§ 391-oo. Sale of over-the-counter diet pills and dietary supplements for weight loss or muscle building. 1. For purposes of this section the following terms shall have the following meanings:

(a) "Dietary supplements for weight loss or muscle building" means a class of dietary supplement as defined in section three hundred ninety-one-o of this article that is labeled, marketed, or otherwise represented for the purpose of achieving weight loss or muscle building, but shall not include protein powders, protein drinks and foods marketed as containing protein unless the protein powder, protein drink or food marketed as containing protein contains an ingredient other than protein which would, considered alone, constitute a dietary supplement for weight loss or muscle building.

(b) "Over-the-counter diet pills" means a class of drugs labeled, marketed, or otherwise represented for the purpose of achieving weight loss that are lawfully sold, transferred, or furnished over-the-counter with or without a prescription pursuant to the federal food, drug, and cosmetic act, 21 U.S.C. section 301 et seq., or regulations adopted thereunder.

(c) "Retail establishment" means any vendor that, in the regular course of business, sells dietary supplements for weight loss or muscle building or over-the-counter diet pills at retail directly to the public, including, but not limited to, pharmacies, grocery stores, other retail stores, and vendors that accept orders placed by mail, telephone, electronic mail, internet website, online catalog, or software application.

(d) "Delivery sale" means any sale of over-the-counter diet pills or dietary supplements for weight loss or muscle building to a consumer if:

(i) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, mail, or the internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(ii) the over-the-counter diet pills or dietary supplements for weight loss or muscle building are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the over-the-counter diet pills or dietary supplements for weight loss or muscle building.

(e) "Delivery seller" means a vendor, including online retailers, who makes delivery sales of over-the-counter diet pills or dietary supplements for weight loss or muscle building. Such vendors shall include persons who accept orders placed by mail, telephone, electronic mail, internet website, online catalog, or software application.

2. 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, an over-the-counter diet pill or dietary supplement for weight loss or muscle building within this state to any person under eighteen years of age. Retail establishments shall require proof of legal age for purchase of such products. For purposes of this section, proof of legal age shall mean (a) a valid driver's license or non-driver's identification card issued by the commissioner of motor vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States, a provincial government of the dominion of Canada, or the city of New York, or (b) a valid passport issued by the United States government or any other country, or (c) an identification card issued by the armed forces of the United States, indicating that the individual is at least eighteen years of age, or (d) a student identification card, provided such card indicates the date of birth of the individual. Such identification need not be required of any individual who reasonably appears to be at least twenty-five years of age; provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of any over-the-counter diet pills and dietary supplements for weight loss or muscle building to an individual under eighteen years of age.

3. (a) Any person operating a retail establishment may perform a transaction scan as a precondition for the purchase of over-the-counter diet pills or dietary supplements for weight loss or muscle building.

(b) In any instance where the information deciphered by the transaction scan fails to match the information printed on the driver's license or non-driver identification card, or if the transaction scan indicates that the information is false or fraudulent, the attempted transaction shall be denied.

(c) In any proceeding pursuant to subdivision five of this section, it shall be an affirmative defense that such person had produced a driver's license or non-driver identification card apparently issued by a governmental entity, successfully completed that transaction scan, and that over-the-counter diet pills or dietary supplements for weight loss of muscle building were sold, delivered or given to such person in reasonable reliance upon such identification and transaction scan. In evaluating the applicability of such affirmative defense, the court shall take into consideration any written policy adopted and implemented by the seller to effectuate the provisions of this section. Use of a transaction scan shall not excuse any person operating a retail establishment from the exercise of reasonable diligence otherwise required by this section.

(d) A retail establishment or employee of such establishment shall only use a device capable of deciphering any electronically readable format, and shall only use the information recorded and maintained through the use of such devices, for the purposes contained in this subdivision. No retail establishment or employee of such establishment shall resell or disseminate the information recorded during such a scan to any third person. Such prohibited resale or dissemination includes but is not limited to any advertising, marketing or promotional activities. Notwithstanding the restrictions imposed by this subdivision, such records may be released pursuant to a court ordered subpoena or pursuant to any other statute that specifically authorizes the release of such information. Each violation of this subdivision shall be punishable by a civil penalty of not more than one thousand dollars.

(e) A retail establishment or employee of such establishment may electronically or mechanically record and maintain only the information from a transaction scan necessary to effectuate this section. Such information shall be limited to the following: (i) name, (ii) date of birth, (iii) driver's license or non-driver identification number, and (iv) expiration date.

4. Notwithstanding subdivision two of this section, a delivery seller, including an online retailer, who mails or ships over-the-counter diet pills or dietary supplements for weight loss or muscle building to

consumers:

(a) shall not sell, deliver, or cause to be delivered any over-the-counter diet pills or dietary supplements for weight loss or muscle building to a person under eighteen years of age; and

(b) shall use a method of mailing or shipping:

(i) that requires the purchaser placing the delivery sale order, or an adult who is at least eighteen years of age to sign to accept delivery of the shipping container at the delivery address; and

(ii) that requires the person who signs to accept delivery of the shipping container to provide proof, in the form of a valid, government-issued identification bearing a photograph of the individual, that the person is at least eighteen years of age.

5. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York, to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violation; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by the court or justice, enjoining and restraining any further violations, without requiring proof that any person has, in fact, been injured or damaged thereby. Whenever a court shall determine that a violation of this section has occurred, the court may impose a civil penalty of not more than five hundred dollars.

6. When determining whether an over-the-counter diet pill or dietary supplement is labeled, marketed, or otherwise represented for the purpose of achieving weight loss or muscle building, the court shall consider, but is not limited to, the following factors:

(a) whether the product contains:

(i) an ingredient approved by the federal Food and Drug Administration for weight loss or muscle building;

(ii) a steroid; or

(iii) creatine, green tea extract, raspberry ketone, garcinia cambogia, green coffee bean extract;

(b) whether the product's labeling or marketing bears statements or images that express or imply that the product will help:

(i) modify, maintain, or reduce body weight, fat, appetite, overall metabolism, or the process by which nutrients are metabolized; or

(ii) maintain or increase muscle or strength;

(c) whether the product or its ingredients are otherwise represented for the purpose of achieving weight loss or building muscle; or

(d) whether the retailer has categorized the dietary supplement for weight loss or muscle building by:

(i) placing signs, categorizing, or tagging the supplement with statements described in paragraph (b) of this subdivision;

(ii) grouping the supplements with other weight loss or muscle building products in a display, advertisement, webpage, or area of the store; or

(iii) otherwise representing that the product is for weight loss or muscle building.