

# Proposed New York Restrictions on Food and Beverage Advertising Threaten to Open Litigation Floodgates

Cristina Ferretti

March 23, 2024

On March 12, the New York State Senate voted to include food and beverage advertising restrictions in its proposed budget, NY [S8308-B](#). These restrictions were originally introduced as [NY S213-B](#), which characterizes advertising unhealthy foods as “inherently misleading.” S213-B aims to protect children from the “disastrous health outcomes that follow the overconsumption of” unhealthy foods, but instead carries far-reaching implications that will impact nearly all food and beverage advertising.

The bill, as written, has no shortage of broad and undefined terms. To determine whether advertising directed at children is false or misleading, the bill, among other changes, amends New York’s general false advertising statute, New York General Business Law § 350 (“NY GBL § 350”), to require courts to consider the following factors:

- Whether the advertising “targets 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.” Here, “‘consumer’ is defined as a person who is targeted by an advertisement, or those acting on such a person’s behalf.”
- Whether the advertising constitutes “an unfair act, practice or conduct.”
- “An act, practice, or conduct” is considered “unfair” to a consumer where it: “(a) causes or is likely to cause substantial injury to such consumer; (b) cannot be reasonably avoided by such consumer; and (c) is not outweighed by countervailing benefits to such consumer or to competition.”
- Courts must give special consideration to advertisements “concerning a food or food product” directed at children. In determining “whether any advertising concerning a food or food product is false or misleading,” courts must also consider factors including—but not limited to—the following: “(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.”

The bill fails to define several key terms, including “unhealthy foods,” and “ignorance,” to name just a few. Further, the bill directs that courts consider not only whether advertising is directed to children, but also whether advertisements target persons unable to protect their interests due to “illiteracy” or “ignorance.” The bill would also provide a private right of action for consumers “targeted by an advertisement, or those acting on such a person's behalf.”

Although subject to constitutional challenges similar to those [filed](#) relative to NY's soon-to-be-effective dietary supplement age restrictions, if passed, this amended version of NY GBL §350 would further open the litigation floodgates against food and beverage companies. Impacted stakeholders should consider advocacy strategies individually or via trade associations to ensure that their viewpoints are considered at the legislative level.