

From Alcoholic Energy Drinks to Supersized Alcopops

A Rare Victory in Protecting Youth from Big Alcohol



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Summary

While for decades the alcohol industry has been dreaming up new ways to hook youth on its products, in recent years, this strategy was taken to new heights. With the increasing popularity of highly caffeinated soft drinks, the alcohol industry decided to combine two drugs in one product. Thus, premixed alcoholic beverages with caffeine, dubbed alcoholic energy drinks (AEDs) were born. It didn't take long for advocates, health practitioners, and policymakers to realize with these new brands, underage drinking became even more risky than ever before.

Thanks to the concerted effort of numerous organizations, government agencies, and health experts, these dangerous products were forced off the market by early 2011. However, the larger problem of alcopops (sweet, soda-like alcohol) remains, with a new twist. Supersized alcopops—coming in single serving cans of up to 24 ounces, containing alcohol as high as 12% by volume—are industry's latest attempt to hook youth. Even without the caffeine, these “reformulated” products still represent a significant public health threat. This case study describes the path to victory to get alcoholic energy drinks off the market and explains what needs to happen next.

The Rise of Alcoholic Energy Drinks

Prior to alcoholic energy drinks, alcopops had been on the radar of public health groups for years. Similar to wine coolers before them, these alcoholic beverages appeal to youth for their sweet taste and cheap price. Though the first alcopops arrived on the market in the 1990s, it was in the 2000's that they gained increased market share.

In 2003, capitalizing on the popularity of energy drinks, along with mixed drinks such as Red Bull and vodka, a new pre-mixed caffeinated alcoholic beverage called Sparks (purchased by Miller Brewing Company in 2006) came on the market. With a neon orange and silver can designed to look like a big battery, the packaging was remarkably similar to non-alcoholic energy drink containers, causing confusion for parents and store clerks alike. Through the use of non-traditional marketing such as social media, giveaways, and sponsorships at clubs and parties, Sparks became popular with young consumers and established the alcoholic energy drink category.¹

When Sparks was released there was little scientific research on the effects of caffeine on alcohol consumption. Then in 2006 a study was published on mixing alcohol with caffeine that concluded consuming energy drinks along with alcohol only makes a person feel less drunk but they still experienced all the usual adverse effects of being drunk. This was important because the marketing implication was that by consuming caffeine along with alcohol, one could mask the usual symptoms of alcohol, but this was not the case. And of course common sense suggested it probably wasn't a good idea to combine a stimulant with alcohol.

Soon, Anheuser-Busch began rolling out its own line of caffeinated alcoholic beverages. Sparks was performing well and the king of beer wanted

to capture some of the AED market. During 2004 and 2005 Anheuser-Busch introduced Tilt (a sweet alcopop) and Bud Extra (a beer brand extension), and an especially galling product packaged in small, colorful, child-friendly containers called Spykes. The advertising campaigns for these products played up the drug-like effects of the stimulants they each contained.

Several advocacy groups, including Marin Institute (now called Alcohol Justice) and the Center for Science in the Public Interest (CSPI) voiced objections about Spykes—particularly over the child-friendly nature of the products, along with the stimulants—which gained much media coverage.

Then in May of 2007, twenty-nine attorneys general (the top state law official) signed a letter to Anheuser-Busch expressing their concern about Spykes and the promotion of AEDs.² In addition to citing the health concerns raised by available science, the letter specifically cited the appeal these products had to underage youth. As a result of the combined public outcry, negative media coverage, and legal pressure, the company pulled Spykes from the market. Though this victory was relatively small at the time, it was a good start and served as a precursor of things to come. Indeed, the power of the state attorneys general would prove to be a critical factor in the larger victory.

Research and Dissemination of Information

Over the next year, the public health community pushed hard against AEDs. In August of 2007 Marin Institute published the groundbreaking report "Alcohol, Energy Drinks, and Youth: A Dangerous Mix," co-authored by Michele Simon and Jim Mosher.³ The report reviewed the research and data available regarding

alcoholic energy drinks and highlighted their sharp increase in sale, their appeal to underage drinkers, and the health concerns involved in mixing stimulants with alcohol. Given that this was the first report to describe the industry's marketing strategies, it served as a critical teaching and organizing tool to focus health professionals, youth advocates, and policymakers' attention on this emerging category of alcoholic beverages. Both Simon and Mosher gave numerous talks around the country, often to standing room only crowds, demonstrating the sharp interest in the topic and the need for more information. In addition, thousands of print copies of the report were distributed around the country and advocates requested the PowerPoint presentation numerous times as well.

From a scientific perspective, the most important research came in November 2007, from Dr. Mary Claire O'Brien, who proved to be a tireless advocate and key player in getting AEDs off the market. Hers was the first study to find higher risk of injury from mixing alcohol with energy drinks than from alcohol alone.⁴ A survey of college students showed that consumption of caffeine and alcohol resulted in an increase in the number of drinks consumed. Also, those students consuming alcohol mixed with energy drinks experienced higher incidence of injury, of being taken advantage of sexually, taking advantage of another sexually, riding with a driver that was under the influence, or requiring medical treatment. This research proved to be critical in the campaign and was cited over and over again by advocates, law officials, and policymakers.

Litigation Strategies Emerge

Given the emerging science on the dangers, combined with the deceptive marketing, of these products (and in the absence of government action) it was inevitable that eventually a good



lawyer would threaten litigation. Indeed in February 2008, The Center for Science in the Public Interest served Anheuser-Busch and Miller Brewing Company with notices of intent to sue over their AEDs.⁵ CSPI asserted that the products were adulterated and that companies were engaged in unfair and deceptive practices. Meanwhile, several state attorneys general had apparently also been investigating behind the scenes. Then in June 2008, Anheuser-Busch reached an agreement with a group of 11 state attorneys general to stop producing Tilt and Bud Extra, as well as to not produce any other AEDs in the future.⁶ This was a huge victory for public health advocates: for a major corporation to sign a legal document to not combine caffeine with alcohol was a critical precedent.

While in contrast, Miller initially refused to budge, this would not be for long. In September of 2008 CSPI proceeded with its previously threatened legal action and filed suit against MillerCoors.⁷ (Miller by this time had merged with Coors in the U.S.) That same month, MillerCoors also receive a letter signed by 29 state attorneys general expressing concerns over the release of a new product called Sparks Red.⁸ Citing the high alcohol content of the product (8% by volume)

and the public health concern of mixing alcohol with caffeine and other stimulants, the letter urged the company to reconsider. Ultimately, MillerCoors would not release Sparks Red, and a few months later pulled all Sparks products from the market. In December 2008 MillerCoors reached an agreement with 13 state attorneys generals and one city attorney (San Francisco) to stop making Sparks, as well as to not make any AEDs in the future.⁹ This was another huge victory, even bigger than Anheuser-Busch, as Sparks was the industry leader at the time. This however, would not be the end of the AED story.

While the exit of the biggest alcohol producers from the AED market was an important victory for public health, the job was still not complete. The legal mechanisms that brought about these two victories were limited only to Anheuser-Busch and MillerCoors. Thus a vacuum was created in the market and soon smaller producers filled the void. The best known of these new AEDs was Four Loko, which came in several flavor varieties, each one more childlike than the next. Introduced by Phusion Projects in August of 2008, Four Loko contained caffeine and other stimulants just like the original AEDs.¹⁰ However, unlike Sparks or Tilt, which came in 16 ounce cans, Four Loko was sold in 23.5 ounce containers with up to 12.5% alcohol. But now, states became more involved, flexing their Constitutional authority to regulate the sale of alcohol.

State Regulatory Actions

In its 2007 report, Marin Institute had recommended in addition to federal action that states assert their independent legal jurisdiction over alcohol to enact outright bans or at least a moratorium on the sale of AEDs. In 2008, Marin Institute drafted model legislation for states to ban caffeine in alcohol. Over the next two years, such bills were introduced in numerous states in-



cluding: California, Illinois, New Jersey, New York, South Carolina, and Washington State. However, despite the obvious risk to youth, due to heavy industry lobbying, they were all defeated.

But other states took different approaches. For example, Utah passed a law in 2008 reclassifying alcopops as products that could only be sold in state-controlled liquor stores. Prior to this law, AEDs could be sold alongside beer, as was the case in most states. As a result of this change, Utah's liquor board simply decided not to approve AEDs for sale in state stores. As a result, Utah became the first state to effectively ban the sale of AEDs.¹¹ Then in February 2009 Virginia passed a law mandating that the ABC Board adopt regulations requiring that off-premises retail licensees place premixed AEDs in the same location where wine and beer are available for sale within licensed premises.¹² Then Montana passed a law in March 2009 redefining "caffeinated or stimulant-enhanced malt beverage" as liquor. As a result AEDs could no longer be sold alongside beer.¹³ It appeared that at least some state regulators were starting to take seriously the problems posed by caffeine in alcohol.

Federal Government Steps Up

Meanwhile, the federal agency with primary jurisdiction over alcohol—the Alcohol and Tobacco Tax and Trade Bureau (TTB)—was not only asleep at the wheel almost the entire time this advocacy effort was underway, but had actually approved these dangerous products for sale in the first place. As a result, health experts and law officials turned instead to the Food and Drug Administration (FDA), which has limited jurisdiction over alcohol—to approve any additives as safe for consumption.

Thanks to months of behind the scenes efforts by a team of assistant state attorneys general, pressure was placed on the FDA to act. In late September, 18 state attorneys general and the San Francisco city attorney’s office sent a letter to FDA expressing concerns about AEDs,¹⁴ which was supported by several medical experts,¹⁵ proving once again the importance of a combined public health and legal approach.

Then finally, a huge breakthrough: in November 2009 FDA sent letters to 30 manufacturers of alcoholic beverages containing caffeine, requesting within 30 days evidence that the use of caffeine in their alcoholic beverage products was safe.¹⁶ FDA made clear that it was considering whether caffeine could lawfully be added to alcoholic beverages. If it could not, such products would be considered “adulterated” and would thus be illegal to sell in interstate commerce under federal law. Advocates rejoiced.

Despite this flurry of activity and the sustained efforts of public health organizations, the headway being made against AEDs would stall over the months that followed. Then in summer of 2010 Senator Charles Schumer (D-NY) called for the Federal Trade Commission (FTC) to investigate companies that were promoting underage drinking through the marketing of AEDs that looked like non-alcoholic energy

drinks.¹⁷ (The FTC has jurisdiction over deceptive marketing by the alcohol industry.) Along with several other senators, Schumer also called for the FDA to “immediately make public its findings from an investigation into possible health risks posed by so-called ‘energy drinks’ that combine alcohol and caffeine.”¹⁸ At this point the FDA had not released any information received from the requests it previously sent, nor had it taken any further regulatory action. This was an extremely frustrating time for advocates who were left wondering: what was taking the FDA so long to finish the job?

Delay Leads to Tragedy, which Leads to Victory

With college students heading back to school in the fall of 2010, tragedy struck. In two separate incidents, Four Loko was cited as the possible cause of hospitalizing more than 30 college students in New Jersey and Washington State. Because of these awful incidents, AEDs were thrust back into the national spotlight and more serious policy discussions began on the dangers these products posed to public health and safety. In early November, numerous states took steps to immediately ban AEDs, even if just temporarily. For example, regulatory or voluntary actions taken in Michigan,¹⁹ Oklahoma,²⁰ Washington state,²¹ New York,²² Connecticut,²³ and Massachusetts²⁴ halted the sale of AEDs. Other states announced similar intentions.

Also during this time and throughout the entire campaign, Marin Institute, along with other advocacy organizations kept the pressure on the FDA and called for state regulation through multiple action alerts and concerted media outreach. All of the combined media attention and public pressure meant the FDA had to act.

Finally, on November 17, 2010 FDA (along with FTC) issued warning letters to Phusion Projects

(maker of Four Loko) and three other producers of alcoholic beverages combined with caffeine. The strongly-worded FDA letters charged that the addition of caffeine to alcoholic beverages was an “unsafe food additive,” not approved for use and continued violation could result in seizure of illegal products.²⁵ The FTC letter²⁶ (also very strongly worded) cited incidents “suggesting that alcohol containing added caffeine presents unusual risks to health and safety” and warned that the marketing of such beverages may constitute an unfair or deceptive practice in violation of federal law. The TTB (the agency that had approved the products in the first place) also sent warning letters²⁷ to the same four companies explaining that a finding by the FDA that a product is adulterated would render that product mislabeled and therefore illegal to sell or ship in interstate or foreign commerce.

After a long fight, advocates finally got what they had been asking for: federal action to remove these dangerous products from the marketplace once and for all. However, the FDA letter did have several limitations:

- 1) It was aimed only at four companies that made seven brands;
- 2) Technically, new companies could start selling caffeinated alcohol;
- 3) Remaining on the market are numerous spirits brands that contain caffeine.

It's unclear why FDA did not target spirits products, but we know that the single-serve alcopop-type products were of the most concern due to their popularity with youth. To fill in the legal gaps, some states are introducing bills to ban caffeine in alcohol completely. Additionally, private lawsuits alleging fraud,²⁸ wrongful death²⁹ and other harm³⁰ have been filed against the companies that manufactured AEDs. Meanwhile further research confirms that the combination of alcohol with caffeine is a dangerous mix.³¹

Thankfully as of this writing, single-serve alcoholic energy drinks are no longer available in stores.

New Threat: Supersized Alcopops

As we've learned over and over, the alcohol industry doesn't exactly give up even when you have a rare victory like this one. To the contrary, companies just come back with new products aimed at youth, as they know this is best way to ensure a steady supply of fresh customers. Even though FDA forced the companies to stop making alcoholic beverages with caffeine, the brands didn't disappear. Instead, they were simply reformulated to remove the caffeine, resulting in a whole new public health and underage drinking threat: supersized alcopops.

The reformulated brands include Four Loko, Joose, Tilt, and Sparks (Sparks remains in 16 ounce cans). A newcomer on the market is “Blast by Colt 45”—a product of Pabst Brewing Company. The supersized products come in 23.5 ounce, single serving cans that still look like soft drink containers, with up to 12% alcohol content—the equivalent of 4.7 standard drinks of alcohol. (Hence the nickname, “binge in a can.”) These supersized alcopops are sweet, bubbly, and come in a variety of fruity flavors to appeal to underage drinkers. Blast is being promoted by





music star Snoop Dogg in an apparent attempt to target urban youth.

In April 2011, 17 state attorneys general, along with the San Francisco city attorney's office sent a strongly-worded letter to Pabst Brewing Company urging the company to reduce the number of servings in a container, noting that:

If an individual consumes a 23.5 ounce can of Blast as it is intended to be consumed - drinking the entire can on a single occasion - he or she will have engaged in binge drinking, putting himself or herself at risk of serious and other health and safety problems.³²

The letter also warns Pabst not to target audiences under the legal drinking age:

In addition to offering this high alcohol flavored malt beverage in youth-friendly flavors of grape, strawberry, lemonade, and watermelon ("made with real juice"), Pabst has chosen as its celebrity spokesperson, hip-hop/rap music

artist, Snoop Dogg, who is popular among persons under 21 and whose promotional videos for Blast are accessible to viewers of all ages on social media sites such as YouTube and Twitter. We also are aware of concerns that Pabst's marketing of Blast is targeting young African-Americans.³²

Thus far, Pabst Brewing Company has been defiant. Thus, in response to this new threat, Marin Institute (now called Alcohol Justice) drafted model state legislation³³ to accomplish two things: one, ban caffeinated alcoholic beverages of all kinds (this is stronger than the FDA approach) and two, bring alcopops down to size by limiting containers to a single serving size, as federal guidelines recommend.

In June, Anheuser-Busch InBev (InBev took over Anheuser-Busch in late 2008) announced that it would limit its alcopops to 8% alcohol by volume in cans over 16 ounces. As noted then³⁴ this is unimpressive and insufficient. It's still a dangerous amount of alcohol to consume in one serving. Meanwhile, new research suggests that these supersized alcopops may be just as dangerous as their caffeinated predecessors because of the combination of high alcohol with sweet flavors.³⁵ Moreover, in its letter regarding caffeine in alcohol, the Federal Trade Commission warned that the high-alcohol content, large-size containers themselves could be construed as deceptive marketing. Thus, there is still much work to do.

Just how much FUEL is there in one can of Four Loko?



One 23.5oz can of Four Loko at 12 percent alcohol by volume contains the same amount of alcohol as 4.7 shots of 80 proof vodka, 4.7 bottles of beer or 4.7 glasses of red wine.

(courtesy of Oregon Partnership)

Lessons Learned

The victory over alcoholic energy drinks resulted from the hard work of public health professionals, community members, and policymakers at all levels of government. It illustrates the important combination of research, activism, organizing, legal tools, and media advocacy to build a foundation upon which meaningful policy change can happen. Here are a few lessons advocates can glean from this experience:

1. Get familiar with your state attorney general's office. Find out if your AG is a member of The National Association of Attorneys General Youth Access to Alcohol Committee and if not, ask why. Then find out which assistant attorney general is assigned to work on alcohol issues. Once you've introduced yourself, become a resource for this attorney. It be cannot stressed enough how critical just a handful of dedicated assistant attorneys general were in this victory; and they remain engaged in the ongoing effort to protect youth from Big Alcohol.³⁶

2. Find a health professional, preferably an MD, to champion your cause. In this case, Mary Claire O'Brien, associate professor of emergency medicine at Wake Forest Baptist Medical Center was the best champion one could hope for. Her original research became the bedrock of the entire campaign and her willingness to be a media spokesperson moved the issue at critical times. She also worked closely with the assistant attorneys general, serving as their go-to expert.

3. Make friends with the media. Alcohol Justice has been able to leverage much media attention to this issue, in part because it has so many dramatic aspects: the confusing package design (the media loves catching retailers

selling to minors), the threat of legal action, and unfortunately, the tragedies. Once you get to know a producer or reporter, become a reliable resource for them.

4. Work with a wide coalition of groups. It's a cliché but it's true: the broader your coalition, the more effective you are. This issue appealed to everyone from health professionals to law enforcement to youth advocates to treatment and prevention groups and of course, parents. Even policymakers who often take the side of the alcohol industry had a hard time defending such obviously dangerous products. (Showing examples of the products always helps.)

5. Be persistent. While this was a relatively short campaign as far as alcohol prevention victories go, it still took a number of twists and turns and at times was frustrating and discouraging: especially when we couldn't understand what was taking the FDA so long to act, or when we couldn't get state legislation passed, or when we got zero cooperation from anyone from the industry, (including some beer wholesalers who claim to be in favor of state regulation). But not being willing to give up and keeping the pressure on all levels of government ultimately paid off.

6. Prepare to do battle again. Because the alcohol industry will keep coming up with clever new ways to target youth, pressure is needed on every level: of course, industry (producers, distributors, and retailers) should be held accountable. Policymakers at the federal, state, and local levels should be educated to become champions or at least embarrassed into doing the right thing. Finally, advocates need to use all tools available—media, grassroots and online activism, coalition building and good old fashioned lobbying to make change happen. With the right combination of factors, victory will come.

Time Line

2003	McKenzie River Corporation introduces Sparks.
2004-2005	Anheuser-Busch introduces Spykes, Tilt, and Bud Extra.
2006	Apr "Effects of Energy Drink Ingestion on Alcohol Intoxication" is published. Jul MillerCoors purchases Sparks for \$215 million.
2007	May Letter from 29 state attorneys general and negative media prompts Anheuser-Busch to stop making Spykes. Aug Report, "Alcohol, Energy Drinks, and Youth: A Dangerous Mix" is published. Nov Dr. Mary Claire O'Brien presents findings demonstrating clear dangers of consuming alcohol mixed with caffeine.
2008	Feb Center for Science in the Public Interest sends Anheuser-Busch and Miller Brewing Company letters of intent to sue. May Anheuser-Busch signs agreement with state attorneys general to stop producing AEDs. Aug Phusion Projects introduces Four Loko in supersized can. Sep Center for Science in the Public Interest files suit against MillerCoors over Sparks. Oct Utah becomes first state to effectively ban sale of AEDs. Dec MillerCoors signs agreement with state attorneys general to stop producing AEDs.
2009	Nov FDA sends letters to makers of AEDs requesting evidence that adding caffeine to alcoholic beverages is safe.
2010	Aug Four U.S. senators call on FDA to complete its investigation of AED manufacturers and issue a report. Oct Two incidents involving scores of college students being hospitalized after consuming AEDs receive national attention. Nov Six states ban AEDs, if only temporarily. Many more states consider similar actions, putting increased pressure on FDA. FDA and FTC each send letters to four producers of AEDs warning that caffeine is an unsafe additive, making the products illegal to sell under federal law and subject to seizure action.
2011	Jan Four Loko returns to store shelves in reformulated, caffeine-free versions, but in supersized containers with high alcohol content. Apr Pabst Brewing Company introduces "Blast by Colt 45", in 23.5 ounce single-serve cans with 12% alcohol in fruity flavors. Letter sent from 17 attorneys general to Pabst Brewing Company over new supersized alcopop, "Blast by Colt 45."

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36. In particular, Alan Lieberman of California and Marlene Trestman of Maryland were instrumental leaders throughout the campaign, as was Francesca Gessner of the San Francisco city attorney's office.



Vision

Alcohol Justice envisions healthy communities free of the alcohol industry's negative impact.

Mission

Alcohol Justice, the industry watchdog, promotes evidence-based public health policies and organizes campaigns with diverse communities and youth against the alcohol industry's harmful practice.

Board Members

Linda Barry Dunn, MPP

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