

**Testimony of Kai Falkenberg**  
**New York City Department of Consumer Affairs**  
**Before the**  
**New York City Council Committee on Consumer Affairs**

**Hearing on Introduction 803-A (Toxic Chemicals in Children's Products)**

January 14, 2016

Good morning, Chairman Espinal, as well as members of the Committee on Consumer Affairs. I am Kai Falkenberg, Senior Legal Counsel at the Department of Consumer Affairs ("DCA"), and I am joined by several colleagues from the agency: Amit Bagga, Deputy Commissioner of External Affairs, Alba Pico, First Deputy Commissioner, Shira Gans, Senior Policy Director, Steve Ettannani, Senior Advisor, External Affairs, and Alvin Liu, Senior Staff Attorney. We are also joined today by our colleagues from the New York City Department of Health and Mental Hygiene, Daniel Kass, Deputy Commissioner of Environmental Health and Eric Colchamiro, Senior Legislative Analyst.

I greatly appreciate the opportunity to speak with you about the bill before the committee today – Introduction 803-A ("Intro 803-A"). This bill, which would bar the sale of children's products and toys with hazardous chemicals and metals, is consistent with DCA's mission to protect and empower New York City's consumers and businesses. DCA is the country's largest municipal consumer protection agency. We license approximately 80,000 businesses across 55 different industries, resolve complaints between consumers and businesses, conduct legal investigations, enforce the City's Paid Sick Leave and Commuter Benefits laws, and operate the City's Office of Financial Empowerment, which is focused on empowering low income New Yorkers.

DCA's work includes protecting consumers from deceptive and illegal practices that may be harmful to New Yorkers. In addition to our robust enforcement of sales of tobacco to underage consumers, we regulate items such as box cutters, toy guns, and laser pointers, all of which may pose health and safety risks if misused by minors. Given the scope of our work, we have found it appropriate and necessary to call attention to the issue of toxic chemicals and heavy metals in children's products and toys. We applaud the committee for highlighting this very important issue and, in particular, would like to recognize the leadership of Council Speaker Melissa Mark-Viverito for introducing the bill we are discussing here today. Following a discussion of DCA's efforts to address the safety of children's products, we will provide specific comments on Intro 803-A.

**Toxic Chemicals and Metals: The Regulatory Landscape**

Toxic chemicals and heavy metals pose a serious health risk to children and infants in New York City and throughout the country. Young children are especially vulnerable since they often put objects in their mouths and exposure to even small quantities of harmful chemicals can affect their development.<sup>1</sup> Diseases caused by toxic chemicals can be prevented by protecting children

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<sup>1</sup> See [Age Determination Guidelines](#): Relating Children's Ages to Toy Characteristics and Play Behavior, U.S. Consumer Product Safety Commission (Sept. 2002).

from environmental threats to their health. That goal has been hampered, however, by the federal government's failure to mandate the elimination of many toxic chemicals from children's products.

In 2008, Congress took a step in the right direction by enacting the Consumer Product Safety Improvement Act ("CPSIA") which established federal standards for the use of 14 chemicals in children's products. That law, however, is limited to certain subgroups of children's products – specifically, toys and products small enough to be ingested. Beyond that limitation, the federal standards do not sufficiently address the breadth of chemicals that can have potentially harmful effects on children.

In addition, the federal regulatory regime is complicated by the fact that the same products may be subject to oversight by multiple agencies and standards. In the State of New York alone, chemicals in children's products can fall under the jurisdiction of up to four different agencies, governed by no fewer than five federal and state statutes.

Accordingly, while the federal government is best positioned to address these concerns, existing laws and regulations are inadequate to ensure that the products being used by our children are free of toxic chemicals.

### **DCA's Efforts**

Recognizing the serious risks posed to children by harmful chemicals, DCA has urged the CPSC to engage in greater efforts to restrict the use of these substances in children's products. In December 2014, the Agency petitioned the CPSC to launch an investigation into 66 chemicals of high concern that are currently being used in children's products. We called upon the CPSC to assess the risk of adverse health effects associated with the continued use of each of those chemicals and asked the agency to issue rules banning the sale of any children's product that contains any of the named chemicals in sufficient concentrations to result in adverse health effects.

Following his receipt of our petition, Chairman Eliot Kaye of the CPSC expressed to DCA his intent to work with Congress to help address our mutual concern on the matter. A copy of DCA's petition has been made available to members of the committee today.

DCA has also reached out to the toy industry directly seeking their commitment to remove unsafe toys from the marketplace. In late 2014, just as the holiday gift-buying season was set to begin, the Agency teamed up with New York State Attorney General Eric Schneiderman to urge retailers to commit to manufacturing and selling toys that are safe for children. Specifically, in a letter to the President and CEO of the Toy Industry Association, DCA urged the association to voluntarily adopt a safety standard that goes beyond federal law and ban toxic chemicals from all products made and sold by its members. The Agency also urged the Association to pull all toys with suspected toxins off the shelves, and support legislation that would keep toxic toys out of the marketplace. In conjunction with that effort, we issued tips for New York City consumers on how to avoid hazardous children's toys. You should all have received copies of our letter and the Toy Industry Association's response.

Like this Agency, other jurisdictions have been similarly frustrated by the lack of robust and comprehensive federal standards. As a result, a number of individual states and counties have taken actions like the bill we are discussing here today. Five states: Maine, Minnesota, Oregon, Vermont, and Washington have enacted bans or require reporting on chemicals in consumer and children's products. There are also bills pending in New York State that would similarly restrict the sale of children's products containing certain chemicals and metals beyond the federal standards. Four counties in New York: Albany, Suffolk, Westchester, and Rockland have also passed legislation regulating the sale of children's products with certain chemicals and metals.

The passage of these laws by state and local governments has, however, raised questions of federal preemption. The legislation in Albany County has been stayed pending resolution of a challenge on preemption grounds, and it is our understanding that Albany's law has since been amended to address these concerns. Given similar questions regarding preemption, the New York City Law Department is currently reviewing Intro 803-A to identify any preemption issues that could be posed by any portion of the current version of the bill.

### **Intro No. 803-A: Opportunities and Challenges**

To the extent federal statutes allow the City to enact local legislation in this area, this bill presents New Yorkers with an opportunity to minimize existing hazards to our children's health. If crafted and implemented effectively, it will significantly increase protections for New York City children and would send a strong signal nationwide that the presence of these toxic chemicals in children's products will not be tolerated.

That said, there are a few points we would like to raise concerning implementation and enforcement of the legislation in its current form. We note that all of these points presume resolution of the preemption concerns by the Law Department, as I just mentioned.

First, Intro 803-A bars retailers only from "knowing" violations. To establish a violation, DCA would have to prove that the retailer was aware that the product contained a banned substance. Since there is no requirement that retailers test all of their products, a defense that the retailer was unaware of the toxic chemicals in the product will be difficult to overcome. Conversely, requiring testing could unfairly burden small businesses, which often don't have the means and methods to analyze their stock. Further, limiting the legislation to "knowing" violations may actually discourage retailers from testing the products they sell since knowledge could trigger future liability.

Second, the legislation does not address the methods for detecting the presence of the banned substances. We have preliminarily explored the use of portable x-ray fluorescence ("XRF") guns for this purpose. The CPSC has conveyed to us that these machines do not produce definitive results and as such, can only be used for screening purposes; subsequent and expensive lab testing would be required for confirmation and enforcement action. Even as a screening tool, XRF guns are of limited use as they are only suited to screen a small subset of the products covered by Intro 803-A. Based on conversations with federal regulators and their accredited labs,

we have determined that XRF guns and “wet testing” at a contracted laboratory would be required for enforcement.

Third, the cost of enforcement would be high. A single XRF gun ranges in price from \$20,000 to \$75,000. These prices do not include the costs of training staff and requisite safety protocols required to operate the equipment and use it in a public space. Lab testing is expensive, as well. Certified laboratory testing fluctuates depending upon the design and make-up of the product. Labs will charge fees to test per component of an item. Components include items like snaps, buckles and zippers on a product. And even those component rates, at least for the lab we contacted, vary by product type. For example, to test one children’s backpack for all the metals banned in Intro 803-A it was estimated to cost over \$1,000 by a CPSC-certified lab.

Fourth, DCA does not currently have the staffing or expertise to enforce Intro 803. There are approximately 40,000 brick and mortar locations in the five boroughs that could potentially sell children’s products as defined by the legislation. This includes 99-cent stores, clothing stores, supermarkets, and bodegas, all of which sometimes sell children’s products and toys. The agency would need additional inspectors, legal and administrative staff as well as experts trained in interpreting the lab results.

Recognizing the complex regulatory landscape, preemption concerns, and potential consideration of New York State legislation, we look forward to working with you to address these issues before Intro 803-A is put up for committee vote.

Thank you for the opportunity to testify today. My colleagues and I will be happy to answer any questions you might have.