CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

June 2, 2016

The Honorable President and Members
of the Baltimore City Council
Attn: Natawna B. Austin, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 16-0617 – Sugar-Sweetened Beverages – Warning Labels

Dear Mr. President and City Council Members:

The Law Department has reviewed City Council Bill 16-0617 for form and legal sufficiency. The bill requires certain health warnings to be given by certain advertisers and purveyors of sugar-sweetened beverages. It defines relevant terms, imposes civil and criminal penalties, and provides for a special effective date.

The Charter of Baltimore City gives the Mayor and City Council the general police and welfare powers to legislate in this area and to preserve the health of all people in the City. *See* City Charter, Art. II, §§ 11, 27 and 47. This allows the City "to prescribe, within the limits of the federal and state Constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals." *Bourgeois v. Live Nation Entertainment, Inc.*, 3 F.Supp.3d 423, 445 (D.Md.2014), *quoting*, *Tighe v. Osborne*, 149 Md. 349, 356 (1925). Further, local governments may constitutionally regulate businesses, occupations and trade in the interest of public health, welfare or morals if such regulation does not impair the constitutional right to pursue a lawful occupation. 5 McQuillin Mun. Corp. § 19.43 (3d ed.). Municipal restrictions of legitimate commercial, industrial and occupational activities are justified only where they relate to public health, morals, order, welfare, convenience or other proper object of the police power. McQuillin Mun. Corp. § 24.322 (3d ed.).

Opponents may argue that the warning required by the bill constitutes a compelled disclosure which violates the First Amendment right to free speech. As explained below, however, regulations requiring the disclosure of truthful, factual information are permissible, provided the disclosure is justified by a sufficient purpose behind the legislation.

The subject of this bill is a warning related to a commercial transaction – the sale of sugar -sweetened beverages (SSBs). The warning requires the disclosure of factual, truthful, non-misleading information, namely, that drinking beverages with added sugar contributes to tooth decay, obesity, and diabetes. Thus, the bill regulates commercial speech.

Fav w/ Amend

See New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114, 131, 133 (2d Cir.2009) (holding that the required "disclosure of calorie information in connection with a proposed commercial transaction—the sale of a restaurant meal"—is "clearly commercial speech" despite state restaurant association's claim that the disclosure requirement forced the information "down the throats" of consumers). Further, the bill does not concern a *restriction* on speech, but rather a government required disclosure. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), *quoting*, *In re R.M.J.*, 455 U.S. 91, 201 (1982), the Supreme Court noted that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warnings[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" In other words, courts apply less rigorous scrutiny to disclosure requirements than restrictions on speech, and a required disclosure consisting of "purely factual and uncontroversial information" if "reasonably related to the state's interest in preventing deception of consumers" and not "unduly burdensome" passes constitutional muster and any constitutional interest in not providing the factual information is "minimal." *Zauderer*, 471 U.S. at 651. Federal Courts have applied the test to disclosures even though no consumer deception was at issue. *See New York State Restaurant Ass'n. v. New York City Bd. of Health*, 2008 WL 1752455, at *8 (S.D. N.Y. 2008), *affirmed*, 556 F.3d 114 (2d Cir.2009); *Nat. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir.2001), *cert. denied*, 536 U.S. 905 (2002). *See also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir.2005), *cert. denied*, 547 U.S. 1179 (2006) ("[W]e have found no cases limiting *Zauderer* [to 'potentially deceptive advertising directed at consumers'].."). The government cannot, however, require a disclosure that forces the speaker to align with a side or viewpoint in a controversial debate. *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Council Bill 16-0617 passes constitutional muster because it is a commercial compelled speech disclosure that is factual and accurate. It is reasonably related to the government's interest in educating consumers about their choices to better their health by avoiding products which may contribute to tooth decay, obesity and diabetes. Recently, a federal court in Northern California rejected an effort to block a new San Francisco law that requires substantially the same warning on sugar-sweetened beverages as the warning at issue here. There, the United States District Court for the Northern District of California, in denying a preliminary injunction, held that the Plaintiffs, among whom were the American Beverage Association, were not likely to succeed on their First Amendment claim, stating: "The warning required by the City ordinance is factual and accurate, and the City had a reasonable basis for requiring the warning given its interest in public health and safety. Plaintiffs' arguments of chilling effect are not sufficiently substantiated but, even if there were an arguable chilling effect, *Zauderer* dictates that a compelled disclosure need only be reasonably related to the government's interest in order for the advertiser's rights to be adequately protected." *American Beverage Association v. City and County of San Francisco*, 2016 WL 2865893, at *18 (N.D. Cal. May 17, 2016).

The Law Department recommends, however, that the facts set forth in the recitals include the source (*i.e.*, the scientific or health organization) from which they originate, and, if avoiding consumer deception is a government interest in passing the law, this should also be clearly stated in the recitals.

This would add to the "factual" and scientific nature of the disclosure, clarify that it is not based solely on the City's opinion, and increase the likelihood that a court would apply the *Zauderer* framework should the law be challenged. Finally, the retailer section, 16-203, provides that the government will provide the warning sign. The Law Department recommends that the language of the warning be repeated in this section of the Code. The Health Department is drafting these amendments.

Opponents may also argue that the Commerce Clause in the federal Constitution limits the City's power to enact this law. However, such a challenge would likely fail because the City may regulate local aspects of interstate commerce if the law: (1) does not discriminate against outside interests to benefit local economic interests; and (2) is not unduly burdensome. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-71 (1981); *accord BlueHippo Funding, LLC v. McGraw*, 609 F.Supp.2d 576, 586 (S.D.W.Va.2009) (recognizing that the Fourth Circuit has consistently used this two part test). The Supreme Court has stated that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Clover Leaf Creamery Co.*, 449 U.S. at 471, *quoting*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This bill does not discriminate against out of state interests and any incidental burden on interstate commerce would likely be seen as not outweighing the significant local health benefits.

In sum, this bill would likely withstand both a First Amendment and Commerce Clause challenge and is consistent with the authority of the City Council. Therefore, assuming the recitals are amended as suggested herein, the Law Department approves the bill for form and legal sufficiency.

Sincerely,

Jennifer Landis
Assistant Solicitor

cc: George Nilson, City Solicitor
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