STATE OF NEW YORK

577

2017-2018 Regular Sessions

IN SENATE

(Prefiled)

January 4, 2017

Introduced by Sen. PERALTA -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

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:

Section 1. The general business law is amended by adding a new section 391-u to read as follows:

§ 391-u. Sexual performance dietary supplements and food additives; prohibition. 1. No person, firm, corporation, partnership, association, limited liability company or other entity shall sell or offer to sell or give away, as either a retail or wholesale promotion, by any means including via the internet, a sexual performance dietary supplement or a food containing an unsafe sexual performance food additive to any person, firm, corporation, partnership, association, limited liability company or other entity located within the state.

2. For purposes of this section, the following terms have the following meanings:

(a) "dietary supplement" means (1) a product that is intended to supplement the diet and that bears or contains one or more of the following dietary ingredients: a vitamin, a mineral, an herb or other botanical, an amino acid, or any other dietary substance for the use by a person to supplement the diet by increasing the total daily intake, or a concentrate, metabolite, constituent, extract or combinations of these

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

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ingredients; (2) intended for ingestion in any manner including but not limited to pill, capsule, tablet, powder or liquid form; and (3) labeled as a "dietary supplement" pursuant to the federal Dietary Supplement Health and Education Act, 21 U.S.C. 321, as amended.

(b) "sexual performance dietary supplement" means a dietary supplement, which is sold, marketed or distributed to enhance or increase a person's sexual performance or to treat erectile dysfunction including, but not limited to, supplements containing the active ingredients tadalafil or sildenafil or analogs thereof.

(c) "food" means all articles of food, drink, confectionery or condiment, whether simple, mixed or compound, used or intended for use by humans, and shall also include all substances or ingredients to be added to food for any purpose. Such term shall include chewing gum and oral dissolvable strips.

(d) "unsafe sexual performance food additive" means a food additive that contains ingredients marketed to enhance or increase sexual performance or to treat erectile dysfunction that has not been recognized by the commissioner of agriculture and markets as safe, for the purpose of enforcement of article seventeen of the agriculture and markets law.

3. Nothing in this section shall apply to nonprescription over-the-counter drugs approved or regulated by the federal Food and Drug Administration.

4. (a) Any person, firm, corporation, partnership, association, limited liability company or other entity that violates the provisions of this section by selling, offering to sell or giving away as either a retail or wholesale promotion, a sexual performance dietary supplement or a food that contained an unsafe sexual performance food additive, shall be subject to a penalty of not more than two thousand dollars for a first violation, a penalty of not more than five thousand dollars for a second violation, and upon a third or subsequent violation, the denial, suspension or cancellation of any state issued license for the sale of alcohol, cigarettes or lottery tickets for a period of five years, recoverable in an action by any enforcement authority designated by any municipality or political subdivision. The enforcement authority shall notify the department of agriculture and markets of any violation of this section.

(b) The department of agriculture and markets shall establish and maintain an internal database of violations of this section including the name and address of the violator, the number of violations committed by such person or entity and a description of each violation. Upon a third or subsequent violation, after notification by the enforcement authority, the department of agriculture and markets shall notify the appropriate state agency to deny, suspend or cancel a violator's license for the sale of alcohol, cigarettes or lottery tickets for a period of five years.

5. It shall be a defense that any person, firm, corporation, partnership, association, limited liability company or other entity that sold, offered for sale or gave away, for either retail, wholesale or promotional purposes, a dietary supplement, did not have knowledge that the dietary supplement was a sexual performance dietary supplement, or that the food contained an unsafe sexual performance food additive, if such knowledge was not reasonably discoverable.

6. Every place located within this state, where dietary supplements and food are sold, shall be subject to inspection by the department of agriculture and markets which shall have the power to inspect the

products covered by this section, to open and examine the contents thereof 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.

§ 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-u 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.

§ 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-u of the general business law, three or more times during a period of five years, in such case the violator's license shall be cancelled or suspended for a period of five years.

§ 4. Subdivision a of section 1605 of the tax law, as amended by chapter 217 of the laws of 2011, is amended to read as follows:

a. The division may license as agents to sell lottery tickets such persons as in its opinion will best serve public convenience, except that no license shall be issued to any person to engage in business exclusively as a lottery sales agent; and provided, further, that no license shall be issued to any person who has been determined to have violated subdivision one of section three hundred ninety-one-u 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. The division may license such persons as in its opinion are suitable to participate in video lottery gaming pursuant to section sixteen hundred seventeen-a of this article.

§ 5. Section 1607 of the tax law is amended by adding a new subdivision i to read as follows:

i. Three or more violations of subdivision one of section three hundred ninety-one-u of the general business law, within any period of five years, in which case, the division shall suspend the violator's license for a period of five years.

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

4. No person shall receive a license to engage in the retail sale of alcoholic beverages for off-premises consumption, who has been determined to have violated subdivision one of section three hundred ninety-one-u 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.

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

4-b. No person shall receive a license to engage in the retail sale of alcoholic beverages for on premises consumption, who has been determined to have violated subdivision one of section three hundred ninety-one-u 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.

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

1-a. A license or permit issued pursuant to this chapter shall be suspended for a period of five years when the holder thereof has been determined to have violated subdivision one of section three hundred ninety-one-u of the general business law, three or more times during a period of five years.

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