact that the alcohol equivalence of several servings of alcohol can be found in one large container of a FMB may also lead to the possibility that inexperienced drinkers can be confused in thinking that one container contains one serving of alcohol. In reality, one container can contain up to six servings of alcohol, such as six beers. Also, alcohol content of this degree is more similar to wine than beer, but unlike wine, which is relegated to liquor stores, these high alcohol malt beverages show up in grocery stores, gas stations, and bodegas.

These drinks are also becoming more prevalent in today's culture. Beverages of this type are the most rapidly expanding sector of the market, becoming more and more prevalent and becoming more available to youth.<sup>10</sup> It is also an expanding market, grossing \$959 million in 2010.<sup>11</sup> Youth, and particularly girls and young women, are attracted to the sweet flavor which masks the

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<sup>9</sup> See, e.g., O&W, Inc., *Progressive Adult Beverages*, Available at <http://www.onwbeer.com/products/progressive-adult-beverages>.

<sup>10</sup> See, e.g., Sherer, M. *Mad for malternatives: Sales of alternative malt beverages are exploding*. Will the trend last? *Beverage Dynamics*. May-June 2002; 6-10.

<sup>11</sup> *Pabst's Horse of a Different Color: Colt 45 Enters Controversial Ring*, David Kesmodel, THE WALL STREET JOURNAL. Available at <http://online.wsj.com/article/SB10001424052748704360404576206621165029478.html>.

high alcohol content. Their lower prices—often even lower than their non-alcoholic counterparts—also appeal to youth given their low spending power.<sup>12</sup> And since they are currently classified as beer, as opposed to liquor, they are far more available and easier for youth to access. As reported by OASAS, “[t]he earlier in life a person starts to drink alcohol, the more likely he or she is to have alcohol-related problems throughout life.”

#### **IV. Legislation**

New York is not alone in its interest in regulating Caffeinated Alcoholic Beverages and the non-caffeinated flavored malt beverages. Maine reclassified alcopops as “low-alcohol distilled spirits” in 2005. Utah reclassified alcopops as distilled spirits in 2008. California also reclassified alcopops as distilled spirits but a loophole states that they may still contain up to 0.5% distilled spirits and except wine-based products. Vermont has a 2011 bill which would ban all sales of flavored malt beverages over 12 oz. and beverages containing < 6% alcohol would be taxed at a higher rate than those containing > 6%. In Texas, a bill passed the House that would ban Four Loko.

With the findings discussed previously in mind, Senator Klein drafted S.4221-A which amends the alcoholic beverage control law to include, for the purposes of distribution, and wholesale and retail sale, flavored malt beverages within the definition of liquor. In its original form, it accomplishes this by defining FMBs as a beverage with a combination of 6 percent alcohol by volume and 1 percent sugar that also includes the addition of flavorings.

Senator Klein has several bills now which address FMBs both in their caffeinated and non-caffeinated forms:

- S. 2798: An act to shift the point of sale for certain high caffeinated alcoholic beverages (hereinafter CABs) from grocery and convenience stores to liquor stores. At the time of this report, this bill has been passed the New York State Senate Committee on Consumer Protection and is now on the Senate Calendar.
- S. 2799: The purpose of this bill is to segregate CABs from other beverages so that they cannot be easily confused and requires a warning label. It also expands the State Liquor Authority's (SLA) ability to review the labels of all caffeinated alcoholic beverage containers. This bill is currently reported to the Committee on Investigations and Government Operations.
- S. 2842: An act to establish a class E felony for the sale to a minor of an alcoholic beverage containing a stimulant when such sale is made by a licensee of the state liquor authority. This bill has been passed by the Committee on Alcoholism and Drug Abuse and is now on the Senate Calendar.
- S. 3889: An act to amend the alcoholic beverage control law, in relation to prohibiting the sale of certain caffeinated or stimulant-enhanced alcoholic beverages. This bill has passed the Committee on Alcoholism and Drug Abuse and the Committee on Commerce, Economic Development and Small Business. It now is on the Senate Calendar.
- S.4221-A:<sup>13</sup> An Act to amend the alcoholic beverage control law, in relation to

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<sup>12</sup> For instance, the energy drink Monster sells for about \$2.39 for 16 ounce can which is \$.15/oz, whereas Four Loko and Joose sells for about \$2.59 for a 23.5 ounce can, or \$.11/oz.

including, for the purposes of distribution, and wholesale and retail sale, flavored malt beverages within the definition of liquor. This bill has passed the Committee on Alcoholism and Drug abuse and is now reported to the Committee on Commerce, Economic Development and Small Business.

Although S.4221-A was the primary basis for the hearing, CABs were mentioned at several points as nearly all stakeholders as well as regulators on the federal level have agreed that the dangers of caffeinated flavored malt beverages are apparent. As a brief synopsis, among the top concerns raised over the sale and consumption of CABs include:

- 1) Individuals, particularly those under the age of 30, who combine alcohol with stimulants engage in riskier drinking behaviors and drink a greater amounts in each session. The stimulants used in CABs make individuals feel more aware, but this "feeling" of awareness does not actually decrease the levels of impairment or coordination, reflexes, and judgment that result from excessive alcohol consumption.
- 2) Individuals are less able to judge their actual levels of inebriation when consuming CABs. This can lead individuals to consume more alcohol than they would otherwise consume if just consuming an alcoholic beverage alone.
- 3) Consumption of CABs makes such persons think that they can mistakenly undertake dangerous activities, in a safe manner, such as driving an automobile.
- 4) The prime market for CABs and for all energy drinks is the same: persons between 13 and 25 years of age. Marketing, caffeine, and the low cost of these products makes them very attractive to young people, who have been shown to be very price conscious.
- 5) Having two agents in the same beverage that have opposite effects has generally been considered to be detrimental to long term health. The Federal Food and Drug Administration (FDA) is now looking into the safety and legality of these beverages. Those experimental studies that have been conducted have not established the safety of co-ingesting caffeine and alcohol, but there are indications that it may heighten the risk of cardiovascular and neurological damage.

For these reasons, S.3889, which outright bans the sale of caffeinated flavored malt beverages has been well received and, as of this report, is on third reading on the Senate calendar and is sponsored in the Assembly by Assemblyman Ortiz as A.5171-A.

AS a corollary to the arguments against CABs, several of the dangerous aspects of CABs can also be found in FMBs. For instance, the labeling of CABs and FMBs is very similar to that of non-alcoholic energy drinks and is meant to be attractive to young people. Alcoholic energy drink makers continue to produce cans that are brightly colored with bold designs meant to project an image of energy common with regular energy drinks and inherently more attractive to younger consumers. With new brands of FMBs and energy drinks going on the market all of the time, this lack of clear labeling as to what is alcoholic and not alcoholic can confuse store

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<sup>13</sup> Note that this bill was amended once, but purely for technical reasons to create a "same-as" with Assembly Bill A.6914 (Ortiz).



personnel and police officers as to which products have alcohol or not. This can lead to law enforcement problems in accurately identifying which beverages can be sold to or possessed by minors and which beverages are subject to open container laws.

The low purchase point and many points of sale also present similar regulatory issues to CABS as discussed in the hearing. The initial feeling of Senator Klein was that allowing for a point of sale that adults could enjoy, namely liquor stores, would allow a sector to continue to grow while limiting the access to youth. Penal Law § 260.21 states in part that “A person is guilty of unlawfully dealing with a child in the second degree when: 1. Being an owner, lessee, manager or employee of a place where alcoholic beverages are sold or given away, he permits a child less than sixteen years old to enter or remain in such place unless: (a) The child is accompanied by his parent, guardian or an adult authorized by a parent or guardian”. A liquor store is an appropriate venue as the youth most at risk for continued health problems and addiction begin under this age. Liquor stores are also more likely to card and be wary of fake identification as unlike grocery stores, convenience stores and gas stations, liquor stores deal almost exclusively in alcoholic products. Thus shifting the venue where these fruit-flavored high alcohol beverages are sold from grocery and convenience stores to liquor stores could effectively limit access to such products for underage drinkers—relegating FMBs to liquor stores would result in approximately 19,000 fewer places for children to buy FMBs.<sup>14</sup>

Under this rationale, S.4221-A was drafted, the purpose of which was to shift the point of sale for high alcohol flavored malt beverages from grocery and convenience stores to liquor stores. High Alcohol Flavored Malt Beverages are defined under this bill as a beverage with a combination of 6 percent alcohol by volume and 1 percent sugar that also includes the addition of flavorings. Such flavorings can be fruit juices or fruit flavor additives, or herbs, nuts, or spices, such as chocolate, licorice or vanilla or stimulants such as caffeine, guarana, ginseng, or taurine. This is to capture those FMBs which are now being actively marketed to and increasingly used by those who are between the ages of 13 and 30.

In particular the sections are:

- Section 1: This bill amends these terms so that the definition of the term "beer" will exclude Flavored Malt Beverages (FMBs) and shifts FMBs to be included in the definition of "liquor". It also amends the term beer explicitly to include all those beverages traditionally brewed to exclude craft beers from the net, a concern of the Flavored Malt Beverage Coalition.
- Section 2: Adds a new definition for the term FMB. Such beverage shall be those types of beverages that are most attractive to underage drinkers and for those under the age of 21. FMBs shall be high alcohol beverages that have over six percent alcohol and over one percent sugar and have added flavors or other ingredients that are attractive to children.
- Section 3: Authorizes the State Liquor Authority to promulgate rules and regulations to further define what is categorized as a FMB that is attractive to children and thus have them treated as a liquor. Further that the SLA can exclude from its definition traditionally brewed beers and what we would commonly refer to as beer.

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<sup>14</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley. On file with author and available at <http://www.nysenate.gov/event/2011/apr/12/allow-committee-fully-explore-high-alcohol-flavored-malt-beverages-proliferation-a>.

What this bill does not do is increase the taxes on these products. Under S.4221-A, the products are still categorized as beer for manufacturing and taxing purposes. Essentially, the legislation creates a “beer plus” group which would not impact taxation.

This legislation will prompt further change in the industry as liquor stores may not be equipped to distribute the FMBs for the purposes of satisfying the requirements of New York’s three-tier system. This system mandates separation of manufacture, distribution, and sale of alcoholic beverages. Although the FMBs would stay “beer” for the purposes of taxation and manufacture, for the purposes of distribution and sale, they would be considered “liquor” and liquor distributors are often not equipped to transport products such as these or to accept bottles back as may be required under current law. Thus, this legislation would require industry investment for the safe future sale of FMBs.

With S.4221 in place, Senator Klein valued the input of the many stakeholders in this process and thus arranged to sponsor a public hearing to gather more information on his legislation and the development of further responsible legislation.

#### **V. April 12, 2011 Hearing<sup>15</sup>**

On April 12, 2011, the New York State Senate Standing Committee on Alcoholism and Drug Abuse sought input from public invitees concerning both caffeinated flavored malt beverages (CABs) and high alcohol-content flavored malt beverages on the following issues:

- Dangers that high-alcohol flavored malt beverages may pose to minors;
- Trends in underage drinking;
- Existence and types of marketing of alcoholic beverages to minors;
- Economic benefits of these products to New York State;
- Differentiation between the types of alcohol products and production processes;
- Efforts manufacturers and law enforcement take to avoid or reduce underage consumption of alcohol;
- The accessibility of high-alcohol flavored malt beverages to minors;
- Why these drinks may be more attractive to minors and/or easier for minors to access; and
- Legislative ideas to address high-alcohol flavored malt beverage consumption by minors.

A field of experts was invited to attend and the response was positive from all participants involved in this issue. As stated earlier, the only invited group that did not participate in this hearing were the actual manufacturers of FMBs.<sup>16</sup> This group was a crucial piece as they alone were in the best position to illuminate the manufacturing processes, marketing strategies, and analysis of risks their products may pose.

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<sup>15</sup> All testimony cited in this section is on file with author, Senator Klein’s Office, and available at <http://www.nysenate.gov/event/2011/apr/12/allow-committee-fully-explore-high-alcohol-flavored-malt-beverages-proliferation-a>.

<sup>16</sup> Although the Flavored Malt Beverage Coalition was in attendance, their products do not include the highest of the alcohol content FMBs in question at this hearing.

The testimony the Committee did receive covered a variety of topics and a transcript is available upon request. The information gathered can be distilled into the following areas:

- Prevalence and Access Among Youth and at Colleges
- Risks to Youth
- Marketing Towards and Impact on Youth
- Impacts to and Enforcement Challenges for New York State
- Regulatory Concerns

## **A. Prevalence and Access Among Youth and at Colleges**

Underage drinking remains prevalent in New York State and nationally.<sup>17</sup> It has been described as a “widespread and persistent public health and safety problem that creates serious personal, social and economic consequences for adolescents, their families, communities and the Nation as a whole.”<sup>18</sup> OASAS-certified treatment systems served 6,500 youth between the ages of 12 and 17 as well as 24,600 young adults between the ages of 18 and 24.<sup>19</sup> In 2007, 23% of New York State students grades 9 to 12 reported they had their first drink before the age of 13.<sup>20</sup> One in three Eighth Graders had tried alcohol, more than half of all Tenth Graders drink alcohol, and about 75% of teens try alcohol outside the home before graduating high school.<sup>21</sup> Two out of five adolescents who begin drinking before 15 will become dependent on alcohol in their lifetimes<sup>22</sup> and the average age for the first use of alcohol is 14.<sup>23</sup> One in eight between the ages of 18 and 20 are already dependent.<sup>24</sup> In a study of 700,000 adolescent drinkers between 15 and 17, more than 52% became alcoholics by age 25.<sup>25</sup> Further, binge drinking is already reported by half of underage drinkers.<sup>26</sup>

It is also disproportionately favored by young female drinkers. The American Medical Association found FMBs to be the favored alcoholic drink of teenage girls.<sup>27</sup>

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<sup>17</sup> See, e.g., United States Surgeon General Dr. Kenneth P. Moritsugu, *The Surgeon General's Call to Action to Prevent and Reduce Underage Drinking*, 2007. Available <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> Testimony of OASAS Commissioner Arlene González-Sánchez.

<sup>20</sup> *Id.*

<sup>21</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda, citing Hingson, Ralph and D. Kenkel. *Social and Health Consequences of Underage Drinking*. In press. As quoted in Institute of Medicine National Research Council of the National Academies. Bonnie, Richard J. and Mary Ellen O'Connell, eds., *Reducing Underage Drinking: A Collective Responsibility*. Washington, DC: The National Academies Press, 2003. Also citing *Monitoring the Future national survey results on drug use, 1975-2009*. Volume I: Secondary school students (NIH Publication No. 10-7584). Bethesda, MD: National Institute on Drug Abuse, 734 pp.

<sup>22</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley.

<sup>23</sup> Testimony of Eastchester Communities that Care James Genova.

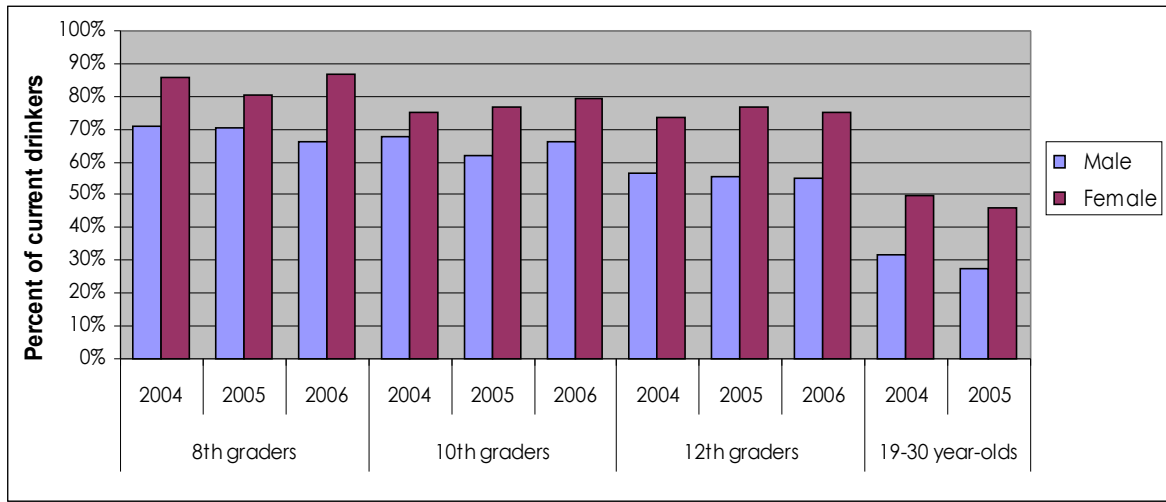
<sup>24</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley.

<sup>25</sup> Testimony of NARCO Freedom, Janet Lerner.

<sup>26</sup> Binge drinking is considered more than five drinks in a sitting. Testimony of NYC Dept of Health Commissioner Thomas Farley.

<sup>27</sup> Testimony of Robert Pezzolesi.

## Female v. Male Use of FMBs



In terms of caffeinated alcoholic beverages, a 2008 study by the University of Florida found that college-aged students who had consumed energy drinks with alcohol were three times as likely to be highly intoxicated and four times as likely to intend to drive. A 2006 Wake Forest University Study found that students who mix alcohol and caffeine were more likely to be injured, get in a car with a drunk driver, or be involved in nonconsensual sex.

FMBs and CABs (Caffeinated FMBs) are most popular with the youngest drinkers:<sup>28</sup>

- 78% of current 8<sup>th</sup> grade drinkers drank FMBs in the past 30 days;
- 71% of current 10<sup>th</sup> grade drinkers drank FMBs in the past 30 days;
- 65% of current 12<sup>th</sup> grade drinkers drank FMBs in the past 30 days;
- Of all 12<sup>th</sup> graders, 53% consumed FMBs in the last year;<sup>29</sup>
- 42% of current drinkers, age 19 to 30, drank FMBs in the past 30 days.

With numbers so high, the question arises regarding access to FMBs by minors. The State Liquor Authority regulates roughly 70,000 licenses and permits which include 15,538 grocery stores and 2,911 liquor stores.<sup>30</sup> In 2009 the SLA Board ruled on 4,225 disciplinary matters. This number decreased to 3,649 in 2010, but the number of licenses terminated rose from 426 to 499.

However, these numerous points of access provide youth with opportunities to purchase FMBs as they are often sold alongside beer, juice, and soda in both grocery stores and convenience stores.<sup>31</sup> In New York City, more than 20% of high school students who drink purchase their alcohol from retail stores such as these.

<sup>28</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth.

<sup>29</sup> Testimony of New York Center for Alcohol Policy Solutions, Robert S. Pezzolesi.

<sup>30</sup> Testimony of SLA Commissioner Dennis Rosen.

<sup>31</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley.

Another aspect of the accessibility is the price factor. As beer, these drinks are taxed at a much lower rate than products of similar alcohol content such as wine.<sup>32</sup> This allows these products to be sold inexpensively, generally between \$2 and \$3 for about 4.7 servings of alcohol per drink which is about \$0.64 per drink. This is 50% less than the price of the average bottle of water.<sup>33</sup>

## **B. Risks to Youth**

Incidences of injury to youth have been well recorded. Along with the incidences recorded above, Mothers Against Drunk Driving reported that an underage Syracuse driver recently consumed three cans of an FMB and tragically crashed her car which killed her best friend, a passenger.<sup>34</sup> However, the risks to youth are much more innocuous as well, impacting social interactions and physiological development.

More than 25 years ago it was concluded that alcohol damages a growing fetus; a fact widely accepted today to such an extent that it is social normalcy for pregnant women to avoid drinking.<sup>35</sup> The science is now coming to bear concerning alcohol and adolescents, but the information is not being disseminated as quickly. A growing adolescent brain is more sensitive than an adult's brain to damage from alcohol. This can lead to long-term detrimental effects as the brain further develops.<sup>36</sup> Alcohol use in youth affects the frontal lobe of the brain associated with reward, attention, long-term memory, planning and drive. It also affects the ability to choose between good and bad actions. Alcohol may also damage developing digestive systems, as well as heart, liver, and other critical organs.<sup>37</sup>

Underage drinking also leads to tragic youth fatalities. Mothers Against Drunk Driving (MADD) estimates that teen alcohol use kills about 6,000 youths per year, which is more than all illegal drugs combined.<sup>38</sup> The majority of these deaths are vehicular in nature. The New York City Department of Health estimates that alcohol causes 1,500 deaths per year in New York City, making it the third leading cause of preventable death behind smoking and obesity.<sup>39</sup> One in 10 hospitalizations is alcohol-related.<sup>40</sup>

FMBs present an easy transition for children from soda to alcohol. Alcohol executives have been quoted saying “the beauty of this category is that it brings in new drinkers, people who don't really like the taste of beer” and that these beverages were “the perfect ‘bridging beverage’ between carbonated fruit juices and the new hard lemonades.”<sup>41</sup>

According to the Marin Institute, restricting access to FMBs would result in 20,000 fewer incidences of harm each year, including accidents and assaults.<sup>42</sup>

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<sup>32</sup> Testimony of Narco Freedom, Janet Lerner.

<sup>33</sup> Testimony of Eastchester Communities that Care James Genova.

<sup>34</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda.

<sup>35</sup> Testimony of Long Beach Medical Center's Coalition to Prevent Underage Drinking, Coordinator Judy Vining.

<sup>36</sup> Testimony of OASAS Commissioner Arlene González-Sánchez.

<sup>37</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda.

<sup>38</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda.

<sup>39</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

### C. Marketing Towards and Impact on Youth

In 2009 10.4 million U.S. young people ages 12 to 20 (27.2% of this group) reported drinking in the past month, and 6.9 million reported binge drinking (18.1%).<sup>43</sup> Every day, 4,750 kids under age 16 start drinking.<sup>44</sup> The earlier young people begin drinking, the worse the consequences are likely to be; young people who begin drinking before age 15 are five times more likely to develop alcohol problems later in life than those who wait until they are 21.<sup>45</sup> Factors such as these contribute to making alcohol use the number one drug problem among young people and every year approximately 5,000 people under age 21 die from alcohol-related injuries resulting from underage drinking.

As outlined above, young drinkers are:

- Four times more likely to develop alcohol dependence;<sup>46</sup>
- Six times more likely to be in a physical fight after drinking;
- More than six times more likely to be in a motor vehicle crash because of drinking;
- Almost five times more likely to suffer from other unintentional injuries after drinking.<sup>47</sup>

These facts have profound repercussions in New York. According to New York Office of Alcoholism and Substance Abuse Services, underage drinking cost NY residents \$3.5 billion in 2007. An estimated 912,000 underage youth drink each year: 49% of NY state high school seniors versus 42% nationally have used alcohol in the last 30 days. 31% of high school seniors in New York, as opposed to 25% nationally, reported binge drinking.<sup>48</sup> This type of underage drinking among New York's youth makes up an estimated 17% of the alcohol market.

Like cigarette marketing, which has been curbed to mitigate the affect on youth, alcohol marketing is often targeted towards a youthful crowd. "While many factors may influence an

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<sup>43</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth *citing* NSDUH

<sup>44</sup> *Id.*

<sup>45</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth *citing* U.S. Surgeon General. Press Release: Acting Surgeon General Issues National Call to Action on Underage Drinking. Available at <http://www.hhs.gov/news/press/2007pres/20070306.html>. Accessed on April 7, 2011.

<sup>46</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth *citing* Grant BF, Dawson D. Age of onset of alcohol use and its association with DSM-IV alcohol abuse and dependence: Results from the National Longitudinal Alcohol Epidemiologic Survey. *Journal of Substance Abuse*, 1997; 9:103-110.

<sup>47</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth *citing* Hingson, R., Zha, W. Age of Drinking Onset, Alcohol Use Disorders, Frequent Heavy Drinking, and Unintentionally Injuring Oneself and Others. *Pediatrics*, 2009; 123: 1477-1484.

<sup>48</sup> Binge drinking is defined as more than five drinks in one sitting.

underage person's drinking decisions, including among other things parents, peers and media, there is reason to believe that advertising also plays a role."<sup>49</sup>

The overwhelming majority of youth exposure—78%—came from ads placed in magazines with disproportionate youth audiences. Recently published longitudinal studies have all found that the more youth are exposed to alcohol advertising and marketing the more they are likely to initiate drinking, even after controlling for other variables. In 2009, 315,581 alcohol product commercials appeared on U.S. television. According to the Center of Alcohol Marketing and Youth, since 2008, compared to adults 21 and over, youth ages 12-20 saw per capita 10% more ads for beer, 16% more for alcopops, and 73% fewer wine ads. Underage youth, ages 12 to 20, were more likely than legal-age adults on a per capita basis to have seen 67,656 of the ads aired in 2009, or about 21%. These ads accounted for more than 44% of youth exposure to alcohol advertising on television.

From 2001 to 2009, the number of television alcohol ads seen by the average 12 to 20 year-old increased by 69%, from 217 per year to 366 per year. Much of this increase was in distilled spirits ads, especially on cable TV. By 2004, the alcohol industry had adopted tighter ad placement standards to shield youth from exposure to their advertising. Nonetheless, between 2004 and 2009, youth exposure to alcohol advertising on television actually grew at a *faster* rate than that of adults ages 21 and above, as well as that of young adults ages 21 to 34. This helps to illustrate the ineffectiveness of the industry's self-regulatory guidelines.

Forms of alcohol advertising and marketing that predict drinking onset among youth:<sup>50</sup>

- Television beer advertisements;
- Alcohol ads in magazines
- Alcohol ads on billboards and in-store beer displays
- Beer concessions at sporting events
- Per capita spending on alcohol advertising in their media market (Alcohol use in movies)

Ownership of alcohol promotional FMBs, now one of the fastest growing segment of the alcohol industry, are also now being marketed. Between 2001 and 2009, the number of FMBs ads on cable TV increased by 143.6%. Expenditures on FMBs ads during that same time period increased from \$11.5 to almost \$17.2 million, a 49% increase.<sup>51</sup> The makers of Blast have indicated that they have already spent “millions” to roll out the beverage. Marketing includes the tag line “Works every time” and photography from “Oh Snap Kid”.

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<sup>49</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth citing Federal Trade Commission. *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*. Washington, D.C.: Federal Trade Commission, 1999.

<sup>50</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth citing among others Collins RL, Ellickson PL, McCaffrey D, Hambarsoomians K. Early adolescent exposure to alcohol advertising and its relationship to underage drinking. *Journal of adolescent health*, 2007;40(6):527-534.

<sup>51</sup> Testimony of Raimee Eck on behalf of David Jernigan of Johns Hopkins Center on Alcohol Marketing and Youth.

Phusion Projects’ own advertisement of their Four Loko products use phrases such as “eye catching packaging” and “bright, pop off the shelves graphics” that promises to “drop a bombshell on the market place.” Their website open with silhouettes of topless women and one Phusion product even touts that the UVA berries have been “revered for centuries for having mystical healing powers” and promises a “mind blowing experience.”<sup>52</sup>

To balance some of this marketing, OASAS has worked with the Advisory Council on Underage Alcohol Consumption to create media campaigns to target parents of teenagers and encourage parents to talk to kids about the dangers of underage drinking.<sup>53</sup> The New York City Department of Health also conducted a media campaign in the public subway system to highlight the dangers of excessive drinking.<sup>54</sup> Mothers Against Drunk Driving has suggested that responsible advertising of FMBs would entail clear packaging of alcoholic content that is not a facsimile of non-alcoholic beverages and not placed near such non-alcoholic products.<sup>55</sup> Advertising would also not be allowed on programming with a 90% or higher viewership over the age of 21.

#### **D. Impacts to and Enforcement Challenges for New York State**

Economically, there is a tension between recognizing a growing industry and potential for economic benefits to New York and the cost to New York in the forms of injuries and treatment. For instance, youth violence and automobile accidents caused by underage drinkers costs New York State roughly \$1,800 per youth per year.<sup>56</sup> It also incurs a direct cost through medical care and loss of work to the cost of \$1.2 billion each year.

In 2009, the Marin Institute of San Rafael, California compiled the following data. The money costs reflect the costs (both public and private) of the numerous risks of underage drinking, which include everything from traffic accidents to violent crime, high-risk sex, to fetal alcohol syndrome. The harms include traffic accidents, suicides, violence, poisonings and fetal alcohol syndrome, among others.

<b>State</b>	<b>Money</b>	<b>Deaths</b>	<b>Incidents of Harm</b>
<b>New Jersey</b>	<b>\$246,820,000</b>	<b>13</b>	<b>9,853</b>
<b>Connecticut</b>	<b>\$104,880,000</b>	<b>5</b>	<b>4,056</b>
<b>New York</b>	<b>\$548,560,000</b>	<b>24</b>	<b>20,121</b>

<sup>52</sup> Testimony of James Genova.

<sup>53</sup> Testimony of OASAS Commissioner Arlene González-Sánchez.

<sup>54</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley. On file with author and available at <http://www.nysenate.gov/event/2011/apr/12/allow-committee-fully-explore-high-alcohol-flavored-malt-beverages-proliferation-a>.

<sup>55</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda.

<sup>56</sup> Testimony of OASAS Commissioner Arlene González-Sánchez.



Increased enforcement has also been a goal of New York. OASAS and the State Liquor Authority have partnered with the New York State Police to increase compliance checks and DWI sweeps as well as an integration of a two-hour underage drinking prevention workshop into the NYS Police training curriculum which has trained 608 New York State Police.<sup>57</sup>

Youth Officers have been finding an increasing number of children who are “graduating” from an “occasional experimental beer or two” to daily use of FMBs.<sup>58</sup> Although the voluntary abstention of shipping caffeinated high alcohol beverages to New York State was a victory, law enforcement and Youth officers are concerned that they may be reinstated as soon as attention is turned elsewhere.<sup>59</sup> Phusion released a statement saying that “Phusion reserves the right to apply to resume the sale and distribution of caffeinated alcoholic beverages, including Four Loko, in the State of New York if emerging science, regulatory developments or other relevant changes in circumstances arise.”<sup>60</sup> Although the Youth Officers are active in the community to educate the youth on alcohol and substances, other strategies are required.

OASAS is implementing “environmental prevention strategies” which are designed to achieve community-level change while addressing underage drinking. In this vein, since 1998 OASAS has overseen the “Enforcing the Underage Drinking Laws” (EUDL) Program which supports the state in prohibiting alcohol sales to minors as well as mitigating underage consumption. It does this through training, information dissemination, and enforcement support.

While outside enforcement and public education is important, they are not enough to stop underage drinking. National surveys indicate that parents are the number one source teens turn to for information, including about drinking. MADD recently launched a program “The Power of Parents, It’s Your Influence” to combat the truth that while one in five teens binge drinks, only one in 100 parents believes his or her teen does.<sup>61</sup> Additionally, 45% of teens that drink do not see a “great risk” in heavy daily drinking and only 31% of teens strongly disapprove of their peers getting drunk.

## **E. Regulatory Concerns**

Concerns in this area were presented by the Food Industry Alliance, the New York Association of Convenience Stores, and the Flavored Malt Beverage Coalition. Many of the concerns raised here will also be addressed here as there is a legitimate adult market for many of the high alcohol content flavored malt beverages and flavored malt beverages such as Mike’s Hard Lemonade, Twisted Tea, and Smirnoff Ice which often have an alcohol content similar to beer and have been both manufactured and sold in New York for over a decade. In fact, in 2003 the Federal Trade Commission determined that these beverages were not being targeted to underage consumers.<sup>62</sup> However, it should be noted that this was before the launch of new products such as Four Loko

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<sup>57</sup> Testimony of OASAS Commissioner Arlene González-Sánchez and SLA Commissioner Dennis Rosen.

<sup>58</sup> Testimony of Bronxville Chief of Police Christopher Satriale.

<sup>59</sup> See Satriale Testimony and Testimony of Detective Frank Kolarik.

<sup>60</sup> *Id.*

<sup>61</sup> Testimony of Mothers Against Drunk Driving Specialist Michele Fonda *citing* Institute of Medicine National Research Council of the National Academies. Bonnie, Richard J. and Mary Ellen O’Connell, eds. *Reducing Underage Drinking: A Collective Responsibility*. Washington, DC: The National Academies Press, 2003.

<sup>62</sup> Testimony of the New York Association of Convenience Stores, President James Calvin. Original report available at <http://www.ftc.gov/os/2003/09/alcohol08report.pdf>.

which entered the market in 2005. But many of these stores, especially grocery stores, voluntarily discontinued the selling of the caffeinated version of FMBs before the manufacturers agreed to no longer distribute them.<sup>63</sup>

### Access

Evidence was presented to suggest that the main point of access to youth is not through their own purchases, but through an unrelated adult or adult family member and thus moving the point of sale would do little to address the issue. Supporting this, a Substance Abuse and Mental Health Services Administration Survey in 2009 found only 9% of youth purchased alcohol themselves while 21% gave money to another to buy it. The remaining 70% received it from an unrelated adult, another underage person, adult family member, or other source.<sup>64</sup> A Teenage Research Unlimited report concluded that 65% of individuals age 10 to 18 who consumed alcohol obtained it from family and friends.<sup>65</sup> Additionally, many of the current points of sale have strict requirements for proper identification and a low or even zero incidence rate of sales to minors.<sup>66</sup> For instance, Price Chopper's voluntary identification process has resulted in 6.4 million alcohol transactions over the past two years with no recorded infractions.<sup>67</sup> Thus, the argument is that shifting the alcohol to another point of sale—even a liquor store where youth may still enter over the age of 16 in New York—is not a foolproof method of mitigating access.

However, the strategy of addressing this issue must be multifaceted and work in tandem with many of the existing programs such as those instituted by OASAS and community groups. As mentioned earlier, OASAS is spearheading environmental prevention strategies which, among other goals, seek to mitigate the consumption of alcohol at home. Also being presented in the New York State Senate is legislation such as Social Host bill S.628 sponsored by Senator Fuschillo which is targeted at adults who provide alcohol to minors at a party, gathering or event. Senator Klein's legislation is another approach which is part of a larger growing plan to combat underage drinking in New York. While access to youth may not be solely through underage sales, thankfully in part to enforcement efforts of the SLA and police departments, there remains a substantial portion that this legislation will encompass, address and mitigate.

Additionally, although this legislation necessarily removes a product from current points of sale, thus removing those sales, economically speaking this is not a large loss. The National Convenience Store Industry indicated that the gross sales of FMBs in 2009 averaged \$408 per store per month, about 0.3% of sales per store. Within the overall category of beer sales, this amounted to 3.6% of sales.<sup>68</sup> Although the counter-argument can be made that this is a growing market and the future sales should be protected, these sales can be realized in a responsible manner in a method to help ensure that the correct, adult audience is targeted.

### Tax Structure and Services in New York

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<sup>63</sup> Testimony of the New York Association of Convenience Stores, President James Calvin.

<sup>64</sup> Testimony of the New York Association of Convenience Stores, President James Calvin.

<sup>65</sup> Testimony of Flavored Malt Beverage Coalition Administrator Greg Altscuh.

<sup>66</sup> Testimony of the Food Industry Alliance, Senior Vice President Michael Rosen.

<sup>67</sup> Testimony of the Food Industry Alliance, Senior Vice President Michael Rosen.

<sup>68</sup> Testimony of the New York Association of Convenience Stores, President James Calvin.

There was also concern presented by these groups that legislating in this area will tamper with the longstanding tax scheme of beer, wine and liquor and may cause the tax rate to increase for FMBs and thus increase their cost.<sup>69</sup> It could also mean that these products lost “shelf stocker” services provided by beer wholesalers but are prohibited for wines and liquors in package stores. These services check “best by” dates and rotate perishable products.<sup>70</sup> It could also result in stores with limited refrigeration capacity, such as many liquor stores, in not being able to accommodate these beverages.<sup>71</sup>

As stated earlier in the “Legislation” section, this legislation would not affect the tax rate in New York as to do so would require amending Tax law §424. Under S.4221-A, the products are still categorized as beer for manufacturing and taxing purposes.

This legislation would also require some industry reinvestment to support a new point of sale for FMBs. However, if the faith in the market is evident, then a small reinvestment to ensure safety should not be a major hindrance. Certainly this reinvestment in a growing market sector is worth preventing 20,000 fewer incidences of harm each year, including accidents and assaults.<sup>72</sup> Further, FMBs such as Four Loko do not require the services of an individual to check “best by” dates as is necessary with beer because, unlike beer, these products present no such date to be able to check.

### Regulatory Language

The final concern presented had to do with the danger that legislation may be drafted to be overbroad and include traditionally brewed craft beers which may exceed 6% alcohol but also contain sugar as a natural by-product of fermentation.<sup>73</sup> Such a section standing alone is almost certainly over-inclusive.<sup>74</sup> However, a standard based on sugar may also be vulnerable to a reformulation to non-nutritive sweeteners.<sup>75</sup>

To this end, the definition of beer was amended in S.4221-A. “‘Beer’ means and includes any fermented beverages of any name or description manufactured from malt, wholly or in part, or from any substitute therefore and shall include, but not be limited to, all naturally fermented or traditionally brewed beers, such as ales, bitters, browns, lagers, porters, stouts, seasonal beers, wheat beers or other specialty beers. Such term shall not include flavored malt beverages.”<sup>76</sup> In doing so, it is clear that tradition beers and microbrews are not to be included in the FMBs. To further this point, when discussing SLA rules, S.4221-A states that “[s]uch rules and regulations shall exclude from such term those traditionally brewed beers and malt liquors which have small amounts of fruit, fruit juice, fruit flavor or other natural herbs or spices added during the fermentation process.” Thus, this legislation does not include any type of beer.

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<sup>69</sup> Testimony of Flavored Malt Beverage Coalition Administrator Greg Altscuh.

<sup>70</sup> Testimony of Flavored Malt Beverage Coalition Administrator Greg Altscuh.

<sup>71</sup> *See generally* testimony of Flavored Malt Beverage Coalition Administrator Greg Altscuh.

<sup>72</sup> Testimony of NYC Dept of Health Commissioner Thomas Farley citing the Marin Institute concerning restricting access to FMBs.

<sup>73</sup> Testimony of the Food Industry Alliance, Senior Vice President Michael Rosen.

<sup>74</sup> Testimony of Marc E. Sorini, McDermott Will & Emory LLP.

<sup>75</sup> *Id.*

<sup>76</sup> Note the additions to the current definition of “beer” are underlined.

Related, another challenge is regulating on the basis of marketing appeal which is often subjective and often attracts an overlapping audience. A simple line of “appeal to persons under the age of twenty-one” may create confusion and no clear line by which the SLA and other enforcement agencies may regulate which could possibly lead to expensive and prolonged litigation. Regulating in this area may also pose resource challenges for the SLA if the regulations are too broad.

To this end, regulatory purview and resources are not a challenge unique to this issue. However, this issue lends itself to the easier end of the spectrum as many of the resources and guidelines are already in place. Enforcement of any rules made pursuant to S.4221-A would fall directly into line with current inspections and enforcement performed by the SLA. For instance, no new point of sale is created that must be regulated; liquor stores are already under SLA enforcement. Also, the rules suggested are already supported by research conducted on products such as cigarettes, soda, and other alcoholic beverages. The SLA is in a position as experts to be the best source of the most effective guidelines in New York.

Lastly, it was suggested that the best method for regulation, rather than focusing on formulation, is to focus on labeling and packaging where the SLA already has authority. The suggestion is that the real problem of the new FMBs such as Joose, Blast, Four Loko and so forth, is the combination of the sweetness, alcohol content, marketing, and labeling and no one discrete portion.<sup>77</sup> Focus on the packaging aspect may be an effective means for the SLA to exercise existing authority in regulating FMBs and may be a basis for requiring one can to only have one serving of alcohol.<sup>78</sup>

Senator Klein could not agree more that packaging is an important aspect and thus S.2799 is another one of bills sponsored by Senator Klein which addresses the labeling power of the SLA and requires warning labels. Also S.4221 gives the SLA flexibility to include this as a facet to their guidelines. However, again, this is a multifaceted challenge best addressed from many angles. With this principle in mind, although the hearing was a great success to determine effective regulation, there is information yet to be gathered.

## **VI. Conclusion**

In creating responsible legislation in a complicated field, it is important to gather all possible evidence and input from stakeholders and experts. The hearing on April 12, 2011 was an important first step and has prompted evaluation of several methods of regulation.

Illustrating the purpose of the public hearing was the evaluation of:

1. the prevalence and access of such products among youth and at colleges;
2. risks to youth;
3. marketing towards and the impact on youth;
4. impacts to and enforcement challenges for New York State; and

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<sup>77</sup> Testimony of Marc E. Sorini, McDermott Will & Emory LLP.

<sup>78</sup> Testimony of Flavored Malt Beverage Coalition Administrator Greg Altscuh.

## 5. regulatory concerns.

While S.4221-A would effectively do as designed and address the concerns raised at the public hearing, the hearing did bring up further possible areas of regulation including:

1. An outright ban of FMBs as most recently suggested by Commissioner Farley of the NYC Department of Health.
2. Determine a method to keep the FMBs at their current points of sale— convenience stores, grocery stores and gas stations —but place new sales controls to limit sales of such beverages to minors such as placing the products in separated sections not near any other alcoholic products and posting health advisories nearby. Another method is to not allow these products to be refrigerated, thus reducing their drinkability at the point of sale. A drawback to this is that it relies heavily upon enforcement resources to effectively implement.
3. Increase the criminal penalties for the sale of these FMBs to minors. With higher penalties, there should be more awareness at the points of sale when selling these products.
4. Limit the can size, possibly even to a serving, and requiring the SLA to place stricter alcohol content warnings on the bottles and cans.

However, the glaring omission of any manufacturer's participation such as Pabst Brewing, Phusion Projects, Anheuser-Busch, or United Brands Company, Inc., means that any bill to regulate this product will necessarily not be wholly informed. While these and other manufacturers have since come out against regulation and particularly S.4221-A, they have not provided any necessary information for a successful regulatory design other than "do not regulate us."

Given the grave dangers that these products pose to New York's youth, regulation must move forward. However, responsible legislation is still the key and, therefore, without the cooperation of the manufacturers, Senator Klein will exercise the necessary powers of a Senate Committee Chair to obtain the much-needed information.

Thus, without voluntary participation, legislative subpoenas for information are the crucial next step.