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Chair, Senate Consumer Protection
Committee
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Ranking Member, Senate Consumer
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Legislative Office Building, Room 415
Albany, NY 12247

RE: S 397 OPPOSE

Chair May, Ranking Member Canzoneri-Fitzpatrick, and Members of the Consumer Protection Committee:

We are writing to express our opposition to bills S397/A2584. As currently written, these bills impose unnecessary and overly broad restrictions on food marketing and advertising. Their 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. Additionally, the lack of clear definitions creates uncertainty, leading to potential legal challenges and unnecessary costs for businesses and the court system.

Advertising plays a crucial role in New York’s economy. 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 future legislation in this area 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 New York economy.

I. The bills’ unclear definitions and broad applicability will make compliance difficult and limit the advertising that all New Yorkers receive.

Although these bills claim to protect children, they use unclear terms like those “reasonably unable to protect their interests,” making enforcement unpredictable and compliance difficult. The bills’ language is also internally inconsistent. While age and illiteracy (section 4(a)) 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. The definition of a “child” as anyone under 18 is inconsistent with other regulations. For example, the Children’s Online Privacy Protection Act defines children as individuals under 13, not those under 18 (16 CFR § 312). Moreover, the FTC has not imposed similar substantive restrictions, even via fencing-in provisions of settlements

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

where the defendant disseminated false and misleading advertisements toward children.² This broad definition could unnecessarily limit advertising targeted at adults, since minors might also see the ads.

Further confusion is created from the bills' references to both "unfair and deceptive marketing" and "false" advertising. It is unclear whether "ignorance" or "illiteracy" is something that can be "reasonably avoided" by consumers (a requirement to avoid a false advertising violation), thereby expanding the potential scope of these violations. The phrase "inability to understand the language of an agreement" is 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 is undefined and unclear. The bills state that "language" includes buzzwords, sayings or phrases that are "trending," but there is no definition, explanation or context for many of these terms.

Other portions of the bills pose similar problems. For example, they would regulate advertisements targeting both "a person who is targeted by an advertising, or those acting on such person's behalf," which includes parents, guardians, and caregivers like parents' friends and family. Additionally, they require courts to assess vague factors—like music, language, and social media use—when determining if an ad is aimed at children. 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. Thus, the expansion would likely regulate food advertising far beyond campaigns targeting children.

II. The bills are likely an unconstitutional violation of free speech.

Further, to avoid violating the unspecified and unclear limitations on ads for children, the bills 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. The bills do not appear to meet the three-part test established in *Central Hudson v. Public Svc. Comm'n*, 447 U.S. 557 (1980), because they do not directly advance the state interest involved and the governmental interest could be served as well by a more limited restriction on commercial speech.

III. Existing frameworks already protect children from false or deceptive advertising.

Further, the bills are not necessary as existing legal frameworks already advance the bills stated goals. For example, the FTC Act provides robust protection for children, as it prohibits false, deceptive, and unfair advertising, and requires advertising to be viewed from the lens of a reasonable member of the targeted audience.³ The Food and Drug Administration also prohibits false and misleading statements on food labels and labeling, as well as food advertising.

² See, e.g., *In re Hasbro*, C-3447 (F.T.C. 1993); *In re Lewis Galoob Toys, Inc.*, C-3324 (F.T.C. 1991); *In re Mego International, Inc.*, C-2924 (F.T.C. 1978); *In re Uncle Ben's, Inc., et al.*, C-2870 (F.T.C. 1977).

³ See FTC Policy Statement on Deception, at 2-3.

IV. The bills are likely to expose New York companies to enormous litigation risk.

Finally, the bills 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. As this statute contains a private right of action, companies would be exposed to enormous liability through the risk of litigation. This is likely to lead to costly lawsuits, discouraging responsible companies from advertising in New York altogether, causing economic harm rather than meaningful consumer protection.

* * *

The bills do include language referencing education on access to, and the nutritional value of, certain foods and food products. We endorse such educational efforts, as they can help to improve the health and well-being of New York residents. Our members strive to present messages, including those likely to be viewed by children, that are accurate and informative. Many of our members belong to BBB National Programs' Children's Food and Beverage Advertising Initiative (CFBAI), an independent program through which participating food advertisers publicly pledge to not direct any food or beverage advertising to children under 13 or to advertise to children only foods meeting robust nutrition standards.

However, these bills are overly broad, their terminology is vague and undefined, and they run 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 do not advance these bills as currently drafted. Please do not hesitate to contact us if you desire further information.

Sincerely,

Association of National Advertisers
American Association of Advertising Agencies
American Advertising Federation
American Beverage Association
The New York Business Council
Food Industry Alliance of New York
National Confectioners Association