Exhibit H

Letter from Aaron Colangelo, Natural Resources Defense Council, to Nancy Nord & Thomas Hill Moore, Consumer Product Safety Commission (Dec. 2, 2008)

December 2, 2008

VIA FEDEX AND FAX

Acting Chairman Nancy Nord
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Commissioner Thomas Hill Moore
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: Phthalates Ban in Children's Toys and Child Care Articles

Dear Acting Chairman Nord and Commissioner Moore,

The Consumer Product Safety Improvement Act (CPSIA) bans the sale of children's toys and child care articles containing certain phthalates after February 10, 2009. By letter dated November 17, 2008, Consumer Product Safety Commission (CPSC) General Counsel Cheryl A. Falvey concluded that this ban does not apply to children's products sold after the ban date if manufactured before that date. Ms. Falvey's letter, which contravenes the plain language and intent of the CPSIA, has been held out by CPSC staff and others as the final decision of the CPSC.

The Natural Resources Defense Council (NRDC) petitions the CPSC to revoke the November 17 decision immediately. Otherwise, this decision will cause both direct harm to individuals exposed to phthalates in children's products and consumer confusion about which products sold in stores comply with the phthalate ban imposed by Congress. This matter is extremely time-sensitive; children's products will be manufactured and distributed in the stream of commerce now in reliance on this decision, for sale after the date of the phthalates ban. For this reason, please respond to this petition no later than close of business on Monday, December 8.

The CPSIA permanently bans the manufacture, sale, distribution, and import of all child care products and children's toys containing more than 0.1 percent of three different phthalates: DEHP, DBP, and BBP. The law also temporarily bans, pending further study and rulemaking, the manufacture, sale, distribution, and import of child care products and children's toys that can be placed in a child's mouth, if any such product or toy contains more than 0.1 percent of three other phthalates: DINP, DIDP, and DnOP. Both the permanent and temporary phthalate bans go into effect on February 10, 2009.

In a letter dated November 13, 2008, on behalf of unnamed clients, counsel at the law firm Arent Fox LLP asked the CPSC to "consider not applying the phthalates restrictions set forth in . . . the CPSIA retroactively to inventory as of February 10, 2009."

In a decision published only two business days later, on November 17, 2008, the CPSC General Counsel agreed. The November 17 decision concludes that the ban on phthalates in children's products is not "retroactive," and therefore products manufactured before the statutory ban date can be sold indefinitely after that date. In reliance on this decision, manufacturers of children's toys and child care products may continue to manufacture and stockpile products containing the six restricted phthalates now, and retailers may continue to sell them long after the ban on sale goes into effect in February.

The November 17 decision contradicts both the plain language and purpose of the CPSIA. First, the CPSIA declares that "it shall be unlawful for any person to manufacture for sale, *offer for sale*, distribute in commerce, or import into the United States any children's toy or child care article," 15 U.S.C. § 2057c(a) (emphasis added). This is an unequivocal ban on any sale after the designated date, regardless of the date of manufacture. The November 17 decision asserts that this applies only to products manufactured after February 10, 2009, because the statute characterizes the phthalates ban as a "consumer product safety standard," *id*. § 2057c(d), and an existing provision in the law states that consumer product safety standards apply "only to consumer products manufactured after the effective date." *Id*. § 2058(g)(1). But specific statutory language must trump more general language where there is any potential conflict.

In the CPSIA, Congress did not just make it unlawful for any person to "manufacture for sale" certain products with phthalates as of the effective date. Congress also expressly made it unlawful for any person to "offer for sale" or "distribute in commerce" these products after the effective date. The November 17 decision purports to allow exactly that – the sale and distribution in commerce of toys and child care articles containing the banned phthalates after the effective date of the ban. The specific phthalate ban in the law trumps more general statements about consumer product safety standards elsewhere. *See, e.g., HUD v. Rucker*, 535 U.S. 125, 134 n.5 (2002) (a general statutory provision in one section "cannot trump the clear language of the more specific"); *Green v. Bock Laundry Machine Co.*, 490 U.S 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Otherwise, Congress's express prohibition on sale and distribution in commerce of toys and child care products containing phthalates would not be given effect.

Second, Congress knows how to ban only manufacture and not all sales after a certain date if it chooses to do so. For instance, Congress previously required that "[e]ffective 6 months after the

date of enactment of this Act [July 17, 2008], each portable gasoline container manufactured on or after that date for sale in the United States shall conform to the child-resistance requirements for closures on portable gasoline containers." 15 U.S.C. § 2056 note (2008) (Children's Gasoline Burn Prevention, § 2(b)). Similarly, Congress required manufacturers to cease making garage door openers that failed to meet specified requirements, but did not place any restrictions on sales. 15 U.S.C. § 2056 note (2008) (Automatic Garage Door Openers, §§ (b)(1), (b)(2)(A)). With regard to phthalates, Congress adopted a different approach.

Third, there is a more logical explanation for Congress's designation of the phthalates ban as a consumer product safety standard. The Consumer Product Safety Act (CPSA) makes clear that it only preempts conflicting regulation of phthalates in the same products regulated by a consumer product safety standard. Therefore, designating the phthalates ban a consumer product safety standard leaves states free to regulate phthalates more broadly, including by restricting phthalates in other products. The State of Washington has already done so. Congress meant to incorporate the preemption regime that would apply under the CPSA and preserve these broader state efforts. The legislative history bears this out. *See*, *e.g.*, 154 Cong. Rec. H7580 (July 30, 2008) (statement of Rep. Waxman).

In addition, Congress wanted to adopt the testing, reporting, and certification regime for safety rules designated consumer product safety standards. This includes a requirement that all manufacturers certify compliance with consumer product safety standards by submitting an annual certificate, *see* 15 U.S.C. § 2063(a)(1); a requirement that manufacturers rely on independent, third-party testing to prove that their products meet consumer product safety standards, *see id*. § 2063(a)(2); and a mandate that manufacturers report non-compliance to the CPSC if their products violate consumer product safety standards, *see id*. § 2064.

Fourth, the purpose of the CPSA is to ensure consumer protection. The first two stated goals of the law are "(1) to protect the public against unreasonable risks of injury associated with consumer products; and (2) to assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051(b). The November 17 decision contravenes both of these goals, by delaying protections for consumers and complicating consumer efforts to evaluate the safety of consumer products. A statute should be interpreted to further the underlying goals of the law.

Finally, the November 17 decision concludes that applying the phthalates ban to existing inventory after the effective date would constitute improper retroactive application of the statute. The cases cited regarding retroactivity are inapplicable. The Supreme Court has held that courts should not presume Congress to have applied a new standard retroactively absent a clear statement of unambiguous intent. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The presumption against retroactivity does not apply if Congress's contrary intent is clear. *Id*. at 280 ("[N]o need to resort to judicial default rules" if "Congress has explicitly prescribed the statute's proper reach"). Here, the CPSIA was signed into law on August 14, 2008, and it imposes a ban on manufacture, distribution, import, and sale of products containing phthalates after the effective date of February 10, 2009, 180 days after enactment. The express ban on manufacture *or* sale provides a clear statement of unambiguous intent to apply the ban to inventory, regardless of the date of manufacture. By building in a delay of 180 days, Congress gave manufacturers

and retailers time to reformulate their products and sell existing inventory, thereby protecting any rights that may have existed under prior law.

The November 17 decision states that manufacturers' "property rights" 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 that the level of phthalates in those products would be restricted." In the name of vindicating this property right, however, the decision permits manufacture of the regulated products *after* Congress enacted the ban. Even if there is such a property right, it would not follow that manufacturers could continue to make the banned products after the law was enacted, with a reasonable expectation that they would be permitted to sell those products after the effective date of the ban.

In a November 24, 2008 letter to the CPSC, Senator Feinstein – the author of the initial version of the phthalates ban that was enacted in the CPSIA – and Representatives Waxman, Schakowsky, and DeGette stated that the November 17 decision "is directly contrary to the plain language of the CPSIA," and that the phthalates ban in the law "appl[ies] to all inventory sold after February 10, 2009." Senator Feinstein's letter expressly asks the CPSC to "overturn" the "flawed analysis" in the November 17 decision and "clarify that no toy or children's product containing more than .1% of certain phthalates may be legally sold after February 10, 2009." Also, in a November 28, 2008 letter to the CPSC, Connecticut Attorney General Richard Blumenthal requested the CPSC's "explicit determination" that, after February 10, 2009, "no retailer may sell any children's toy or child care article" that contain phthalates in concentrations exceeding the limits set in the CPSIA. Attorney General Blumenthal asks the CPSC to supersede the November 17 decision immediately. As far as we are aware, the CPSC has not responded to either Senator Feinstein's or Attorney General Blumenthal's requests.

We are therefore filing this petition to ask that the CPSC revoke the November 17 decision and declare that the phthalates ban in the CPSIA applies to all products manufactured, distributed, sold, or imported after February 10, 2009, as required by the law. We will appreciate hearing from you by close of business on December 8.

Respectfully,

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cc: Cheryl Falvey, General Counsel, CPSC