

Legislative Bill Drafting Commission
03277-11-5

S. -----
Senate

IN SENATE--Introduced by Sen

--read twice and ordered printed,
and when printed to be committed
to the Committee on

----- A.
Assembly

IN ASSEMBLY--Introduced by M. of A.

with M. of A. as co-sponsors

--read once and referred to the
Committee on

GENEBULA* *Attorney General 2 R-10
**(Enacts the "fostering affordability
and integrity through reasonable
(FAIR) business practices act")**

Gen Bus L. unfair practices

AN ACT

to amend the general business law,
in relation to enacting the "foster-
ing affordability and integrity
through reasonable (FAIR) business
practices act"

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

IN SENATE

Senate introducer's signature

The senators whose names are circled below wish to join me in the sponsorship
of this proposal:

s15 Addabbo	s46 Fahy	s27 Kavanagh	s01 Palumbo	s29 Serrano
s43 Ashby	s22 Felder	s28 Krueger	s21 Parker	s42 Skoufis
s36 Bailey	s34 Fernandez	s24 Lanza	s19 Persaud	s11 Stavisky
s63 Baskin	s60 Gallivan	s16 Liu	s13 Ramos	s45 Stec
s57 Borrello	s12 Gianaris	s04 Martinez	s05 Rhoads	s35 Stewart- Cousins
s25 Brisport	s59 Gonzalez	s07 Martins	s33 Rivera	s44 Tedisco
s55 Brouk	s26 Gouardes	s02 Mattera	s39 Rolison	s49 Walczyk
s06 Bynoe	s53 Griffo	s48 May	s50 Ryan, C.	s52 Webb
s09 Canzoneri- Fitzpatrick	s40 Harckham	s37 Mayer	s61 Ryan, S.	s38 Weber
s17 Chan	s54 Helming	s03 Murray	s18 Salazar	s08 Weik
s30 Cleare	s41 Hinchey	s20 Myrie	s10 Sanders	
s14 Comrie	s47 Hoylman- Sigal	s51 Oberacker	s23 Scarella- Spanton	
s56 Cooney	s31 Jackson	s62 Ortt	s32 Sepulveda	

IN ASSEMBLY

Assembly introducer's signature

The Members of the Assembly whose names are circled below wish to join me in the
multi-sponsorship of this proposal:

a078 Alvarez	a136 Clark	a083 Heastie	a150 Molitor	a052 Simon
a031 Anderson	a047 Colton	a028 Hevesi	a145 Morinello	a075 Simone
a121 Angelino	a140 Conrad	a035 Hooks	a016 Norber	a114 Simpson
a133 Bailey	a032 Cook	a128 Hunter	a045 Novakhov	a094 Slater
a120 Barclay	a039 Cruz	a029 Hyndman	a011 O'Pharrow	a005 Smith
a106 Barrett	a043 Cunningham	a079 Jackson	a091 Otis	a118 Smullen
a105 Beephan	a077 Dais	a104 Jacobson	a132 Palmesano	a022 Solages
a107 Bendett	a053 Davila	a134 Jensen	a088 Paulin	a110 Steck
a082 Benedetto	a072 De Los Santos	a115 Jones	a141 Peoples- Stokes	a010 Stern
a027 Berger	a003 DeStefano	a004 Kassay	a023 Pheffer	a127 Stirpe
a042 Bichotte	a054 Dilan Hermelyn	a100 Kay	a063 Pirozolo	a102 Tague
a117 Blankenbush	a081 Dinowitz	a125 Kelles	Amato	a064 Tannousis
a015 Blumencranz	a147 DiPietro	a040 Kim	a063 Pirozolo	a086 Tapia
a144 Bologna	a009 Durso	a069 Lasher	a089 Pretlow	a071 Taylor
a073 Bores	a099 Eachus	a013 Lavine	a019 Ra	a085 Torres
a098 Brabenec	a048 Eichenstein	a065 Lee	a030 Raga	a037 Valdez
a026 Braunstein	a074 Epstein	a126 Lemondes	a038 Rajkumar	a033 Vanel
a138 Bronson	a061 Fall	a095 Levenberg	a006 Ramos	a055 Walker
a046 Brook-Krasny	a008 Fitzpatrick	a060 Lucas	a062 Reilly	a112 Walsh
a020 Brown, E.	a057 Forrest	a135 Lunsford	a087 Reyes	a024 Weprin
a012 Brown, K.	a124 Friend	a123 Lupardo	a149 Rivera	a097 Wieder
a093 Burdick	a050 Gallagher	a129 Magnarelli	a109 Romero	a059 Williams
a142 Burke	a131 Gallahan	a101 Maher	a067 Rosenthal	a113 Woerner
a018 Burroughs	a007 Gandolfo	a036 Mamdani	a025 Rozic	a070 Wright
a119 Buttenschon	a068 Gibbs	a130 Manktelow	a111 Santabarbara	a041 Yeger
a096 Carroll, P.	a002 Giglio	a108 McDonald	a090 Sayegh	a080 Zaccaro
a044 Carroll, R.	a066 Glick	a014 McDonough	a001 Schiavoni	a056 Zinerman
a058 Chandler- Waterman	a034 Gonzalez- Rojas	a146 McMahan	a076 Seawright	
a049 Chang	a116 Gray	a137 Meeks	a148 Sempolinski	
a143 Chludzinski	a021 Griffin	a017 Mikulin	a084 Septimo	
	a139 Hawley	a122 Miller	a092 Shimsky	
		a051 Mitaynes	a103 Shrestha	

1) Single House Bill (introduced and printed separately in either or
both houses). Uni-Bill (introduced simultaneously in both houses and printed
as one bill. Senate and Assembly introducer sign the same copy of the bill).

2) Circle names of co-sponsors and return to introduction clerk with 1
signed copy of bill and 1 copy of memorandum in support (single house);
or 2 signed copies of bill and 2 copies of memorandum in support (uni-bill).

1 Section 1. This act shall be known and may be cited as the "fostering
2 affordability and integrity through reasonable (FAIR) business practices
3 act".

4 § 2. Article 22-A of the general business law is amended by adding a
5 new section 348 to read as follows:

6 § 348. Purpose and intent of article. The legislature declares that
7 the state has a responsibility to protect New Yorkers from unfair,
8 deceptive and abusive business acts and practices (known as UDAP stat-
9 utes). The legislature recognizes the limitations of the current state
10 law, which prohibits only the use of deceptive business acts and prac-
11 tices, and has proven insufficient to satisfy the state's responsibil-
12 ities to protect New Yorkers and the New York economy from unfair,
13 deceptive, and abusive business practices. For too long, New Yorkers,
14 especially New Yorkers with limited income, communities of color,
15 seniors, veterans, and immigrant populations, have been left vulnerable
16 to unscrupulous business practices ranging from wasting a customer's
17 time as a business tactic to avoid giving customers the products or
18 services they are entitled to receive, to misleading or harmful prac-
19 tices by employers, including deceptive marketing or contract terms,
20 forcing workers into undesirable work conditions, to distributing and
21 selling toxic and otherwise harmful products during public health emer-
22 gencies and natural disasters. It is time for New York to move forward
23 and join all but a handful of New York's fellow states and the District
24 of Columbia, by adopting a comprehensive UDAP statute that gives govern-
25 ment and private parties the tools to address these harms. The state
26 must achieve the goal of deterring and remedying a broad range of
27 unfair, deceptive, and abusive business practices, and leveling the
28 playing field for the state's many honest businesses and non-profits who

1 treat their customers fairly. To that end, this article defines unfair
2 and abusive acts and practices expansively to reach harmful conduct that
3 is unfair or abusive but arguably not deceptive.

4 The state must also ensure the most meaningful and effective
5 protection to New Yorkers against harmful commercial conduct. This arti-
6 cle therefore eliminates atextual exceptions imposed by courts over the
7 last five decades that have limited prohibited conduct to acts that are
8 "consumer oriented" conduct that has an impact on the public at large,
9 or acts that are part of a broader, or recurring, pattern. These court-
10 imposed limitations have been used to bar relief to New Yorkers victim-
11 ized by deceptive acts and practices in a variety of contexts, including
12 small businesses tricked into predatory loans, individuals defrauded in
13 landlord-tenant transactions, vulnerable communities victimized by toxic
14 or otherwise harmful products, and victims of conduct that affected a
15 single individual or concerned a single transaction, product, or
16 service.

17 The legislature confirms that this article protects businesses and
18 non-profits as well as individuals. Businesses and non-profits, partic-
19 ularly small businesses and non-profits, are themselves a class of
20 consumers. There is no reason to believe that a small entity is any
21 better able to defend itself from unfair, abusive, and deceptive conduct
22 than a consumer, or needs the protections of this article any less than
23 a consumer does. The market and wider society is harmed by the negative
24 consequences that flow from unfair, deceptive, and abusive practices
25 even if those acts and practices have not been understood as "consumer
26 oriented".

27 The underlying concern motivating the courts to create the narrower
28 "consumer oriented" doctrine in the first place--a desire to ensure that

1 the statute is not misapplied to high-value sophisticated private
2 commercial disputes for which New York is one of the world's premiere
3 forums--is addressed by new provisions that provide a defense excluding
4 the application of such section from deals made by large businesses and
5 high-value sophisticated transactions made between individuals and small
6 entities without affecting the broad protections New Yorkers need
7 against unfair, deceptive, and abusive business acts and practices. It
8 is the intention of the legislature that this article be applied expan-
9 sively, with limits imposed only in accordance with its text, without
10 additional restrictions.

11 § 3. The article heading of article 22-A of the general business law,
12 as amended by chapter 43 of the laws of 1970, is amended to read as
13 follows:

14 [CONSUMER] PROTECTION FROM

15 UNFAIR, DECEPTIVE, OR ABUSIVE ACTS AND

16 PRACTICES

17 § 4. Section 349 of the general business law, as added by chapter 43
18 of the laws of 1970, subdivision (h) as amended by chapter 157 of the
19 laws of 1984 and subdivision (j) as added by section 6 of part HH of
20 chapter 55 of the laws of 2014, is amended to read as follows:

21 § 349. [Deceptive] Unfair, deceptive, or abusive acts and practices
22 unlawful. (a) [Deceptive] Unfair, deceptive, or abusive acts or prac-
23 tices in the conduct of any business, trade or commerce or in the
24 furnishing of any service in this state are hereby declared unlawful.
25 For the purposes of this section:

26 (1) An act or practice is unfair when it causes or is likely to cause
27 a person substantial injury which is not reasonably avoidable by such

1 person and is not outweighed by countervailing benefits to consumers or
2 to competition.

3 (2) An act or practice is deceptive when the act or practice misleads
4 or is likely to mislead a reasonable person in the relevant market
5 acting reasonably under the circumstances.

6 (3) An act or practice is abusive when:

7 (i) it materially interferes with the ability of a person to under-
8 stand a term or condition of a product or service; or

9 (ii) it takes unreasonable advantage of:

10 (A) a lack of understanding on the part of a person of the material
11 risks, costs, or conditions of a product or service;

12 (B) the inability of a person to protect their interests in selecting
13 or using a product or service; or

14 (C) the reasonable reliance by a person on a person covered by this
15 section to act in the relying person's interests.

16 (4) An unlawful act or practice is actionable under this section
17 regardless of whether or not that act or practice is consumer-oriented,
18 has a public impact or impact on consumers, poses a risk of harm to the
19 public health or interest, is only or primarily directed at or only or
20 primarily affects businesses or not-for-profit organizations, affects
21 the consuming public at large, concerns employment or the furnishing of
22 goods or services, is unique to the parties, or involves an economically
23 modest transaction, consumer goods or their equivalent, or the offering
24 of goods, services, or property for personal, family, or household
25 purposes.

26 (5) For purposes of this article, the term "injury" means any impair-
27 ment of a person's interests, and the term "substantial injury" means
28 any substantial impairment of a person's interests, whether or not such

1 impairments or substantial impairments to interests are quantifiable,
2 economic, or monetary in nature, including but not limited to loss of
3 time, loss of privacy, or loss of security.

4 (b) Whenever the attorney general shall believe from evidence satis-
5 factory to [him] the attorney general that any person, including but not
6 limited to an individual, firm, corporation, company, partnership or
7 association, or agent or employee thereof, has engaged in or is about to
8 engage in any of the acts or practices stated to be [unlawful he]
9 unfair, deceptive, or abusive, the attorney general may bring an action
10 or proceeding in the name and on behalf of the people of the state of
11 New York to enjoin such unlawful acts or practices and to obtain resti-
12 tution of any moneys or property obtained directly or indirectly by any
13 such unlawful acts or practices. In such action or proceeding, prelimi-
14 nary relief may be granted under article sixty-three of the civil prac-
15 tice law and rules. The attorney general may bring such an action or
16 proceeding against any person conducting any business, trade or commerce
17 or furnishing a service in this state, whether or not the person is
18 without the state, and any person in the state conducting any business,
19 trade, or commerce or furnishing a service, whether or not the business
20 or service is conducted or furnished without the state.

21 (c) Before [any violation of this section is sought to be enjoined]
22 commencing an action or proceeding pursuant to this section, the attor-
23 ney general shall be required to give the person against whom such
24 proceeding is contemplated notice by certified mail and an opportunity
25 to show in writing within five business days after receipt of notice why
26 [proceedings] an action or proceeding should not be instituted against
27 [him] such person, unless the attorney general shall find, in any case

1 in which [he] the attorney general seeks preliminary relief, that to
2 give such notice and opportunity is not in the public interest.

3 (d) In any such action or proceeding it shall be [a complete] an
4 affirmative defense that the act or practice is[, or if in interstate
5 commerce would be, subject to and complies with] required or specif-
6 ically authorized by the rules and regulations of, and the statutes
7 administered by, the federal trade commission or any official depart-
8 ment, division, commission or agency of the United States [as such
9 rules, regulations or statutes are interpreted by the federal trade
10 commission or such department, division, commission or agency or the
11 federal courts] or this state.

12 (e) Nothing in this section shall apply to any television or radio
13 broadcasting station or to any publisher or printer of a newspaper,
14 magazine or other form of printed advertising, who broadcasts,
15 publishes, or prints the advertisement.

16 (f) In connection with any proposed action or proceeding under this
17 section, the attorney general is authorized to take proof and make a
18 determination of the relevant facts, and to issue subpoenas in accord-
19 ance with the civil practice law and rules.

20 (g) This section shall apply to all [deceptive] unfair, deceptive, or
21 abusive acts or practices [declared to be unlawful], whether or not
22 subject to any other law of this state, and shall not supersede, amend
23 or repeal any other law of this state under which the attorney general
24 or any other party is authorized to take any action or conduct any
25 inquiry. This section shall be liberally construed, and its exceptions
26 and defenses narrowly construed, so as to effectuate its remedial and
27 protective purposes. This section is intended to expand and not take
28 away any statutory or common law rights.

1 (h) (1) In addition to the right of action granted to the attorney
2 general pursuant to this section, any person who has been injured by
3 reason of any violation of this section may bring an action in [his]
4 such person's own name to enjoin such unlawful act or practice, an
5 action to recover [his actual damages or fifty dollars, whichever is
6 greater, or both such actions] one thousand dollars in statutory damages
7 and the person's actual damages, if any. The court [may, in its
8 discretion,] shall increase the award of damages to [an amount not to
9 exceed] three times the [actual] damages [up to one thousand dollars,]
10 awarded if the court finds the defendant willfully or knowingly violated
11 this section. The court [may] shall award reasonable attorney's fees,
12 expenses including expert witness fees, and costs to a prevailing plain-
13 tiff.

14 [(j)] (2) (i) It shall be an affirmative defense to any action brought
15 pursuant to this subdivision that the plaintiff is a person other than
16 an individual or small entity. For purposes of this subparagraph, a
17 "small entity" shall mean a person other than an individual, including
18 but not limited to a business or professional corporation or company, a
19 not-for-profit corporation, an unincorporated association, or a partner-
20 ship, that: (A) is independently owned and operated;(B) is not dominant
21 in its field; (C) is either a not-for-profit corporation or employs
22 three hundred or fewer persons; (D) received in the past fiscal year
23 gross revenue and support in an amount less than five hundred million
24 dollars; and (E) possessed total assets in the last fiscal year of not
25 more than two hundred fifty million dollars.

26 (ii) It shall be an affirmative defense to any action brought pursuant
27 to this subdivision that the act or practice complained of is redressa-
28 ble pursuant to federal securities or intellectual property laws, or

1 that the act or practice arose in the course of a high-value experienced
2 commercial transaction and was directed exclusively to the parties to
3 that transaction. This defense shall not apply to acts or practices that
4 arise in the context of a residential housing matter.

5 For purposes of this subparagraph:

6 (A) an act or practice is "redressable pursuant to federal securities
7 or intellectual property laws" only if: (I) the plaintiff may remedy
8 the injury arising or alleged to arise from the act or practice by use
9 of the private rights of action contained in the Securities Act of 1933,
10 15 U.S.C. Section 77a et seq., or the Securities Exchange Act of 1934,
11 15 U.S.C. Section 78a et seq., or regulations promulgated thereunder; or
12 (II) the plaintiff may remedy the injury arising or alleged to arise
13 from the act or practice by use of the private rights of action
14 contained in title 35 of the United States Code, or the Trademark Act of
15 1946, 15 U.S.C. Section 1051 et seq., or the Defend Trade Secrets Act of
16 2016, 18 U.S.C. Section 1836, et seq., of the Copyright Act of 1976, 17
17 U.S.C. Section 101 et seq., or regulations promulgated thereunder;

18 (B) a "high-value experienced commercial transaction" is a transaction
19 the value of which exceeds one million dollars and where all parties to
20 the transaction have extensive commercial experience with the subject
21 matter of such transaction; provided that the experience or otherwise of
22 the defendant shall not be considered in making this determination;

23 (C) a person other than an individual has "extensive commercial expe-
24 rience" in the subject matter of the transaction if the individuals who
25 control that person have extensive commercial experience in the subject
26 matter of the transaction;

27 (D) "residential housing" means any residential real property, includ-
28 ing but not limited to rental housing, one-to-four family dwellings,

1 condominium units, cooperative apartments, lots in manufactured home
2 parks, or securities that entitle the holders thereof to possession or
3 occupancy of such housing; and

4 (E) a "residential housing matter" is one that concerns the
5 construction, renovation, sale or rent of residential housing used,
6 occupied, or intended to be occupied as a home or residence by one or
7 more parties to the transaction or individuals owning or controlling one
8 or more parties to the transaction, or credit extended to one or more
9 persons to purchase, refinance, repair, or improve such residential
10 housing, or credit secured by a person's equity in such residential
11 housing.

12 (3) (i) Standing to bring an action under this section, including but
13 not limited to organizational standing and third-party standing, shall
14 be liberally construed and shall be available to the fullest extent
15 otherwise permitted by law.

16 (ii) A court may enjoin an act or practice found to be unlawful in an
17 action brought pursuant to this subdivision notwithstanding the plain-
18 tiff or plaintiffs' failure to demonstrate that they will suffer future
19 harm as a result.

20 (4) (i) Notwithstanding section nine hundred one of the civil practice
21 law and rules or any other applicable provision of law, any person enti-
22 tled to bring an action under this article may, if the prohibited act or
23 practice has caused damage to others similarly situated, bring an action
24 on behalf of such person and others similarly situated to recover actu-
25 al, statutory or punitive damages or obtain other relief as provided for
26 in this article. Statutory damages under this section shall be limited
27 to (i) such amount for each named plaintiff as could be recovered under
28 paragraph one of this subdivision; and (ii) such amount as the court may

1 allow for all other class members without regard to a minimum individual
2 recovery, not to exceed the lesser of one million dollars or two per
3 centum of the gross value of the defendant.

4 (ii) As applied to a class action or proposed class action, the term
5 "plaintiff" as used in the defenses provided by paragraph two of this
6 subdivision shall mean only the named or representative plaintiff or
7 plaintiffs and not the proposed or certified members of the class.

8 (5)(i) At least thirty days before bringing an action pursuant to this
9 subdivision, a complainant must send the respondent notice in writing to
10 the respondent's place of business. Such notice must reasonably describe
11 the unfair, deceptive, or abusive acts or practices at issue, state a
12 demand for relief, and include the complainant's mailing address or
13 e-mail address. For the purposes of this paragraph, the term "complain-
14 ant" shall mean a person who may bring an action pursuant to this subdivi-
15 vision. For the purpose of this paragraph, the term "respondent" shall
16 mean a person against whom an action is contemplated.

17 (ii) A respondent receiving a notice required to be sent pursuant to
18 this paragraph may, within ten days of delivery of such notice, make a
19 written tender of settlement by postal mail or by e-mail, if provided in
20 the notice. If such tender is rejected, in any subsequent action by the
21 complainant arising out of the conduct described in the complainant's
22 notice, the respondent may file the written tender of settlement with an
23 affidavit concerning its rejection and proof that the tender was filed
24 with the attorney general. If such settlement is deemed complete relief
25 by the court, the court shall limit any recovery to the relief tendered
26 therein.

27 (iii) A tender of settlement shall be deemed complete only if the
28 respondent unconditionally: (A) tenders an amount equal to actual and

1 statutory damages, as applicable, (B) makes a binding undertaking to
2 correct and permanently cease such acts or practices described in the
3 notice as to the complainant and all other impacted persons, and (C)
4 files the notice and tender of settlement with the attorney general in
5 accordance with paragraph six of this subdivision.

6 (iv) In making such a tender of settlement, a respondent shall not be
7 deemed to have conceded any factual or legal matter stated in the notice
8 or to have undertaken any obligations other than, if the tender is
9 accepted or the court so orders, the payment of the monetary amounts
10 specified in the tender and the correction and permanent cessation of
11 the acts or practices described in the notice. Except as this paragraph
12 otherwise provides, a tender of settlement shall be deemed an offer to
13 compromise subject to article forty-five of the civil practice law and
14 rules.

15 (v) An accepted tender of settlement shall be deemed a settlement of
16 an action to recover damages for purposes of article fifty of the civil
17 practice law and rules.

18 (vi) For the purposes of computing the period of limitation under
19 article two of the civil practice law and rules, an action pursuant to
20 this subdivision shall be deemed timely if the complainant's notice to
21 the respondent was sent on or before the date on which the statute of
22 limitations would have expired without regard to the date of that notice
23 or any other notice made pursuant to this paragraph, and the action is
24 commenced no later than forty days following the date on which the
25 complainant's notice was sent to the respondent.

26 (vii) A notice pursuant to this paragraph shall not be required prior
27 to the filing of an action if:

28 (A) such action is brought as a counterclaim or crossclaim;

1 (B) the sending of such notice would cause immediate and irreparable
2 injury, loss, or damages;

3 (C) the person bringing the action is not represented by an attorney;

4 (D) a mailing address for the respondent is not reasonably discerni-
5 ble;

6 (E) the respondent, or any entity owned or controlled by the one or
7 more of the same persons that own or control or ultimately own or
8 control the respondent, has previously been the subject of an action or
9 proceeding by the attorney general for substantially similar conduct;

10 (F) the respondent, or any entity owned or controlled by one or more
11 of the same persons that own or control or ultimately own or control the
12 respondent, has already received a notice pursuant to this paragraph for
13 substantially similar conduct; or

14 (G) there are other exigent circumstances or the court otherwise finds
15 that the notice requirement should be waived in the interests of
16 justice.

17 (6) (i) Any respondent that delivers a tender of settlement pursuant
18 to paragraph five of this subdivision shall file with the attorney
19 general a prescribed form that includes a copy of the complainant's
20 notice and the respondent's written tender of settlement. The attorney
21 general shall publish all such filings.

22 (ii) The attorney general may commence an action or proceeding against
23 any respondent who fails to make a filing required by paragraph six of
24 this subdivision within thirty days of the acts giving rise to the
25 requirement. A failure to file the required statement on time shall be
26 subject to a civil penalty not to exceed five hundred dollars for each
27 day such violation continues, in addition to any other penalties or

1 remedies provided under this section or any other section of this chap-
2 ter or the executive law.

3 (i) Notwithstanding any law to the contrary, all monies recovered or
4 obtained under this article by a state agency or state official or
5 employee acting in their official capacity shall be subject to subdivi-
6 sion eleven of section four of the state finance law.

7 § 5. Section 349-c of the general business law, as added by chapter
8 687 of the laws of 1996 and renumbered by chapter 189 of the laws of
9 1999, is amended to read as follows:

10 § 349-c. Additional civil penalty for [consumer frauds] unfair, decep-
11 tive, or abusive practices against [elderly] vulnerable persons. 1.
12 Definition. As used in this section [elderly person means] "vulnerable
13 person" means (a) a person who is under eighteen years of age or sixty-
14 five years of age or older; (b) a person who is on active duty in, or a
15 veteran of, the United States Armed Forces; (c) a person who has a phys-
16 ical or mental impairment that substantially limits one or more major
17 life activities; or (d) a person with limited English proficiency.

18 2. Supplemental civil penalty. [(a)] In addition to any liability for
19 damages or a civil penalty imposed pursuant to sections three hundred
20 forty-nine, three hundred fifty-c and three hundred fifty-d of this
21 [chapter] article, regarding unfair, deceptive, or abusive practices and
22 false advertising, and subdivision twelve of section sixty-three of the
23 executive law, regarding proceedings by the attorney general for equita-
24 ble relief against fraudulent or illegal [consumer fraud] acts, a person
25 or entity who engages in any conduct prohibited by said provisions of
26 law, and whose conduct is perpetrated against one or more [elderly]
27 vulnerable persons, [may] shall be liable for an additional civil penal-
28 ty not [to exceed] less than five thousand dollars or greater than ten

1 thousand dollars[, if the factors in paragraph (b) of this subdivision
2 are present] for each such vulnerable person substantially injured by
3 the unlawful conduct.

4 [(b) In determining whether to impose a supplemental civil penalty
5 pursuant to paragraph (a) of this subdivision, and the amount of any
6 such penalty, the court shall consider, in addition to other appropriate
7 factors, the extent to which the following factors are present:

8 (1) Whether] 3. Rebuttal of supplemental civil penalty. The additional
9 penalty provided by subdivision two of this section shall not be imposed
10 on a defendant who proves that, with respect to each violation to which
11 the penalty would otherwise apply:

12 (a) the defendant [knew] did not know or have reason to know that the
13 defendant's conduct was [directed to one or more elderly] perpetrated
14 against vulnerable persons; or [whether]

15 (b) the [defendant's] defendant used its best efforts, within the
16 limits of economic feasibility and commercial reasonability, to ensure
17 that vulnerable people were not disproportionately affected by the
18 conduct [was in willful disregard of the rights of an elderly person;].

19 [(2) Whether the defendant's conduct caused an elderly person or
20 persons to suffer severe loss or encumbrance of a primary residence,
21 principal employment or source of income, substantial loss of property
22 set aside for retirement or for personal and family care and mainte-
23 nance, substantial loss of payments received under a pension or retire-
24 ment plan or a government benefits program; or assets essential to the
25 health or welfare of the elderly person or whether one or more elderly
26 persons were substantially more vulnerable to the defendant's conduct
27 because of age, poor health, infirmity, impaired understanding,

1 restricted mobility, or disability, and actually suffered physical,
2 emotional, or economic damage resulting from the defendant's conduct.

3 3.] 4. There is hereby established in the state treasury a special
4 fund to be known as the [elderly] vulnerable victim fund, which shall
5 consist of and into which shall be paid all moneys derived from supple-
6 mental civil penalties imposed pursuant to this section. The moneys in
7 such fund shall be administered by the department of law and shall be
8 expended solely for the investigation of and prosecution of [consumer
9 frauds] unfair, deceptive, or abusive acts against [elderly] vulnerable
10 persons. The moneys in the fund shall be paid out on the audit and
11 warrant of the comptroller on vouchers certified or approved by the
12 attorney general. Notwithstanding any other provision of law to the
13 contrary, any balance in the said fund on March thirty-first of any
14 fiscal year shall not revert to the general fund of the state.

15 [4.] 5. Restitution to be given priority. Restitution ordered pursuant
16 to the provisions of law listed in subdivision two of this section shall
17 be given priority over the imposition of civil penalties designated by
18 the court under this section.

19 § 6. Section 350-c of the general business law, as amended by chapter
20 65 of the laws of 1989, is amended to read as follows:

21 § 350-c. Notice of proposed action. Before the [attorney-general]
22 attorney general commences an action or proceeding pursuant to section
23 three hundred fifty-d of this article [he] the attorney general shall be
24 required to give the person against whom such action or proceeding is
25 contemplated [appropriate] notice by certified mail and an opportunity
26 to show[, either orally or] in writing[,]
27 within five business days
28 after receipt of notice why such action should not be commenced, unless
the attorney general shall find, in any case in which the attorney

1 general seeks preliminary relief, that to give such notice and opportu-
2 nity is not in the public interest. In such showing, said person may
3 present, among other things, evidence [that the advertisement is subject
4 to and complies with the rules and regulations of, and the statutes
5 administered by, the Federal Trade Commission or any official depart-
6 ment, division, commission or agency of the state of New York] probative
7 of any affirmative defense said person may raise in such an action or
8 proceeding.

9 § 7. Section 350-d of the general business law, as amended by chapter
10 803 of the laws of 2022, is amended to read as follows:

11 § 350-d. Civil penalty. [(a)] 1. Any person, firm, corporation or
12 association or agent or employee thereof who engages in any of the acts
13 or practices stated in this article to be unlawful shall be liable to a
14 civil penalty of not more than five thousand dollars for each
15 violation[, which] or the greater of fifteen thousand dollars or three
16 times the gross value of restitution for each violation if the court
17 finds either that the defendant willfully or knowingly violated this
18 article, or violated this article in connection with or during an abnor-
19 mal disruption of the market, as defined by section three hundred nine-
20 ty-six-r of this chapter, or both. Such penalty shall accrue to the
21 state of New York and may be recovered in a civil action or proceeding
22 brought by the attorney general.

23 2. In any such action or proceeding it shall be [a complete] an affir-
24 mative defense that the advertisement, act or practice is [subject to
25 and complies with] required or specifically authorized by the rules and
26 regulations of, and the statutes administered by, the Federal Trade
27 Commission or any official department, division, commission or agency of
28 the United States or this state [of New York].

1 [(b) Notwithstanding subdivision (a) of this section, any firm, corpo-
2 ration or association or agent or employee thereof who engages in any of
3 the acts or practices stated in section three hundred forty-nine of this
4 article to be unlawful in connection with or during an abnormal
5 disruption of the market shall be liable to a civil penalty of not more
6 than fifteen thousand dollars for each violation or three times the
7 actual restitution needed, whichever is greater, which shall accrue to
8 the state of New York and may be recovered in a civil action brought by
9 the attorney general. In any such action it shall be a complete defense
10 that the advertisement is subject to and complies with the rules and
11 regulations of, and the statutes administered by the Federal Trade
12 Commission or any official department, division, commission or agency of
13 the state of New York. For the purposes of this subdivision, "abnormal
14 disruption of the market" shall mean any change in the market, whether
15 actual or imminently threatened, resulting from stress of weather,
16 convulsion of nature, failure or shortage of electric power or other
17 source of energy, strike, civil disorder, war, military action, national
18 or local emergency, or other cause of an abnormal disruption of the
19 market which results in the declaration of a state of emergency by the
20 governor.]

21 § 8. Severability. If any clause, sentence, paragraph, subdivision,
22 section or part of this act shall be adjudged by any court of competent
23 jurisdiction to be invalid, such judgment shall not affect, impair, or
24 invalidate the remainder thereof, but shall be confined in its operation
25 to the clause, sentence, paragraph, subdivision, section or part thereof
26 directly involved in the controversy in which such judgment shall have
27 been rendered. It is hereby declared to be the intent of the legislature

1 that this act would have been enacted even if such invalid provisions
2 had not been included herein.

3 § 9. This act shall take effect on the sixtieth day after it shall
4 have become a law.