

The Model Law: Testing Requirements and Implications for Industry Compliance and Lab Capacity

Toolkit for establishing
laws to eliminate
lead paint

2021 Update

Module E-2



Global Alliance to
Eliminate Lead Paint



Outline

- Role of testing in the *Model Law and Guidance for Regulating Lead Paint*
- Model Law Mechanisms for Enforcement are Built on Testing
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Role of Testing in the Model Law and Guidance for Regulating Lead Paint

- The UNEP [Model Law and Guidance for Regulating Lead Paint](#) or Model Law is a template for drafting strong lead paint laws (for more information, see Module E-1 Developing Legal Limits on Lead in Paint)
- In the Model Law, testing of paint plays a central role in documenting industry compliance in meeting a low legal limit on lead in paint (90 ppm)
- Industry is responsible for testing: Manufacturers and importers arrange for testing of their paints and certify compliance with lead limit
- Government is responsible for enforcement: Inspectors can test paints as one way to check for compliance

Model Law Enforcement Mechanisms are Built on Testing

- Section D of the Model Law provides for manufacturers and importers to submit sufficient samples of paint or similar coating materials to a **third-party laboratory** accredited under international standards for testing of compliance with the 90-ppm total lead limit.
 - Section D of the Model Law provides for manufacturers and importers to issue a **declaration of conformity** stating that their paint product or similar coating material complies with the law’s 90-ppm total lead limit.
 - Section E of the Model Law provides for government agents to enter a location at “reasonable times” for **government inspection and testing** of paint or similar coating materials.

Testing in the Model Law:

The Question of Laboratory Capacity

- Given the focus on testing in the Model Law, the question often arises: should a lack of laboratory capacity in a given country present an obstacle to developing and establishing a lead paint law?
- The Model Law addresses this question in the following ways:
 - Lack of laboratory capacity need not be an obstacle to developing, establishing, and enforcing a lead paint law.
 - Governments' rights to inspect and test paint is merely one of three mechanisms for enforcing limits on lead in paint.
 - Testing is not unduly burdensome and duplicative for industry.

Testing Requirements are Primarily for Manufacturers and Importers

- The testing requirements under the Model Law primarily concern manufacturers and importers, not government/enforcers.
 - Given that manufacturers and importers are the parties most affected by the testing requirements, it is crucial that governments work with the private sector to determine phased-in effective dates for the 90-ppm total lead limit.
- Phased-in effective dates allow time for:
 - Industry to change its practices and come into compliance with the limit;
 - Industry to determine how it will obtain testing;
 - Government to encourage in-country laboratories to acquire the necessary equipment, expertise, and accreditation to perform the required testing.

Testing Not Always Needed for Enforcement

- The Model Law recognizes that while “inspections [and testing] by the relevant agency are critical to ensuring that paints are manufactured and imported in conformity with the country’s total lead limit...”, testing is not always needed:
 - Paints without an accompanying declaration do not need to be tested because without the declaration they are already in violation of the Law’s requirements.
 - Civil, and possibly criminal, penalties apply to parties selling, manufacturing, or importing such paints.
 - One goal of government inspections is to ensure that all paints for sale can produce a copy of a declaration.

Testing Not Always Needed for Enforcement (Continued)

- In the Model Law Section F: Prohibited Acts, violations of the low legal limit or lack of declaration of conformity are unlawful.
- *It shall be unlawful for any person to:*
 - *Sell, offer for sale, manufacture for sale, distribute in commerce, import into [X country], any paint or similar coating material that contains lead or lead compounds and in which the lead (calculated as lead metal) is in excess of 90 ppm of the weight of the total non-volatile content of the paint or the weight of the dried paint film, ...*
 - *Fail to furnish a declaration of conformity required by [cite section] or issue a false declaration of conformity if such person in the exercise of due care has reason to know that the declaration of conformity is false or misleading in any material respect...*

Ways to Reduce the Burden of Testing:

“Sufficient Samples”

- It is possible to reduce the burden of testing by defining “sufficient samples” to help testing, e.g., from the first batch
- It is useful for government officials to remember the Model Law’s Guidance, in Key Element D, section i:
 - *“Manufacturers and importers should be required to submit sufficient samples of a paint product’s first production batch or lot for third-party testing. Testing of the first production batch or lot will be sufficient to meet the testing requirement unless a material change occurs in the product process for that paint product...”*

Ways to Reduce the Burden of Testing:

Use of Foreign Lab Data

The Model Law and Guidance also specifically facilitates compliance by importers. Key Element D, section i, notes that:

“In order to ensure that testing is not unduly burdensome and duplicative, importers may be allowed to rely on a foreign manufacturer’s test results to issue a declaration of conformity, as long as the importer exercises due care to ensure that the manufacturer’s test results meet the requirements of the law, and the importer maintains appropriate records of the test methodology and results.”

Lack of Laboratory Capacity Need Not Prevent a Law

For all the reasons discussed above, in response to the question of laboratory capacity, the Guidance answers, in Key Element C, that:

“Current lack of in-country laboratory capacity need not be an impediment to a lead paint law going into effect, as industry can still comply with the law by sending paint samples to laboratories in other countries that are qualified to perform the required testing. Additionally, for imported paints, manufacturers and importers can rely on test results from qualified laboratories in the country of origin under the model law under certain circumstances.”

Compliance through Collaboration with Industry

Although the Model Law places obligations on manufacturers and importers for compliance, testing, and certification, the Model Law and Guidance also:

- Recommends ensuring that such compliance is not unduly burdensome or duplicative; and
- Envisions governments working collaboratively with manufacturers and importers to establish phased-in effective dates for when compliance is binding.

Market Forces for Qualified Laboratories

- It is also useful to consider that market forces can supplement the regulatory power of the government and create a setting for innovation, initiative, and compliance.
- The law creates new customers: manufacturers, importers, and government will all be in the market for qualified laboratories: establishing a legal lead paint limit creates a **demand** for testing.
 - The remaining question then, is one of **supply**: Testing will be taking place but who will conduct the testing – foreign laboratories or domestic ones?”
 - The testing requirement provides domestic laboratories with the potential for more profits, the potential to contribute to economic growth in their country through increased hiring, benefits to laboratory employees through expanded skill sets, and the opportunity to protect the health and safety of their fellow citizens.

Market Forces for Compliant Paint

- Whereas the market forces relevant to developing laboratory capacity were **demand** and **supply**, the market forces most pertinent to manufacturing and importing paint are **competition** and **competitiveness**.
- There are a variety of ways market forces will facilitate manufacturers and importers' compliance:
 - Vis-a-vis consumers:
 - In the absence of a law, or during a phase-in period, the more aware consumers become about the risks associated with lead levels in paint, the more inclined they will be to choose compliant paint, regardless of price considerations.
 - **Manufacturers and importers will not want to miss out on the opportunity to provide compliant paints.**

Market Forces for Compliant Paint (Continued)

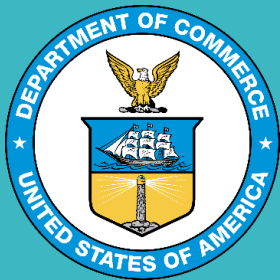
- Vis-a-vis competitors:
 - In the absence of a law, or during a phase-in period, if there is a choice between supplying compliant or non-compliant paint, there will always be a competitor who will seize the opportunity to supply the better/compliant product – **compliant paint will become a selling point.**
 - High prices for compliant paint will similarly face a competition challenge: **there will always be a competitor willing to supply a more affordable, compliant paint.**
- Vis-a-vis markets:
 - As more countries adopt Model Law provisions and/or a 90ppm limit, a manufacturer will have access to more markets for exports by producing paints with the lowest possible limit – **even in the absence of a law in their country.** A manufacturer producing non-compliant paint is greatly reducing its ability to expand its market.

Key Conclusions

- The *Model Law and Guidance for Regulating Lead Paint* mechanisms for enforcement are built on testing, but national laboratory capacity is not required for enforcement, and there are ways to reduce the burden of testing.
- Market forces facilitate industry compliance and promote lab capacity.
 - As more countries are adopting Model Law provisions and/or a 90ppm total lead limit, the availability of qualified laboratories globally, and industry's ability to safely rely on test results from other countries of origin, are becoming more realistic and more practical.

Michael Cofield
Attorney Advisor – International
Commercial Law Development Program

Office of the General Counsel
U.S. Department of Commerce
+1-202-482-6029 (office)
+1-202-482-0006 (fax)
+1-202-802-6878 (mobile)
mcofield@doc.gov
www.cldp.doc.gov



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