Exhibit B

Letter from Cheryl A. Falvey, General Counsel, Consumer Product Safety Commission, to Georgia C. Ravitz & Scott A. Cohn, Arent Fox LLP (Nov. 17, 2008)

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Cheryl A. Falvey
General Counsel

Office of the General Counsel

Tel: 301.504.7642
Fax: 301.504.0403
Email: cfalvey@cpsc.gov

November 17, 2008

Ms. Georgia C. Ravitz
Mr. Scott A. Cohn
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Dear Ms. Ravitz and Mr. Cohn:

I write in response to your letter dated November 13, 2008 regarding retroactive application of the Consumer Product Safety Improvement Act (CPSIA) to inventory. You have asked that we reconsider "the staff advisory opinion issued concerning the retroactivity of the lead content restrictions set forth in Section 101." You have also asked that the CPSC "consider not applying the phthalates restrictions set forth in Section 108 of the CPSIA retroactively to inventory as of February 10, 2009."

First, with respect to lead, the Commission is aware of the potentially significant economic impact that the new Act could have on any remaining inventory next February. However, Congress stated that children's products that did not meet the new lead limits would be treated as "a banned hazardous substance" under the Federal Hazardous Substances Act as of February 10, 2009, and made it unlawful "to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States" any banned hazardous substance. The language Congress wrote does not permit me the flexibility to take into consideration the policy and economic issues that have been raised by you and your unidentified clients as to the potential consequences of requiring products to meet the new stricter lead limits by that date. For the reasons provided in the September 12, 2008 advisory opinion, which will not be readdressed here, your request for reconsideration is denied.

Second, with respect to phthalates, the legal analysis is different. Section 108 of the CPSIA limits the amount of certain types of phthalates in certain specific categories of children's products. It makes it a prohibited act to offer products for sale that contain more than that level of those specific phthalates 180 days after enactment. However, section 108 also indicates that the prohibition on the amount of phthalates in these products "shall be considered a consumer

product safety standard under the Consumer Product Safety Act." The Consumer Product Safety Act expressly states that consumer product safety standards apply only to products manufactured after the effective date of a new standard. *See* 15 U.S.C. § 2058(g)(1) ("A consumer product safety standard shall be applicable only to consumer products manufactured after the effective date."). It has always been the case that it is unlawful to sell a product that does not conform to a consumer product safety standard, but only those products manufactured after the effective date of the new standard. The inclusion of a subsection in the phthalates provision specifically stating that the phthalates limit would be treated as a consumer product safety standard appears to reflect a desire to keep the fundamental expectations of the regulatory process consistent with past practice under the existing statute.

Congress treated lead differently than phthalates in a number of ways, including the scope of products affected and, importantly, the statute under which these chemical hazards would be regulated. Congress made the limit on lead a ban under the Federal Hazardous Substances Act ("FHSA"). The FHSA does not have a provision comparable to section 9(g) of the CPSA that spells out whether a ban is applicable only to products manufactured after the effective date. Congress could have regulated phthalates in the same manner as lead and chose not to do so.

With regard to phthalates, Congress created a consumer product safety standard and the clear statement of unambiguous intent to apply that standard retroactively cannot be found. The Supreme Court stated in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), that "retroactivity is not favored in the law. . . . Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." The Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994), also recognizes that the "presumption against retroactive legislation is deeply rooted" and that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly." *Landgraf* explains that "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272-73. *Landgraf* further explained that in looking for this "clear, strong and imperative" language indicating retroactive intent "the largest category of cases" in which the Court has "applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights." *Id.* at 270-271. Those interests are clearly implicated here because the property at issue, products in inventory in the distribution chain, was manufactured prior to any indication from Congress or the Commission[1] that the level of phthalates in those products would be restricted. By treating phthalates differently than lead and making the limit on phthalates a consumer product safety standard, Congress did not evidence clear congressional intent to apply that standard retroactively and displace the ordinary treatment of such standards on a prospective basis. Supreme Court precedent does not require us to give the statute "retroactive operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.* at 272 (citations omitted).

---

[1] Unlike lead where prior to the passage of CPSIA there had been numerous, highly publicized recalls of children's products by the Commission, there had been no equivalent activity by the Commission with regard to phthalates. Rather, the Commission had denied a petition seeking to ban phthalates as recently as 2002.

The views expressed in this letter are those of the General Counsel and have not been reviewed or approved by the Commission. They are based on the best available information at the time they were written. They may be superseded at any time by the Commission or by operation of law.

Sincerely,

/s/

Cheryl A. Falvey