



March 19, 2024

Assemblywoman Donna A. Lupardo
Chair, Assembly Agriculture Committee
LOB 828
Albany, NY 12248

Cc: Senator Zellnor Myrie

RE: Food Advertising to Children Restrictions in Budget - OPPOSE

Dear Chairwoman Lupardo:

We write to express our opposition to extremely burdensome food and beverage advertising restrictions in the New York Senate's proposed budget, S 8308. The restrictions were previously filed as a standalone bill, S 213B. As currently written, this bill will place significant and unnecessary limitations on the marketing and advertising of food and food products. The bill's vague and overly broad terms are likely to give rise to a host of legal and constitutional questions due to their infringement on the First Amendment speech rights of both advertisers and consumers. In addition to other concerns, it uses a variety of undefined terms, making their application speculative and exposing marketers to needless litigation and expense without providing clear and substantial benefit to consumers. We urge you to reconsider this bill.

As you undoubtedly know, advertising in New York State is a tremendous engine of economic activity; according to an IHS Markit study, in 2020, advertising generated an estimated \$652.7 billion in economic activity and supported 1.98 million jobs, or 20% of all jobs in New York¹. Any legislation regulating food advertising must preserve the economic benefits of advertising and marketing by ensuring that responsible advertising continues to provide access to products and services and fuels the American economy.

Last year, advertising related to food accounted for over 7% of all advertising spend in the state of New York according to well-known media intelligence company Vivvix². The extreme and broad nature of this legislation means that many companies would be forced to cease any and all advertising of food related products and services in the state, not just those directed at children. Inevitably, this would cost tens of billions of dollars in economic harm to New York and hundreds of thousands of New Yorkers would lose their jobs. Given New York's unique position as the

¹ The Economic Impact of Advertising on the US Economy, 2018-2026, IHS Markit, November 2021 (<https://www.ana.net/content/show/id/adtax>)

² <https://www.vivvix.com/>

global center of advertising, this bill will not only impact advertising that runs in New York, it will have a chilling effect on advertising and media nationally. The result would be even further economic harm to New York as anything that hurts advertising and media on a national scale harms New York's economy.

Though purportedly directed toward protecting children, this bill appears to include many populations by referencing those "reasonably unable to protect their interests." This class of "targeted" individuals is too unclear to pass legal scrutiny and does not provide regulated entities with the certainty they require to comply with the law. Additionally, because there is no definition of "junk food" in the bill, companies will be forced to apply the requirements of the bill to all food advertising.

The bill's language is also internally inconsistent. While age and illiteracy may be somewhat easier to determine factually than those "reasonably unable to protect their interests," they remain unspecified — except with regard to a "child," which uses New York's definition as a person actually or apparently under the age of 18. It is unclear how a marketer would ascertain whether a consumer is "apparently" under the age of 18, meaning this definition may sweep in those who are not actually in this category. In any case, this definition is outside the mainstream of many laws and regulations governing advertising, which do not include children older than the age of 13.

Further, "ignorance" is cited as a factor which might render an ad false or misleading. It is not clear what this means, but it seems to impose upon food marketers the obligation to be sure consumers are informed even when — despite marketers' best efforts — consumers have not taken advantage of information that has been presented. This is obviously an impossible burden to place on marketers. Further, it is unclear whether "ignorance" or "illiteracy" is something that can be "reasonably avoided" by consumers (a requirement to avoid unfairness from a false or misleading food/food product ad), thereby expanding the potential scope of the messages that could be unfair. The phrase "inability to understand the language of an agreement" is similarly unclear, as it does not indicate whether "language" refers to the choice of words used, the language/dialect employed, or some other meaning; and the "agreement" cited in the bill is undefined and unclear.

The portions of the bill regarding children pose similar problems. For example, the terms "directed" and "targeted" are both used, though it is not clear whether these have the same or differing meanings. Among factors to be considered in ads "directed" at a child, the bill identifies music, language, and the medium employed. These factors would potentially eliminate any use of music or other sound in an advertisement as teens and children often enjoy the same musical tastes or celebrity voices as adults. Regarding "language," it is not clear whether this is the choice of words used, or the language/dialect employed, or some other meaning. In addition, by listing social media as a factor, many older teenagers who utilize the numerous benefits of advertising provided in the digital ecosystem, would be included in this prohibition, as they use social media more than younger children. There is strong evidence that older teens are more capable than young children of "resisting the rewarding cues presented in unhealthy food marketing," (cited in the "findings" section), thereby undercutting one of the justifications for the legislation. Finally, to avoid violating the unspecified and unclear limitations on ads for children, the bill will invariably limit the messaging and marketing utilized to communicate with adults, since children might be exposed to them. This is an overly broad infringement on the free speech rights of both conveyors and recipients of marketing messages.

Finally, the bill would amend New York GBL 350, New York's general false advertising statute, by requiring courts to consider specific additional factors when determining whether any advertising concerning a food or food product is false or misleading. As this statute contains a private right of action, companies would be exposed to enormous liability through the risk of litigation. This will undoubtedly have a chilling effect on the state's economy by creating the threat of steep penalties for companies that are good actors but inadvertently fail to conform to technical provisions of the law. Private litigant enforcement provisions and related penalties for potential violations represent an overly punitive scheme that do not effectively protect consumers. Instead, businesses will face extraordinary, and potentially crippling, litigation costs for technical violations of the law rather than be driven to create systemic and helpful changes to business practices. Ultimately, this could lead businesses to cease food-related advertising in New York. This would result in consumers missing out on the opportunity to learn about new products, including healthier alternatives.

We strongly support truthful and non-deceptive advertising. Because we share your view that special care must be taken with certain populations, our members have put in place many mechanisms to assist marketers in presenting messages that are not false or misleading and are especially focused on messages that are likely to be viewed by children. However, S00213-B is overly broad, its terminology is vague and undefined, and it runs counter to First Amendment protections that have long been accorded to truthful and non-deceptive advertising.

We appreciate your consideration of our views, and request that you all do not advance the bill as currently drafted. Please do not hesitate to contact us if you desire further information.

Sincerely,

Association of National Advertisers
American Advertising Federation
AAF - Buffalo
AAF – District 2
AAF – Greater Rochester
Association of American Advertising Agencies
American Beverage Association
Consumer Brands Association
The New York Business Council
The Food Industry Alliance of New York
New York Broadcasters Association
National Confectioners Association
New York State Restaurant Association