

September 3, 2015

Mr. Ed Day  
County Executive  
11 New Hempstead Road  
New City, NY 20956

RE: Request to Halt Enforcement of Local Law No. 3: "The Toxic Free Toys Act"

Dear Executive Day:

In your message to the Clerk to the Legislature dated July, 7, 2015, you cited several reasons for transmitting Referral No. 8894 (Local Law No. 3 of 2015) unsigned, and more specifically noted the new law is "preempted, unenforceable and raises a number of unanswered questions." The concerns about the legality of the law are well founded as both the Federal Hazardous Substances Act (FHSA) and the Consumer Product Safety Act (CPSA), both enforced by the United State Consumer Product Safety Commission, preempt states and subdivisions from passing such legislation. In fact—following a lawsuit filed in the United States District Court for the Northern District of New York in Albany County, challenging an almost identical law—Albany County agreed to halt enforcement of its legislation, by Court Order, pending such qualification subject to judicial review.

We, the undersigned, representing companies employing tens of thousands of workers in New York, respectfully request that the County of Rockland halt enforcement of Local Law No. 3 pending resolution of the US District Court case under appeal in Albany County.

Specifically, Local Law No. 3 attempts to regulate heavy metals and chemicals in children's products in a manner that is duplicative and preempted by federal law. Specifically, 15 U.S.C. 2075 provides as follows: "*Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, **no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which **are designed to deal with the same risk of injury associated with such consumer product**, unless such requirements are identical to the requirements of the Federal standard.***" [Emphasis Added].

The FHSA also contains an express preemption clause stating that "*if under Regulations of the Commission promulgated under or for the enforcement of section 2(q) [15 U.S.C. § 1261(q)] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, **no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations***" 15 U.S.C. §1261 note, (b)(1)(B). [Emphasis Added].

This clear preemption by superior law has also been noted by County Attorney Humbach in his memorandum to you dated July 7. In that memorandum, Attorney Humbach noted that there are "strong indications" that the law may be

preempted and that in Albany County “the Court has a basis to find that Albany County’s Local Law may be preempted. As noted above, Rockland County’s Local Law is identical in many respects to Albany County’s Local Law.”

These legal concerns are in addition to the fact that Local Law No. 3 is impossible for any company to comply with because the zero limit ban established in the law is scientifically impossible to test to. The law would also ban naturally occurring elements that cannot be removed and that do not present any health hazard from use of these products. As such, Local Law No. 3 effectively bans all toys and children’s products from being sold in Rockland County. Moreover, the 90 day effective date in the law does not give the county the adequate time to promulgate appropriate regulatory rules to address the legal concerns with appropriate deferral to the existing federal scheme of regulation. Nor does the effective date allow for the legal process to take its course in Albany County in order to determine if the law is legal.

Given the overwhelming facts in this case, Executive County action is needed immediately. On behalf of all of our memberships, we urge that the county to express in writing that it will not enforce Local Law No. 3; the local law regulating certain chemicals in children’s products until the lawsuit in Albany County has been resolved.

American Apparel & Footwear Association  
Fashion Jewelry and Accessories Trade Association  
Gemini Shippers Association  
Halloween Industry Association  
Juvenile Product Manufacturers Association  
Promotional Products Association International  
Retail Council of New York State  
Toy Industry Association

Cc: Thomas Humbach, County Attorney  
Terry Grosselfinger, Director, Department of Consumer Protection