STATE OF NEW YORK

8583--C

2021-2022 Regular Sessions

IN ASSEMBLY

December 13, 2021

Introduced by M. of A. REYES, SOLAGES -- read once and referred to the Committee on Agriculture -- recommitted to the Committee on Agriculture in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Agriculture in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the agriculture and markets law, the general business law and the public health law, in relation to food and food product advertising

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and intent. The legislature hereby finds that children are an inherently vulnerable population, and that marketing unhealthy foods in a targeted and persistent manner to this group is inconsistent with this state's efforts to curb the disastrous health outcomes that follow the overconsumption of these products. Such marketing is inherently misleading, as children often lack the same ability to resist the rewarding cues presented in unhealthy food marketing as adults. This predatory commercial speech has contributed to an epidemic of obesity and its related co-morbidities, particularly in the children of black and brown communities. Furthermore, there is a growing consensus that highly processed food is habit forming, increasing the danger to public health that can arise from succumbing to misleading advertising. New York has a strong and substantial interest in protecting our children from negative health consequences. Additionally, the power of the state is at its greatest when protecting the health and welfare of its citizens, especially those most vulnerable. Thus, the legislature finds that unfair and deceptive marketing targeted at chil-

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

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dren can mislead and manipulate children into lifelong habits, and that such unfair and deceptive advertising should be regulated accordingly.

§ 2. Section 202-a of the agriculture and markets law is amended by adding a new subdivision 4 to read as follows:

4. Whenever the court shall determine that a violation of this section has occurred, the court shall consider factors and special consideration given to advertising directed at a child pursuant to section three hundred fifty-a of general business law.

§ 3. Section 350-a of general business law is amended by adding five new subdivisions 4, 5, 6, 7, and 8 to read as follows:

4. In determining whether advertising of a food or food product is misleading, there shall be taken into account any representations disseminated in any manner or by any means including digitally, or by statement, word, design, device, sound or any combination thereof, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of food or food products shall not be false or misleading in any manner. In determining whether any advertising concerning a food or food product is false or misleading, factors shall include, but not be limited to:

(a) The extent to which the advertising fails to reveal facts material in the light of such representations with respect to the food or food product to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual;

(b) Whether the entity responsible for the advertisement targeting a consumer who is reasonably unable to protect their interests because of their age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factor used:

(i) an unfair act, practice, or conduct; or

(ii) a deceptive representation, omission, practice, or content; and

(c) Whether: (i) the advertisement causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.

(d) For the purposes of this subdivision and subdivision six of this section, a "consumer" is defined as a person who is targeted by and exposed to an advertisement, or those acting on such a person's behalf.

5. For the purposes of paragraph (a) of subdivision four of this section, a true statement of information in brief summary relating to effects of substantial consumption of this product is sufficient. Untrue or misleading information in any part of the advertisement will not be corrected by the inclusion in another distinct part of the advertisement of a brief statement containing true information relating to the effects of consumption.

6. For the purposes of this section, for a consumer:

(a) an act, practice, or conduct is "unfair" where it:

(i) causes or is likely to cause substantial injury to such consumer;

(ii) cannot be reasonably avoided by such consumer; and

(iii) is not outweighed by countervailing benefits to such consumer or to competition.

(b) a representation, omission, or practice is "deceptive" where:

(i) it is likely to mislead such consumer;

(ii) such consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and

(iii) the misleading representation, omission, or practice is material.

7. For purposes of paragraph (b) of subdivision four of this section, special consideration shall be given to advertisements directed at a child as defined in section three hundred seventy-one of the social services law. In determining whether an advertisement concerning a food or food product is directed at a child, factors shall include, but not be limited to:

(a) Subject matter;

(b) Visual content;

(c) Use of animated characters or child-oriented activities and incentives;

(d) Music or other audio content;

(e) Age of models;

(f) Presence of child celebrities or celebrities who appeal to children;

(g) Language;

(h) Competent and reliable empirical evidence regarding audience composition and evidence regarding the intended audience;

(i) Physical location of advertisement, including, but not limited to, proximity to schools or other institutions frequented by children;

(j) Medium by which the advertisement is communicated, including, but not limited to, social media; or

(k) Other similar factors.

8. (a) Whenever there shall be a violation of this section, the attorney general, in the name of the people of the state of New York, or a city corporation counsel on behalf of the locality, may bring an action in the supreme court or federal district court to enjoin and restrain such violations and to obtain restitution and damages.

(b) Any person, firm, corporation or association that has been damaged as a result of violations of this section shall be entitled to bring an action for recovery of damages or to enforce this section in the supreme court or federal district court by seeking an injunction.

(c) The court may award reasonable attorneys' fees to a prevailing plaintiff.

§ 4. Subdivision 1 of section 2599-b of the public health law, as amended by section 1 of part A of chapter 469 of the laws of 2015, is amended to read as follows:

1. The program shall be designed to prevent and reduce the incidence and prevalence of obesity in children and adolescents, especially among populations with high rates of obesity and obesity-related health complications including, but not limited to, diabetes, heart disease, cancer, osteoarthritis, asthma, emphysema, chronic bronchitis, other chronic respiratory diseases and other conditions. The program shall use recommendations and goals of the United States departments of agriculture and health and human services, the surgeon general and centers for disease control and prevention in developing and implementing guidelines for nutrition education and physical activity projects as part of obesity prevention efforts. The content and implementation of the program shall stress the benefits of choosing a balanced, healthful diet from the many options available to consumers[~~, without specifically targeting the elimination of any particular food group, food product or food-related industry~~] while specifically including education on access and the nutritional value of locally grown foods. The program shall cooperate with the department of agriculture and markets to add access to locally grown foods within the guidelines and framework of the program.

§ 5. Severability. If any part or provision of this act or its application to a person is held invalid, the invalidity of that provision or application does not affect other provisions or applications of this act that can be given effect without the invalid provision or application.

§ 6. This act shall take effect on the thirtieth day after it shall have become a law.