VIA E-MAIL

February 29, 2016

Hon. Mark C. Poloncarz
Erie County Executive
95 Franklin Street #1600
Buffalo, New York 14202

Hon. John J. Mills
Chairman, Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Hon. Joseph C. Lorigo
Majority Leader
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Hon. Patrick B. Burke
7th District
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Re: Local Law #3 of 2015

Dear County Executive Polancarz and Chairman Mills:

The Retail Council of New York State and the Food Industry Alliance of New York State together represent brands with dozens of locations and thousands of employees serving the residents of and visitors to Erie County. We join today on their behalf to ask you and the Erie County Legislature to reconsider and abandon plans to enforce Local Law #3 of 2015 with relation to the prohibiting the sale of certain products containing microbeads.

We and our members respect the priority that you place on protecting the environment, particularly water quality. Your leadership on the microbeads issue specifically catalyzed federal action in 2015. When President Obama approved Public Law No. 114-114, the retail industry welcomed the uniform standard that bans rinse-off cosmetic products containing intentionally-added microbeads.

We are concerned, however, that conflicting enforcement philosophies will create untenable compliance hurdles for retailers operating in Erie County and other jurisdictions – including those local governments that

followed your lead in 2015 to approve their own bans on the sale of products containing microbeads. Notwithstanding practical compliance hurdles, we believe Public Law No. 114-114 supersedes and therefore precludes enforcement of Local Law #3 of 2015 at this time.

As you know, §5 of Local Law #3 contains a 'reverse preemption' clause, which states, in pertinent part: "This local law shall be null and void on the day that statewide or federal legislation goes into effect, incorporating either the same or substantially similar provisions as are contained in this law." On December 28, 2015, Public Law No. 114-114 became federal law and includes a definition of microbeads that is "substantially similar" to the provisions of the Erie County ordinance.

Even without §5, the county's ban would have been explicitly preempted by the clear language in Public Law 114-114 itself. §2(c) precludes the county from enforcing its restrictions that are not identical to the restrictions in the federal law, particularly the February 14, 2016 sale ban applicable to rinse-off cosmetics. It is settled law that an explicit preemption clause in a federal statute bars a local county from enforcing a conflicting law (see *U.S. v. Allegheny County, Pa., 322 U.S. 174, 183, 64 S.Ct. 908, 913* [1944]). A few years later, the Court stated, "We recently noted that Congress can act so unequivocally as to make clear that it intends no regulation except its own … the test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State" (*Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 235, 67 S.Ct. 1146, 1155* [1947]).

No doubt you're familiar with these and the other legal arguments that have been and will be raised in opposition to Erie County's planned enforcement of Local Law #3 of 2015. They are well worth considering anew, particularly through the prism of the success Erie County sparked with regard to leading the national fight to ban the sale of products with microbeads.

Be assured that you have a willing partner in the retail industry. We are committed to working with you and with the federal government to ensure a full and complete compliance with Public Law 114-114 – a measure that recognizes marketplace realities and affords retailers the time and procedure needed to work through the complexities of international supply chains. As we work to comply with the letter of Public Law 114-114, we hope you will recognize this commitment and suspend enforcement of the conflicting conditions associated with Local Law #3 of 2015.

We look forward to your response and welcome any questions you may have.

Sincerely,

Ted Potrikus
President and CEO
Retail Council of New York State

Michael E. Rosen
President & CEO
Food Industry Alliance of NYS, Inc.