

6074

2015-2016 Regular Sessions

I N S E N A T E

October 26, 2015

Introduced by Sens. PERALTA, KLEIN -- read twice and ordered printed,
and when printed to be committed to the Committee on Rules

AN ACT to amend the general business law, in relation to prohibiting the sale and distribution of sexual performance dietary supplements or foods containing an unsafe sexual performance food additive; and to amend the tax law and alcoholic beverage control law, in relation to the denial, suspension or cancellation of certain licenses for repeated violations of the ban on the sale of sexual performance dietary supplements or foods containing an unsafe sexual performance food additive

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The general business law is amended by adding a new section
2 391-t to read as follows:
3 S 391-T. SEXUAL PERFORMANCE DIETARY SUPPLEMENTS AND FOOD ADDITIVES;
4 PROHIBITION. 1. NO PERSON, FIRM, CORPORATION, PARTNERSHIP, ASSOCIATION,
5 LIMITED LIABILITY COMPANY, OR OTHER ENTITY SHALL SELL OR OFFER TO SELL
6 OR GIVE AWAY, AS EITHER A RETAIL OR WHOLESALE PROMOTION, BY ANY MEANS
7 INCLUDING VIA THE INTERNET, A SEXUAL PERFORMANCE DIETARY SUPPLEMENT OR A
8 FOOD CONTAINING AN UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVE TO ANY
9 PERSON, FIRM, CORPORATION, PARTNERSHIP, ASSOCIATION, LIMITED LIABILITY
10 COMPANY, OR OTHER ENTITY LOCATED WITHIN NEW YORK STATE.
11 2. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS HAVE THE FOLLOW-
12 ING MEANINGS:
13 (A) "DIETARY SUPPLEMENT" MEANS (1) A PRODUCT THAT IS INTENDED TO
14 SUPPLEMENT THE DIET AND THAT BEARS OR CONTAINS ONE OR MORE OF THE
15 FOLLOWING DIETARY INGREDIENTS: A VITAMIN, A MINERAL, AN HERB OR OTHER
16 BOTANICAL, AN AMINO ACID, OR ANY OTHER DIETARY SUBSTANCE FOR THE USE BY
17 A PERSON TO SUPPLEMENT THE DIET BY INCREASING THE TOTAL DAILY INTAKE, OR
18 A CONCENTRATE, METABOLITE, CONSTITUENT, EXTRACT, OR COMBINATIONS OF
19 THESE INGREDIENTS; (2) INTENDED FOR INGESTION IN ANY MANNER INCLUDING

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 BUT NOT LIMITED TO PILL, CAPSULE, TABLET, POWDER, OR LIQUID FORM; AND
2 (3) LABELED AS A "DIETARY SUPPLEMENT" PURSUANT TO THE FEDERAL DIETARY
3 SUPPLEMENT HEALTH AND EDUCATION ACT, 21 U.S.C. 321, AS AMENDED.

4 (B) "SEXUAL PERFORMANCE DIETARY SUPPLEMENT" MEANS A DIETARY SUPPLE-
5 MENT, WHICH IS SOLD, MARKETING OR DISTRIBUTED TO ENHANCE OR INCREASE A
6 PERSON'S SEXUAL PERFORMANCE OR TO TREAT ERECTILE DYSFUNCTION INCLUDING,
7 BUT NOT LIMITED TO, SUPPLEMENTS CONTAINING THE ACTIVE INGREDIENTS TADA-
8 LAFIL OR SILDENAFIL OR ANALOGS THEREOF.

9 (C) "FOOD" MEANS ALL ARTICLES OF FOOD, DRINK, CONFECTIONERY OR CONDI-
10 MENT, WHETHER SIMPLE, MIXED OR COMPOUND, USED OR INTENDED FOR USE BY
11 HUMANS, AND SHALL ALSO INCLUDE ALL SUBSTANCES OR INGREDIENTS TO BE ADDED
12 TO FOOD FOR ANY PURPOSE. SUCH TERM SHALL INCLUDE CHEWING GUM AND ORAL
13 DISSOLVABLE STRIPS.

14 (D) "UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVE" MEANS A FOOD ADDITIVE
15 THAT CONTAINS INGREDIENTS MARKETING TO ENHANCE OR INCREASE SEXUAL
16 PERFORMANCE OR TO TREAT ERECTILE DYSFUNCTION THAT HAS NOT BEEN RECOG-
17 NIZED BY THE COMMISSIONER OF AGRICULTURE AND MARKETS AS SAFE, FOR THE
18 PURPOSE OF ENFORCEMENT OF ARTICLE SEVENTEEN OF THE AGRICULTURE AND
19 MARKETS LAW.

20 3. NOTHING IN THIS SECTION SHALL APPLY TO NONPRESCRIPTION
21 OVER-THE-COUNTER DRUGS APPROVED OR REGULATED BY THE FOOD AND DRUG ADMIN-
22 ISTRATION.

23 4. (A) ANY PERSON, FIRM, CORPORATION, PARTNERSHIP, ASSOCIATION, LIMIT-
24 ED LIABILITY COMPANY, OR OTHER ENTITY THAT VIOLATES THE PROVISIONS OF
25 THIS SECTION BY SELLING, OFFERING TO SELL, OR GIVING AWAY AS EITHER A
26 RETAIL OR WHOLESALE PROMOTION, A SEXUAL PERFORMANCE DIETARY SUPPLEMENT
27 OR A FOOD THAT CONTAINED AN UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVE,
28 SHALL BE SUBJECT TO A PENALTY OF NOT MORE THAN TWO THOUSAND DOLLARS FOR
29 A FIRST VIOLATION, A PENALTY OF NOT MORE THAN FIVE THOUSAND DOLLARS FOR
30 A SECOND VIOLATION, AND UPON A THIRD VIOLATION, THE DENIAL, SUSPENSION
31 OR CANCELLATION OF ANY STATE ISSUED LICENSE FOR THE SALE OF ALCOHOL,
32 CIGARETTES OR LOTTERY TICKETS FOR A PERIOD OF FIVE YEARS, RECOVERABLE IN
33 AN ACTION BY ANY ENFORCEMENT AUTHORITY DESIGNATED BY ANY MUNICIPALITY OR
34 POLITICAL SUBDIVISION. THE ENFORCEMENT AUTHORITY SHALL NOTIFY THE
35 DEPARTMENT OF AGRICULTURE AND MARKETS OF ANY VIOLATION OF THIS SECTION.

36 (B) THE DEPARTMENT OF AGRICULTURE AND MARKETS SHALL ESTABLISH AND
37 MAINTAIN AN INTERNAL DATABASE OF VIOLATIONS OF THIS SECTION INCLUDING
38 THE NAME AND ADDRESS OF THE VIOLATOR, THE NUMBER OF VIOLATIONS COMMITTED
39 BY SUCH PERSON OR ENTITY AND A DESCRIPTION OF EACH VIOLATION. UPON A
40 THIRD VIOLATION, AFTER NOTIFICATION BY THE ENFORCEMENT AUTHORITY, THE
41 DEPARTMENT OF AGRICULTURE AND MARKETS SHALL NOTIFY THE APPROPRIATE STATE
42 AGENCY TO DENY, SUSPEND OR CANCEL A VIOLATOR'S LICENSE FOR THE SALE OF
43 ALCOHOL, CIGARETTES OR LOTTERY TICKETS FOR A PERIOD OF FIVE YEARS.

44 5. IT SHALL BE A DEFENSE THAT ANY PERSON, FIRM, CORPORATION, PARTNER-
45 SHIP, ASSOCIATION, LIMITED LIABILITY COMPANY OR OTHER ENTITY THAT SOLD,
46 OFFERED FOR SALE OR GAVE AWAY, FOR EITHER RETAIL, WHOLESALE OR PROMO-
47 TIONAL PURPOSES, A DIETARY SUPPLEMENT, DID NOT HAVE KNOWLEDGE THAT THE
48 DIETARY SUPPLEMENT WAS A SEXUAL PERFORMANCE DIETARY SUPPLEMENT, OR THAT
49 THE FOOD CONTAINED AN UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVE, IF SUCH
50 KNOWLEDGE WAS NOT REASONABLY DISCOVERABLE.

51 6. EVERY PLACE LOCATED WITHIN THIS STATE, WHERE DIETARY SUPPLEMENTS
52 AND FOOD ARE SOLD, SHALL BE SUBJECT TO INSPECTION BY THE DEPARTMENT OF
53 AGRICULTURE AND MARKETS WHICH SHALL HAVE THE POWER TO INSPECT THE
54 PRODUCTS COVERED BY THIS SECTION, TO OPEN AND EXAMINE THE CONTENTS THER-
55 EOF AND THE POWER TO SEIZE AND HOLD FOR EVIDENCE ANY PRODUCT, IN WHOLE

OR IN PART, WHICH THE DEPARTMENT OF AGRICULTURE AND MARKETS HAS REASON TO BELIEVE IS SOLD IN VIOLATION OF THIS SECTION.

7. THE DEPARTMENT OF HEALTH, IN CONJUNCTION WITH THE DEPARTMENT OF AGRICULTURE AND MARKETS, SHALL ESTABLISH AND MAINTAIN A DATABASE OF KNOWN SEXUAL PERFORMANCE DIETARY SUPPLEMENTS OR UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVES. THE DATABASE SHALL BE PUBLISHED ON THE DEPARTMENT OF HEALTH'S WEBSITE SO THAT CONSUMERS, RETAILERS, AND LAW ENFORCEMENT AGENCIES CAN ACCESS INFORMATION INCLUDING, BUT NOT LIMITED TO, A LIST OF THE BRAND NAMES OF PRODUCTS KNOWN TO VIOLATE THIS SECTION AND IMAGES OF THEIR PACKAGING. THE WEBSITE SHALL INCLUDE A STATEMENT INDICATING THAT SUCH INFORMATION IS BEING PROVIDED AS A RESOURCE FOR CONSUMERS, RETAILERS, AND LAW ENFORCEMENT; AND SUCH INFORMATION MAY NOT BE COMPREHENSIVE. NEITHER THE DEPARTMENT OF HEALTH NOR THE DEPARTMENT OF AGRICULTURE AND MARKETS SHALL BE LIABLE FOR ANY ECONOMIC HARM, PERSONAL INJURY, OR DEATH THAT MAY RESULT FROM INFORMATION INCLUDED IN, OR OMITTED FROM, THE DATABASE.

8. (A) WITHIN THIRTY DAYS OF THE EFFECTIVE DATE OF THIS SECTION, THE DEPARTMENT OF AGRICULTURE AND MARKETS SHALL DEVELOP AND IMPLEMENT AN OUTREACH PROGRAM, IN THE MANNER IT DEEMS MOST EFFECTIVE, TO INFORM WHOLESALERS, MANUFACTURERS AND RETAILERS OF THE PROHIBITION ON THE SALE OF SEXUAL PERFORMANCE DIETARY SUPPLEMENTS AND FOOD CONTAINING UNSAFE SEXUAL PERFORMANCE FOOD ADDITIVES UNDER THIS SECTION AND THE PENALTIES FOR A VIOLATION OF THIS SECTION.

(B) THE DEPARTMENT OF AGRICULTURE AND MARKETS IS AUTHORIZED AND EMPOWERED TO ENTER INTO CONTRACTUAL AGREEMENTS WITH PUBLIC AND PRIVATE ORGANIZATIONS TO DEVELOP AND IMPLEMENT SUCH AN OUTREACH PROGRAM.

S 2. Paragraphs (e) and (f) of subdivision 2 of section 480 of the tax law, as amended by chapter 744 of the laws of 1990, are amended and a new paragraph (g) is added to read as follows:

(e) Any controlling person of such applicant has committed any of the acts specified in subdivision three of this section within the preceding five years, [or]

(f) Such applicant or any controlling person has been finally determined to have violated any of the provisions of this article or article twenty-A of this chapter, or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter[.], OR

(G) SUCH APPLICANT OR ANY CONTROLLING PERSON HAS BEEN DETERMINED TO HAVE VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED NINETY-ONE-T OF THE GENERAL BUSINESS LAW, THREE OR MORE TIMES DURING A PERIOD OF FIVE YEARS, IN SUCH CASE THE VIOLATOR SHALL BE DENIED A LICENSE FOR A PERIOD OF FIVE YEARS AFTER THE LAST SUCH VIOLATION.

S 3. Subparagraphs (iii) and (iv) of paragraph (b) of subdivision 3 of section 480 of the tax law, subparagraph (iii) as added by chapter 860 of the laws of 1987 and subparagraph (iv) as amended by chapter 61 of the laws of 1989, are amended and a new subparagraph (v) is added to read as follows:

(iii) Has impersonated any person represented to be a wholesale dealer under this article but not in fact licensed under this section, [or]

(iv) Has knowingly aided and abetted the sale of cigarettes or tobacco products by a person which such licensee or controlling person knows (A) has not been licensed by the commissioner of taxation and finance and (B) is a wholesale dealer pursuant to the terms of subdivision eight of section four hundred seventy of this chapter[.], OR

(V) HAS BEEN DETERMINED TO HAVE VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED NINETY-ONE-T OF THE GENERAL BUSINESS LAW, THREE OR MORE

1 TIMES DURING A PERIOD OF FIVE YEARS, IN SUCH CASE THE VIOLATOR'S LICENSE
2 SHALL BE CANCELLED OR SUSPENDED FOR A PERIOD OF FIVE YEARS.

3 S 4. Subdivision a of section 1605 of the tax law, as amended by chap-
4 ter 217 of the laws of 2011, is amended to read as follows:

5 a. The division may license as agents to sell lottery tickets such
6 persons as in its opinion will best serve public convenience, except
7 that no license shall be issued to any person to engage in business
8 exclusively as a lottery sales agent; AND PROVIDED, FURTHER, THAT NO
9 LICENSE SHALL BE ISSUED TO ANY PERSON WHO HAS BEEN DETERMINED TO HAVE
10 VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED NINETY-ONE-T OF THE
11 GENERAL BUSINESS LAW, THREE OR MORE TIMES DURING A PERIOD OF FIVE YEARS,
12 IN SUCH CASE THE VIOLATOR SHALL BE DENIED A LICENSE FOR A PERIOD OF FIVE
13 YEARS AFTER THE LAST SUCH VIOLATION. The division may license such
14 persons as in its opinion are suitable to participate in video lottery
15 gaming pursuant to section sixteen hundred seventeen-a of this article.

16 S 5. Section 1607 of the tax law is amended by adding a new subdivi-
17 sion i to read as follows:

18 I. THREE OR MORE VIOLATIONS OF SUBDIVISION ONE OF SECTION THREE
19 HUNDRED NINETY-ONE-T OF THE GENERAL BUSINESS LAW, WITHIN ANY PERIOD OF
20 FIVE YEARS, IN WHICH CASE, THE DIVISION SHALL SUSPEND THE VIOLATOR'S
21 LICENSE FOR A PERIOD OF FIVE YEARS.

22 S 6. Section 105 of the alcoholic beverage control law is amended by
23 adding a new subdivision 4 to read as follows:

24 4. NO PERSON SHALL RECEIVE A LICENSE TO ENGAGE IN THE RETAIL SALE OF
25 ALCOHOLIC BEVERAGES FOR OFF-PREMISES CONSUMPTION, WHO HAS BEEN DETER-
26 MINED TO HAVE VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED NINETY-
27 ONE-T OF THE GENERAL BUSINESS LAW, THREE OR MORE TIMES DURING A PERIOD
28 OF FIVE YEARS, IN SUCH CASE THE VIOLATOR SHALL BE DENIED A LICENSE FOR A
29 PERIOD OF FIVE YEARS AFTER THE LAST SUCH VIOLATION.

30 S 7. Section 106 of the alcoholic beverage control law is amended by
31 adding a new subdivision 4-b to read as follows:

32 4-B. NO PERSON SHALL RECEIVE A LICENSE TO ENGAGE IN THE RETAIL SALE OF
33 ALCOHOLIC BEVERAGES FOR ON PREMISES CONSUMPTION, WHO HAS BEEN DETERMINED
34 TO HAVE VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED NINETY-ONE-T
35 OF THE GENERAL BUSINESS LAW, THREE OR MORE TIMES DURING A PERIOD OF FIVE
36 YEARS, IN SUCH CASE THE VIOLATOR SHALL BE DENIED A LICENSE FOR A PERIOD
37 OF FIVE YEARS AFTER THE LAST SUCH VIOLATION.

38 S 8. Section 118 of the alcoholic beverage control law is amended by
39 adding a new subdivision 1-a to read as follows:

40 1-A. A LICENSE OR PERMIT ISSUED PURSUANT TO THIS CHAPTER SHALL BE
41 SUSPENDED FOR A PERIOD OF FIVE YEARS WHEN THE HOLDER THEREOF HAS BEEN
42 DETERMINED TO HAVE VIOLATED SUBDIVISION ONE OF SECTION THREE HUNDRED
43 NINETY-ONE-T OF THE GENERAL BUSINESS LAW, THREE OR MORE TIMES DURING A
44 PERIOD OF FIVE YEARS.

45 S 9. This act shall take effect on the one hundred eightieth day after
46 it shall have become a law.