CPSA 6(b)(1) CLEARED for PUBLIC
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— EXCEPTED BY: PETITION RULEMAKING ADMIN. PRCDG
— WITH PORTIONS REMOVED: _____

CP10-1

PETITION

to the

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TO AMEND AND INTERPRET 16 C.F.R. § 1303 AND SECTION 14(a) OF THE CPSA, AS AMENDED BY SECTION 102(a) OF THE CPSIA, TO EXPLICITLY AUTHORIZE "SPRAY SAMPLING," "MULTIPLE STAMPING," AND "FINISHED COMPONENT PART" TESTING AS ACCEPTABLE PROCEDURES UNDER THE CPSA AND CPSIA

Submitted by

INTERTEK CONSUMER GOODS NA, INC.

and

THE AMERICAN APPAREL & FOOTWEAR ASSOCIATION

I. OVERVIEW OF PETITION

Section 101 of the Consumer Product Safety Improvement Act of 2008 (P.L. 110-314) ("CPSIA") establishes new limits on lead paint and lead substrate for children's products, as defined by the CPSIA. Section 102 of the CPSIA generally sets forth requirements for the testing and certification of children's products to mandatory safety standards and the approval of third party labs that conduct the testing of those products.

Section 102(a) of the CPSIA requires that children's products subject to mandatory product safety rules be tested by a U.S. Consumer Product Safety Commission-approved third party testing "conformity assessment body" (herein "lab"). Manufacturers must also "submit sufficient samples of the children's product or samples that are identical in all material respects to the product" to such labs for testing. The children's products must then be certified to the applicable standard(s), based on such testing. There have been a number of informal CPSC staff interpretations that this language of Section 102(a) may require that *only* complete and fully assembled (herein "final") product samples be submitted to labs for testing to product safety standards covered by that section, including the limits on lead in paint and similar surface coatings for children's products (herein "lead paint standard").[1/]

Because the testing of lead paint and similar surface coatings is destructive testing (the coating must be removed from the product, typically by scraping), the testing of only final products for compliance with the lead paint standard often means the destruction of dozens or even hundreds of individual product samples. This results in a severe economic burden to manufacturers and importers, delays in receiving test reports from

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1/ 16 C.F.R. § 1303.

labs, and the disposal and resulting environmental impact of hundreds of thousands of products.

There are, however, testing procedures that can be undertaken, in addition to final product testing, that can reduce this burden without any loss of reliability in the testing. This Petition requests official Commission approval for several alternative test methods to the lead paint standard. These methods represent common sense and science-based alternative procedures to reduce the number of samples that must be submitted for testing and destruction, saving affected industries and ultimately consumers millions of dollars in testing costs and countless staff hours of testing time, with no reduction in the validity or reliability of that testing.

Intertek Consumer Goods NA is a leading provider of quality and safety testing and quality assurance solutions serving a wide range of industries around the world. The American Apparel & Footwear Association (AAFA) is the national trade association representing apparel, footwear and other sewn products companies, and their suppliers. Both entities ("Petitioners") have a significant interest in the policies and positions of the CPSC with regard to the requirements for third party testing to the lead paint standard.

II. SUMMARY OF ARGUMENTS

Regarding the application of Section 102(a) of the CPSIA to the lead paint standard, neither the Commission nor the CPSC staff have yet approved or otherwise affirmatively recognized the acceptability of the test procedures that are the subject of this Petition, in contrast to final product testing. (Attachment A also provides additional detail about these procedures).

Petitioners believe that an interpretation of the language and intent of Section 102(a), which prohibits these alternative test procedures, is incorrect and unreasonable and that these procedures are fully permissible under the language and intent of that section and fully supported by policy considerations. In addition to causing a severe economic burden on many manufacturers and importers, this incorrect and unnecessarily restrictive interpretation of Section 102 also caused confusion among both manufacturers and test labs. Specifically, the CPSC has not yet approved the use by labs of (i) "spray sampling," (ii) "multiple stamping," or (iii) "finished component" testing.

With spray sampling, a product that normally has a small area of paint or similar surface coating has a purposefully wider than normal surface area coating applied to it, which coating is then tested for lead. The product so painted is and must be identical to those that are painted normally, *i.e.*, the substrate is identical between the uniformly painted product and the one painted (coated) for market sale.

An example of spray sampling is to take a doll with a painted eye, paint the entire head of the doll the same color as the eye (under identical production circumstances as the dolls produced for sale) and then use that uniformly painted doll head for lead testing for that particular color. Another example might be to paint an entire zipper with the same paint as the zipper pull, where only the zipper pull will be painted on the final product to be sold to consumers. In all cases, spray sampling requires that the surface coating is applied to the exact same substrate as it would appear on the product offered for sale.

Similarly, with multiple stamping, a stamp or other surface coating (like a screen print) that is to be placed on, say, a pair of children's jeans would be placed numerous

times on one sample (again, under the same manufacturing conditions under which products for sale are made) in order to scrape off a sufficient mass of surface coating for lead testing. The alternative in both examples is usually to destroy many dozens or even several hundred "final" product samples, with no enhanced compliance or other beneficial safety purpose.

Nor has the CPSC yet recognized as acceptable for third party lead paint testing the practice of testing finished components of a product (components that are identical to those that will be assembled into the final product for sale to consumers). Examples of this include testing doll eyes for lead in paint before they are assembled into the dolls, thereby preventing destruction of the entire doll, or testing the buttons on a child's garment before they are sewn onto the garment, avoiding destruction of the final product.

With all of these test procedures, there is no diminution in test reliability but dramatic cost and time savings for the affected firms. Indeed, making testing to the lead paint standard more affordable and efficient will encourage more firms to test their products, ensuring greater conformance to this important product safety standard.

As an added and not insignificant benefit, the destruction of fewer product samples will mean a reduction of the environmental impact of destructive testing that now results from the creation and disposal of countless sample final products that today are thrown in landfills or otherwise disposed of unnecessarily, with no increase in product safety or public health to American consumers.

Petitioners recognize that these testing techniques touch on the broader issue of component testing, an issue for which the CPSC has requested and received numerous public comments and suggestions. The issue of component testing, in turn, is one of a

number of issues that the agency will have to tackle as part of a CPSIA-mandated regulation to establish "protocols and standards" with regard to the third party testing of children's products. Thus, it may be the case that the Commission goes beyond even those procedures requested herein and ultimately allows the testing of only components rather than final products.[2]/

But while these broader issues continue to be considered by the Commission, difficult, real-world testing decisions are being made every day by firms that seek to fully comply with the law and to ensure the safety of their products and customers. The techniques described in this Petition offer practical, reliable testing solutions for the agency and its stakeholders and will ensure greater conformance to the lead paint standard at a significantly lower cost and impact to the environment.

III. REQUESTS FOR RULEMAKINGS AND AUTHORITY TO DOCKET AND APPROVE PETITION

A. Agency authority.

The Administrative Procedure Act ("APA") directs Federal agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule" (5 U.S.C. § 553(e)) and to give "prompt notice" of the disposition of such petitions (5 U.S.C. § 555(e)). Pursuant to this authority, the Commission established requirements for the submission and disposition of petitions for the amendment of CPSC administered regulations. 16 C.F.R. § 1051.

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[2]/ Indeed, several members of Congress have urged the CPSC to allow certification to children's products standards based on component testing regimes. *See, e.g.*, Letter from Senator Amy Klobuchar to Acting Chairman Nancy A. Nord, January 26, 2009.

Below is set forth the information required for the Commission to properly docket and consider this Petition.

B. Relevant statutes, regulations and regulated products.

This Petition relates to the following:

1. Amendments to the lead paint ban (16 C.F.R. § 1303), promulgated under the Consumer Product Safety Act ("CPSA"), which regulates "toys and other articles intended for use by children" and "furniture articles for consumer use"; and

2. An interpretive rule regarding the requirements for third party product certification pursuant to Section 14(a) of the CPSA, as amended by Section 102(a) of the CPSIA, which regulates "any children's product that is subject to a children's product safety rule."

C. Specific requests for agency rulemaking.

This Petition hereby requests the Commission to initiate the following regulatory activities:

1. Amend the lead paint standard (16 C.F.R. § 1303) to specifically authorize the test procedures referred to and explained herein as "spray sampling," "multiple stamping" and "finished component testing;" and

2. Adopt an interpretive rule regarding Section 14(a) of the CPSA, as amended by Section 102(a) of the CPSIA, that clarifies that the test procedures referred to and explained herein as "spray sampling" "multiple stamping" and "finished component testing" are expressly permissible under the CPSIA, including Section 102(a).

D. Statutory authority for docketing and granting the petition.

Regarding specific statutory authority for the Commission to take the requested regulatory actions stated above, the following are cited:

1. The inherent and well-established authority of Federal agencies to issue interpretive rules regarding their statutes;

2. The APA (5 U.S.C. § 553(e), 555(e));

3. The general rulemaking authority granted to the Commission by its relevant statutes (specifically Section 7 of the CPSA and Section 3 of the FHSA);

4. Section 14(c) of the CPSA, granting the Commission the authority to "prescribe reasonable testing programs for consumer products which are subject to consumer product safety standards under this Act and for which a certificate is required..."; and

5. Section 3 of the CPSIA (granting the Commission general authority to "issue regulations, as necessary, to implement" the CPSIA), and Section 10 of the FHSA (granting the Commission "authority to promulgate regulations for the efficient enforcement of this Act").[3/]

E. Additional facts and supporting evidence and arguments for docketing and granting the petition.

Below are set forth additional facts and legal and policy arguments that support the docketing and granting of this Petition.

[3/] The statutory authorities cited here are not independent from one another. Thus, for example, in addition to its inherent authority to interpret its own statutes, the CPSC has authority to prescribe reasonable testing programs under Section 14(c) of the CPSA, which in turn is augmented by Section 3 of the CPSIA. Combined, these authorities fully enable the Commission to grant the Petition and issue an interpretive rule clarifying the meaning of Section 14(a) of the CPSA, as amended by Section 102(a)(2) of the CPSIA.

IV. BACKGROUND

The CPSIA requires that lead in paint and similar surface coatings for products covered by 16 C.F.R. § 1303 may not exceed 90 parts per million (ppm), or 0.009%, beginning August 14, 2009. This lowers the limit from the current limit of 600 ppm. In addition, Section 102(a) of the CPSIA requires that all children's products subject to the lead paint rule and manufactured on or after December 22, 2008 must be certified to that standard and that such certification must be supported by testing by CPSC-approved, independent, third party labs.

While the federal lead paint standard has been in effect for about 30 years, these new statutory mandates, coupled with a number of well publicized recalls for violations of the lead paint standard, have generated a significant increase in the number of firms and labs conducting testing to this standard, as well as many questions about what are allowable, third party lead paint test procedures.

Because Section 102(a) of the CPSIA states that samples submitted for testing must be "identical in all material respects to the product," CPSC staff have informally indicated at various times that this means that only completely assembled (final) products may be used for testing to support required third party testing and certification under the CPSIA, including to the lead paint standard.[4/] As explained below, Petitioners believe that an alternative interpretation of this language is reasonable, appropriate, and fully supportable.

As a result of the agency's interpretation of Section 102(a), final product testing for lead in paint must be destructive testing, as paint must be scraped off of the surface of

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[4/] It should be noted here that by "final product," while not a term used in or defined by the CPSIA, Petitioners understand to indicate a product that is complete, fully assembled and otherwise finished and that is the same as the products offered for sale to consumers.

the final product, rendering the product unusable.[5/] If the area of paint being tested is small, many samples must be destroyed--sometimes several hundred--to obtain a sufficient sample size. In addition to being very costly for firms submitting the samples for destruction, the physical labor involved in hand scraping the many samples can also significantly increase the time involved in testing the product and in producing a test report. Destroyed samples are typically discarded.

The impact of this approach is disproportionately felt by small business, especially crafters and artisans producing children's products in small numbers. Indeed, for products made in small numbers it may be impossible to obtain enough samples to get a sufficient mass of paint to test if testing can only be done on the final product. Even if there are physically enough final products to obtain a sufficient sample, it may necessitate the destruction of such a large percentage of the total number of products made that it is economically untenable for the manufacturer or importer to do the testing. In many such cases, no testing is done at all.

The CPSC Directorate for Laboratory Sciences, Division of Chemistry, in response to requests and suggested procedures from Intertek and others to allow the compositing of unlike paints in order to reduce the number of samples that must be destroyed, issued April 29, 2009 guidance to labs that effectively allows for composite testing of different paints, under certain conditions ("CPSC SOP").[6/] This welcome

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[5/] Prior to the enactment of the CPSIA, manufacturers typically sent just the paint they intended to use to labs for lead testing. Petitioners are unaware of any action by the CPSC to prohibit or restrict this practice or any determination that this practice was unreliable or more prone to error or abuse than final product testing.

[6/] "Test Method: CPSC-CH-E1003-09; Standard Operating Procedure for Determining Lead (Pb) in Paint and Other Similar Surface Coatings," April 26, 2009, at www.cpsc.gov. While not binding on laboratories conducting such testing, this SOP is self-described as sufficient to enable "appropriate determinations" under 16 C.F.R. § 1303 and CPSC-recognized labs deviate from this SOP at their own peril.

development, despite earlier concerns that composite testing of unlike paints to the lead paint standard might constitute inappropriate "component testing" or otherwise violate the notion of "final product" testing of Section 102(a) of the CPSIA, is today helping to reduce the frequency of situations where an inordinate number of product samples must be destroyed. But there still remain numerous situations where there is only one small-area color on a product to test or where even composite testing of up to three unlike paints, in accord with the CPSC SOP, still requires the destruction of many product samples.[7]/

Thus, Intertek and AAFA believe that the test procedures suggested in this Petition are not only statutorily permissible, but need to be expressly allowed to address the practical challenges being faced by labs and manufacturers, just as the composite testing of unlike paints was recently recognized by the CPSC to address similar challenges. Reasonable solutions to testing and other challenges under the complex CPSIA should be permitted and even encouraged, not disallowed. Given the stakes,[8]/ this determination should be made officially, clearly and quickly by the Commission by granting this Petition.

V. DESCRIPTION OF ALTERNATIVE TEST PROCEDURES

Attachment A describes in more detail the testing techniques referred to in Section V. of this Petition.

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[7]/ Petitioners also point out that this new policy allowing for composite testing of up to three unlike paints does not address the need to expressly allow for the testing of only base paints rather than blended (multicolor) paints.

[8]/ While it is not certain whether use of an as-yet unapproved test procedure like these could result in the CPSC withdrawing the accreditation of an approved lab under the authority of Section 102(e) of the CPSIA (since the Commission has not yet issued a "protocols and standards" regulation required by Section 102 section), CPSC staff could nevertheless potentially reject product certifications that are based on the use of the test procedures requested for approval herein.

A. Spray sampling.

"Spray sampling" refers to the procedure whereby a product that has a very small surface area of paint (or other, similar surface coating) is covered entirely with that coating to enable a laboratory to obtain a sufficient sample (via scraping) to support a valid lead test result, in accordance with the CPSC Standard Operating Procedure ("CPSC SOP") for lead paint referred to above. (It is important to note that approval is being sought for spray sampling, whether the painting is done by machine or by hand). For example, if a doll's eyes are painted brown and each set of eyes being scraped yields 0.2 milligrams (mg) of paint,[9/] at least 250 final sample dolls would be needed to yield the 50 mg of paint for a sufficient sample size under the CPSC SOP. However, with spray sampling, the entire doll (or a larger part of the doll) would be painted entirely with the same brown paint, using the same substrate (the unpainted doll) in the same manufacturing process (*i.e.*, same factory, same spray machines, *etc.*). Thus, only one or at most a few, samples would need to be destroyed for testing purposes.

B. Multiple stamping.

This procedure is essentially the same as that described above, except that, instead of paint, the surface coating may be an ink stamp or some similar surface coating. Instead of merely stamping the product once, the stamp could be repetitively applied to the identical product substrate in order to supply sufficient surface coating samples to

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9/ For very small areas of paint (less than 10 milligrams of paint or paint covering an area less than 1 square centimeter), Section 101(f)(3) of the CPSIA allows the CPSC to "rely on" x-ray fluorescence testing. However, the Commission staff have since interpreted this not to grant exemption from compliance with the limits of lead in the surface coating of any children's product. . *See* CPSC "Frequently Asked Questions," posted at: http://www.cpsc.gov/about/cpsia/faq/101faq.html#q1. This section therefore gives little relief to manufacturers that have products with small surface areas of paint on their products.

conduct valid testing. Alone, the surface area of the stamped coating is too small to test for the presence of lead, without the destruction of possibly hundreds of individual sample products. With children's apparel and footwear product surfaces, which tend to be soft, it is often particularly difficult to obtain a sufficient sample size of coating to permit reliable lead paint testing. Without the use of this test procedure, many dozens or even hundreds of high-cost jeans, shoes, or other children's wearing apparel products must be destroyed.

C. Finished component testing.

In this procedure, components of a product that would otherwise be placed on the final product (*e.g.*, multiple heads of a doll; buttons on a children's garment) *that are identical in all material respects to those components used in the final products*, are tested for lead in surface coating prior to the final assembly of the product provided that final assembly does not materially affect the chemical composition of the surface coating. This avoids having to destroy final products as opposed to just the finished components being tested. This procedure would dramatically save time and resources by avoiding the unnecessary destruction of the final products themselves, again with no reduction in the validity or reliability of the tests themselves.

VI. MEANING OF SECTION 102(a) OF THE CPSIA

A. The language of section 102(a) does not limit third party testing exclusively to final products.

Section 102(a) of the CPSIA requires that manufacturers (including importers) of children's products subject to a mandatory standard for which independent, third party

testing is required, must "submit sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body...". Petitioners oppose an interpretation of this language that it mandates that *only* final products, *i.e.*, finished, fully assembled products that are intended for sale to consumers or prototypes may be submitted for third party testing to standards covered by Section 102(a). Petitioners respectfully suggest that this interpretation of the language is incorrect. In fact, what that language clearly indicates is that Congress fully contemplated the submission of samples other than final products for testing under Section 102(a).

At the time the CPSIA was being considered by Congress, there were no fewer than eight CPSC standards that mandated testing and certification of products to those standards.[10/] Since these are all performance standards (requiring demonstration of the final products to meet some performance qualities or characteristics), they do necessitate "final product" testing. At least one, the standard for bicycle helmets, does so explicitly, requiring that helmets must "be tested in the condition in which they are offered for sale."[11/] In contrast, one of these standards explicitly mandates the products submitted for testing--cigarette lighters--must be materially *different* from those offered for sale. (The test lighters cannot be able to produce a flame).[12/]

It can reasonably be assumed, therefore, that in enacting this section of the CPSIA, (i) Congress was aware of the distinct difference between certification testing requirements that require final products only in contrast to those that do not and (ii)

10/ Those were: automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides.

11/ 16 C.F.R. § 1203.7.

12/ 16 C.F.R. § 1212.2.

Congress was aware of how to require final product testing if it so desired. However, not only did Congress choose not to specify final product testing in Section 102(a), but, by explicitly allowing testing on "samples that are identical in all *material* respects to the product," (emphasis added) Congress demonstrated a clear intent to allow other than final product testing in support of third party certification under Section 102(a).

The "Joint Explanatory Statement of the Committee of Conference" accompanying the CPSIA does not mention final versus non-final product testing, nor does any other authoritative legislative history indicate Congress' intent in this regard.[13/] In fact, all testing procedures for product safety standards have been promulgated by the Commission in rulemakings, not via legislative mandate.

In the absence of such evidence to illuminate congressional intent, the plain language of the statute controls.[14/] Black's Law Dictionary defines "material" as "important; more or less necessary; having influence or effect; going to the merits...".[15/] Thus, Section 102(a) implicitly allows samples submitted for testing to labs to be different in inconsequential (immaterial) ways to the final products. And since the entire purpose of Section 102(a) is to ensure reliable product testing to standards covering children's products, the issue of whether those differences are "material" or not is

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13/ U.S. Representative Ed Markey did insert a written statement into the Congressional Record in conjunction with House consideration of the CPSIA, stating his view that Section 102(a) means that "submitting product prototypes rather than actual examples of the manufacturing run for testing would not, in my view, satisfy the requirements of this section." 154 Cong. Rec. H-7585 (2008). But this interpretation is flatly contradicted by the language of that section and would render the phrase "or samples that are identical in all material respects to the product" meaningless and testing extremely difficult as manufacturers must very often use prototypes for testing in order to begin actually manufacturing those products.

14/ See, *e.g.*, Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

15/ Black's Law Dictionary 976 (6th ed. 1990).

whether they impact on the reliability of testing.[16/] If a product is painted entirely with the same paint, in the same factory and using the same machinery processes as a product painted in only a small area on the product, the reliability of the same tests on these two otherwise identical products is "materially" the same.

In fact, the reliability of lead paint testing in many cases is enhanced with spray sampling, multiple stamping and finished component testing because the size, consistency and integrity of the surface coating sample are very often greater than can be obtained from scraping only final products (where the sample may be small and may be "contaminated" by scrapings from other paint and/or substrate material). (Attachment A provides additional information in this regard).

B. <u>Final product testing is likely not required at all under Section 102(a)</u>.

Moreover, the assertion that Section 102(a) requires the submission of final product samples at all, with or without the exception for "materially" similar samples, is dubious. As noted, there were eight long-standing CPSC safety standards that, save one, require the testing of final products, including the bicycle helmet standard cited. If Congress had in fact desired to allow only final product testing it would have been a simple matter to simply insert the word "final" or "finished" in front of "children's product." That Congress chose not to so specify the form of the "product" that must be tested, especially in light of the enormous burden that could be assumed to arise (and in fact does arise) from mandating only final product testing, is strong evidence that such was not Congress' intent in enacting Section 102(a).

16/ The CPSC lighter standard is helpful here. It requires the use of a lighter surrogate that: "Approximates the appearance, size, shape, and weight of, and is identical in all other factors that affect child resistance...". It appears clear that Congress likewise intended to allow samples to be submitted for testing under Section 102 that, while not the same as a product for sale, are identical with respect to all the factors that significantly affect testing reliability.

This conclusion is bolstered by a consideration of Section 102(a) in the overall context of Section 102. Section 102(a)(3)(B) additionally requires the phase-in, over a one-year period of time, of the third party testing and certification requirements for various mandatory standards to which children's products are subject. This also involves the establishment of a complex system of accreditation and approval of laboratories to test to those standards. Under Section 102(b), the CPSC must then issue "protocols and standards" to determine the actual lab procedures required to test to these standards. It seems odd that, given the enormity of the task of determining "protocols and standards" for lab procedures for the many and complex mandatory standards that apply to children's products, Congress would decide to preemptively and obliquely dictate only one element of testing protocol and procedure: exclusive final product testing. Indeed, when addressing another key variable--the number of samples submitted for testing--Congress merely required "sufficient samples." Surely Congress intended similar agency flexibility in reviewing the issue of final product testing, at least until the Section 102(b) rulemaking was complete.

There appears therefore to be little evidence that Congress wanted in any way to preclude the testing of products that had been spray sampled, multiple stamped, or to prevent the testing of finished components in lieu of final product testing. To the contrary, there is every indication that Congress fully intended that reasonable and reliable test methodologies, including these, are entirely permissible under Section 102(a).

C. Reasonable, alternative test methods should be authorized.

While Congress directs in the 102(b) of CPSIA the Commission to establish, via regulation, "protocols and standards" for various aspects of testing children's products to mandatory standards, (and the Commission has additional authority under Section 14 of the CPSA to "prescribe reasonable testing programs" for products subject to mandatory standard certification),[17] the Commission has not yet exercised this authority with regard to permitting or prohibiting the test procedures argued for by Petitioners.

However, despite the absence of controlling test regulations or procedures for lead paint testing, including no requirement that it be based exclusively on "final product" testing, there have been indications from CPSC staff that they may not accept as valid certifications to the lead paint standard that are based on other than final product testing. In addition, over time, CPSC rejection of the test methodologies set forth in this Petition could lead to the loss of accreditation for labs that employ them, typically at the request if not insistence of the firms submitting the samples for testing. Therefore, the Commission itself should act now to explicitly authorize the wholly reasonable practices set forth herein.

VII. RELIABILITY OF AND POLICY JUSTIFICATION FOR ALTERNATIVE TEST PROCEDURES

A. Safeguards are possible to prevent error or abuse.

Any lab test procedure, process or methodology is subject to possible error or abuse. Whether only final products are tested or whether the more sensible test procedures of spray sampling, multiple stamping and finished component testing are

[17] CPSA § 14(b).

allowed, manufacturers and labs that wish to cut corners, use sub-par processes, equipment or personnel or manipulate results may find a way to do so.

It might be argued that if only final products are tested the results generally will be more reliable, presumably due to the assumption that components (whether paint or final component parts like buttons) submitted for testing may be different from those that go into the final product sold to consumers. Another assumption apparently giving rise to concern over non-final product testing methods is that the manufacturing process may be different in some significant way between the samples submitted for testing and the final products intended for consumer use.

Despite the fact that these assumptions are just that and, to the Petitioners' knowledge, are not supported by empirical evidence, there are doubtless ways in which the CPSC, working in cooperation with the laboratories and manufacturers, can impose safeguards against either of these scenarios. The CPSC should require that tested raw materials, components or products be randomly selected and not be materially different than the products ultimately sold to consumers. Petitioners believe that in the absence of evidence that the proposed testing procedures would enable more scenarios for abuse of testing, immediately approving the petition would strengthen the third party testing regime and provide significant relief to industry stakeholders and ultimately enhanced product safety.

In addition to granting this petition, Petitioners therefore suggest that the Commission direct staff to begin in inquiry into conditioning the use of spray sampling, multiple stamping or finished component testing on the utilization of safeguards to

prevent alteration of the materials or processes used for test samples and those used for market production runs. Petitioners would gladly contribute to such a project.[18]/

B. Testing fewer samples does not reduce test reliability and may actually enhance it.

A final, possible assumption that may underlie concern over the use of spray sampling, multiple stamping and finished component testing is that the use of more samples by requiring only final product testing helps to ensure a more representative group of products and is therefore more reliable. The notion is that taking 100 dolls, for example, from production for testing will generally yield more reliable results than just testing one or two dolls.

Setting aside for the moment the small production run issue and the fact that there may only be several hundred of a particular product produced to begin with, what this assumption relies on is the notion that the 100 samples pulled for testing will indeed be more representative of the overall group of products produced, *i.e.*, that those test products will be randomly selected. But this assumption is far from sound. There are currently no CPSC requirements that samples selected for final product testing for lead in paint be done so at random or in any other way be representative of the overall group of products being manufactured.

As discussed in Attachment A, many production runs are in fact quite large, consisting of several hundred thousand or even several million units. So the selection of 100 final products for testing could be (and very likely typically is) made from just one

[18]/ It should also be noted here that today many manufacturers and importers require separate lead testing and certification for their paint and other surface coatings, especially those intended to be placed on children's products. In addition, the Chinese government maintains a registration and testing program for all paint intended to be placed on toys.

small slice of that production run. Those 100 samples may even be painted from a different container of paint than those that will be painted the next day or possibly even the next hour. The fact is that there is simply no evidence that final product testing ensures any significant enhancement to the representativeness of test samples of the overall production run. While this issue may well be addressed by the Commission as part of its CPSIA Section 102(b) testing "protocols and standards" rulemaking later this year, the fact is that without such an assurance, one or two samples may statistically and practically be just as representative and reliable as one or two hundred.

Indeed, there are situations in which testing a small number of product samples actually *enhances* the reliability of the final lead in surface coating test result. With a large number of samples submitted for testing, if only a small number of those samples had an excessive--perhaps even very excessive--level of lead in the paint, the test results for those few, violative products may very well be obscured (diluted) by combining the paint from those samples with that from the larger group of samples.

For example, suppose10 samples of 100 had 8,000 ppm of lead in the paint from a small and the other 90 had zero ppm, if all the samples yield the same amount of paint the overall sample test would yield only 80 ppm, a legally permissible level of lead. This product would therefore pass despite the fact that 10 percent of the overall sample pool--representing perhaps thousands of actual products intended for sale to consumers--would be sold with very excessive levels of lead in their paint.

A small number of samples used for either spray sampling or multiple stamping, therefore, will in many situations be *more* likely to catch an excessively high level of lead in paint or other coating than would be the case using only final product testing.

C. **The test procedures requested herein are at least as reliable and valid as final product testing.**

When a product is spray sampled or multiple stamped, it is typically done in the same factory, using the same materials and other production inputs and processes as the products manufactured for sale. The paint is the same. The machinery is the same. The only difference is the amount of surface area painted/coated. In fact, it would cost the manufacturer more to alter any of these manufacturing processes or supplies in order to separately spray sample or multiple stamp only those products to be used as samples.

If this should not in some instance be the case, then the results may very well be invalid or unreliable. But this is the exact same risk the Commission faces now with the requirement that only final products be tested. With final product testing, "golden samples" (samples that are deliberately made to meet standards) might be submitted to the lab that may have different components, *etc.* from the products that will end up in the hands of consumers. These risks are identical in both cases. If a company wanted to submit samples to a lab that had little or nothing to do with the actual product for sale, they could do so just as easily under either scenario. And, in both cases, these risks can be reduced by diligent lab management and appropriate government and other oversight of labs and third party testing processes.

If anything, spray sampling and multiple stamping will actually help *reduce* the likelihood of error or manipulation with the testing procedures. Rather than having a lower level line employee just pull 100 samples for shipment to the lab, these more involved techniques are likely to be conducted with the knowledge and involvement of

company personnel in a more senior position to care about and be able to affect a valid sample selection and preparation.

Finally, all three alternative test procedures tend to yield a lab more consistent surface coating and substrate from which to conduct lead paint testing. When only a small area on a finished product is painted, even a large number of samples may fail to yield a sufficient sample size for lead testing. If additional samples are requested, manufacturers are often understandably reluctant to go through the time and expense of submitting more samples, so the lab may end up attempting to test a smaller than desirable sample mass. In addition, scraping one color of paint from a small area often causes other, surrounding paint to contaminate the sample, potentially compromising the test results. The same holds true for multiple stamping.

Moreover, with finished component testing, manufacturers are typically more willing to send a larger number of finished components for testing than final products, so the lab is able to obtain more consistent samples are typically obtained by the lab. All of this increases significantly the reliability and validity of these alternative test procedures over final product testing.

D. The alternative test procedures will result in easier, less expensive testing and therefore will increase the number of firms testing their products.

Importers and domestic manufacturers are today legally required to third party test and certify their covered children's products for compliance with the lead paint standard. However, it is not clear just what percentage of products subject to the standard are actually tested and certified. Anecdotal observation suggests that there are a significant number of covered products that are not now tested.

Petitioners' experience and considered opinion is that the greatest barriers to a firm making the decision regarding testing and certification are the cost of doing so and the perception that doing so is a complex and lengthy process. Allowing these and other similar simplified and less costly procedures will undoubtedly encourage more companies to test their products for not only lead in paint, but likely for other important safety standards as well, such as the limit on lead substrate in children's products, the third party testing and certification requirement for which was stayed by the Commission.

While it is impossible to quantify just how many additional companies and children's products will be appropriately tested and brought into active compliance with CPSC safety standards covering children's products, this expected benefit should be considered.

VIII. CONCLUSION

The U.S. Consumer Product Safety Commission is engaged in the most challenging period in its history. Enactment of the CPSIA has given the agency many new authorities and enforcement tools, but also new and demanding missions. These include the requirement that the agency approve and effectively supervise the third-party testing of children's products. Petitioners appreciate the difficulty and complexity of this new mission, as well as the CPSC's primary goal of working to ensure sound and reliable testing of those products.

The Commission and its professional staff have thus far taken on this new mission with characteristic enthusiasm, hard work and integrity. Petitioners applaud the agency and its staff for developing a program of certification and lab approval with extremely

limited resources and very little time. More firms are testing their products for conformance to standards. Product safety is now front and center for responsible companies. Most importantly, children's products are now probably safer than they have ever been.

But systems like this can always be improved. Any expectation or *de facto* policy that only final products may be tested to the lead paint and other standards covering children's products perplexes and frustrates manufacturers and labs worldwide. Logic and reason dictate, and experience bears out, that the test result from five uniformly painted doll heads will be just as valid as a test on 100 painted dolls eyes if the paint and the substrate are the same. Likewise, testing a button for lead in paint before it is sewn onto a child's garment will be just as valid as the test after the button is sewn on the garment. The only "material" difference is how much it will cost the company doing the testing and how long it will take the lab to complete it.

Petitioners believe the assertion that "identical in all material respects" mandates only final product testing is a misreading of the language of Section 102(a). In fact, the language of that section, alone and in the context of the overall legislation, strongly suggest a contrary interpretation. At the very least, if a product is divided between "Part A" and "Part B," whether Part A and B are combined or separate their physical composition remain "identical in all material respects."

Granting this Petition will lead to more testing because it will lead to more affordable testing. Any concern about abuse or error arising from explicitly allowing spray sampling, multiple stamping or finished component testing can and should be addressed by the Commission, most logically through its CPSIA Section 102(b)

rulemaking. Both Intertek and AAFA stand ready to assist the agency to achieve that goal and instill those safeguards. After all, product safety and the health and well-being of our children are as central to our respective missions as it is to the mission of the CPSC.

For the reasons stated, the Petitioners respectfully request that the U.S. Consumer Product Safety Commission docket this Petition, schedule a public hearing as soon as is feasible, and grant the regulatory activities requested herein, as well as any other regulation, policy or action the Commission deems necessary to affect the purposes and intent of this Petition.

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Attachment A

Sample Weight Rationale

An ICP-OES (Inductively Coupled Plasma – Optical Emission Spectrometry) is the instrument used by a preponderance of labs for lead in paint analysis according to CFR 1303. According to the CPSC-CH-E1003-09 test method, the CPSC instrument detection limit and method detection limit for lead are each 0.01 ppm.

The detection limit is the concentration in solution at which the presence or absence of lead can be determined. A higher concentration (sometimes called quantitation or quantification limit - LOQ) is needed to accurately measure how much lead the solution contains. The detection limit is often taken as three times the standard deviation of a set of blanks (as in the case of CPSC-CH-E1003-09) and the LOQ as ten times the standard deviation. Using this factor of ten and information in CPSC-CH-E1003-09, we assume an LOQ of 0.033 ppm.

In analysis, a small sample is dissolved in nitric acid, then diluted with water, and subsequently introduced into the ICP-OES. For accurate analysis, the final concentration of lead in the diluted solution should be greater than the quantification limit – here assumed to be 0.033 ppm. In practice the final solution volume usually ranges between 10 and 25 ml. Assuming a "worst case" of 25 ml and a 0.05 gram [50 mg] sample (and neglecting density considerations), the sample is diluted by a factor of 25/0.05 = 500 times through dissolution in nitric acid and subsequent dilution with water.

Using this 500 X dilution factor, a sample containing the legal limit of 90 ppm lead would be processed into a solution containing 90/500 = 0.18 ppm. This is approximately 5 times higher than the assumed LOQ of 0.033 ppm. However, in practice most companies require that testing labs provide accurate measurements of lead concentration at levels below the legal limit (for internal quality control purposes) and therefore require that testing laboratories maintain a LOQ below the minimum necessary for legal limits.

It should be noted that by using alternative analytical equipment such as an ICP-MS (Inductively Coupled Mass Spectrometry) – smaller sample weights can be used. However, the ICP-OES is widely used in industry.

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Spray Sampling Description

Quite often, children's products have a very small area of surface coating that requires Third Party Testing. Utilizing accepted composite testing procedures may not be applicable and an inordinate amount of final products are required in order to provide ample surface coating content to run a lead paint test. Quite often, hundreds of samples are required at great and unnecessary expense. Spray sampling is the term used for the process where paint is applied to a larger area of the finished product than is intended with the original final product's design. The procedures provides more surface coating sample for paint testing while reducing the amount of samples submitted to the lab. While the name for this procedure references painting by "spray" method, the same concept is translatable to hand-painted products subject to 16 CFR 1303.

To responsibly conduct this procedure, some simple controls must be employed:

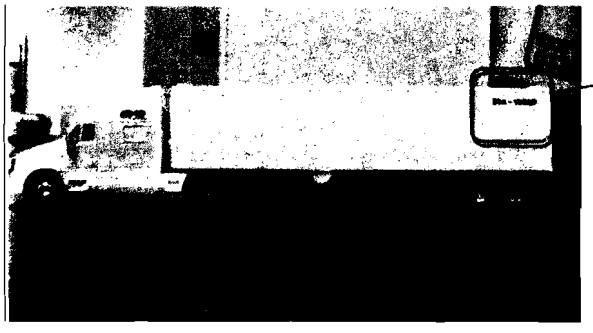
Spray Sampling Controls

- The coating, found in the small area, must be applied to a larger area of the product during the standard manufacturing process. This is to ensure that:

    1. The paint applied to the larger area is the same paint that is used in the small areas.

    2. The "spray sampling" would be conducted on the identical substrate material where the small amount of paint was initially applied.

Spray Sample Example A: Truck with Small Decal on Trailer



A small amount of red paint is applied on the right corner of the trailer of a truck.

Approximately 0.4 mg of paint can be removed – requiring approximately **125 samples.**

An example of spray sampling can be illustrated by considering a toy truck that has a small painted decal. The amount of paint on the decal is very small. If the paint was applied to the entire trailer of the truck, the number of samples required for testing would be drastically reduced.

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The entire trailer has been painted using the same paint that was applied for the decal.

Over 100 mg of paint can be removed from the trailer – requiring only **1 sample.**

Using this "spray sampled" truck, only 1 sample would technically be required to run the lead in surface coating test (16 CFR 1303).

Spray Sample Example B: Doll with Painted Fingernails

Another example of spray sampling can be illustrated by considering a plastic doll that has painted fingernails. A small amount of pink paint is applied to the fingernails of the doll. Through "spray sampling," the pink paint is applied to the entire arm of the doll instead of just being applied on the fingernails.

By ensuring that the same paint is applied to a larger area of the finished substrate, testing the paint (scraped from the entire hand or arm) would be scientifically identical to testing the same surface coating applied only to the fingernails – complying with statutorily-mandated testing to conduct Third Party Testing upon "samples that are identical in all material respects to the product."

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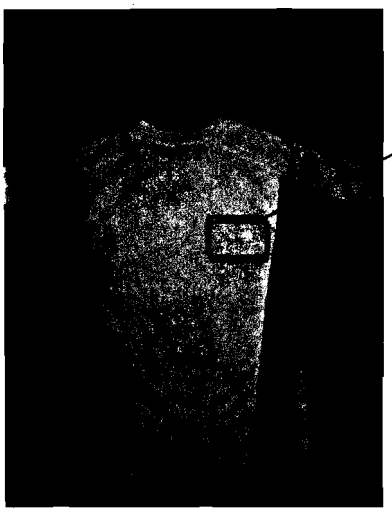
Multiple Stamping Testing

A common practice in manufacturing involves the stamping of a logo or small design in one discrete part of a toy or children's garment. Imagine a logo on a garment like the one below. That logo might be the only surface coating on the product subject to testing for CFR 1303. In order to generate enough surface coating content to run a lead test, hundreds of garments may be required for destructive testing at great expense, waste and environmental impact. This petition requests that the CPSC allow the regulated industry to apply the logo to the identical substrate on the product in repetition to obtain sufficient surface coating content to run the test. Much like "spray sampling" where the paint is sprayed or hand-painted to a larger surface area of the same substrate, multiple stamps would be applied to the product.

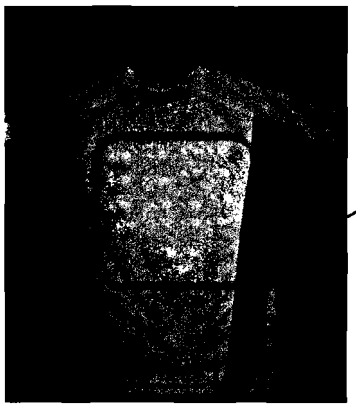
Multiple Stamping Example A: Children's T-Shirt



A small logo has been screen-printed. This logo is about 1" by 0.5".

Approximately 0.3 mg of coating can be removed from this logo – requiring over **160 samples.**

If the small logo is repeatedly stamped on the t-shirt, the number of required samples drastically reduces.



If approximately 20 logos are stamped on the garment, the number of samples required for testing will be reduced to approximately **8 samples.**

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Finished Component Part Testing

Another alternative to submitting a large quantity of fully assembled finished products is submitting finished component parts in addition to the finished sample. Perhaps only one part of a product subject to CFR 1303 contains the surface coating that requires testing. It is unnecessary to provide fully completed final products to laboratories for testing. Imagine a complex electronic toy with a plastic housing. Why should a manufacturer be responsible to waste all the electronic insides of the product just to test the surface coating of the plastic housing? The environmental and economic impact is considerable. The manufacturer should only have to provide the final plastic housing to the lab for testing. The CPSC listed lab should then be allowed to provide a Third Party Test report for CFR 1303 based on testing of the housing.

What defines a "Finished Component Part"?

A "finished component part" must be identical, in all design and material aspects, to the component part that is found in the finished sample. The only difference being that the finished component part is not assembled on the final product.

Finished Component Part Example A: Die cast cars with painted rims (tires).

In this example, the rims are painted with a small amount of chrome paint. In order to perform lead in paint analysis (16 CFR 1303), hundreds of fully assembled cars would be required. Instead of submitting a large number of finished cars, additional wheels could be submitted with multiple finished products (10 – 12 cars). These additional wheels would have gone through the same manufacturing process, except that they are not assembled on to the axles of the car.

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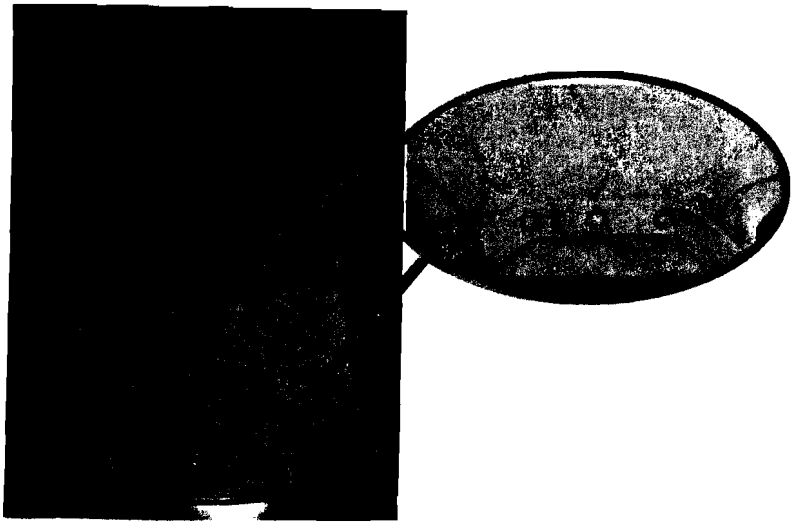
Finished Component Part Example B: Figurine

In this example, the figurine is made up of two finished component parts manufactured separately – the head and the base/body of the unit. The head of the toy contains small amounts of paint (pink, blue, black, etc...) Instead of submitting a large quantity of fully finished samples, the finished heads are submitted to the lab accompanied by a finished sample. In this example, the laboratory could then scrape sufficient black paint from the figurine head without having to waste countless figurine bases (bodies).

Finished Component Part Example C: Children's "Onesie"



In this example, there are three snaps located on this garment. These snaps are painted. There are no other coatings on this garment. Around 0.3 mg of coating can be removed from these three snaps; therefore, over **160 samples** would be required to conduct the 16 CFR 1303 testing. This petition seeks formal acceptance from the CPSC to allow the manufacturer to submit to the lab additional snaps in addition to the final garment.

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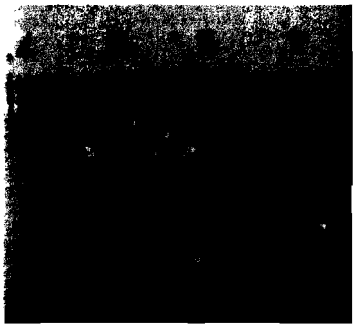
Reduction of Sample Size Illustration

Below is an example of the impact in reduced sample sizes required through utilization of spray sampling techniques.

The below picture illustrates how small some areas of coatings can be. In this particular action figure example, about 0.2mg of coating was removed from the 2 eyes of the sample.



Assuming that 50 mg of sample weight is required for lead in paint analysis (see sample weight rationale), the below chart illustrates the number of samples required when utilizing finished products (both with and without compositing) and spray sampling:

Weight achieved from black coatings from eyes of 1 sample:- 0.2 mg	Weight achieved from black coating from eyes of 1 sample:- 0.2 mg	Approximate # of spray samples required for analysis:- 4-5
# of samples required for analysis:- 250	# of samples required for analysis, if compositing 3 colors:- 80	

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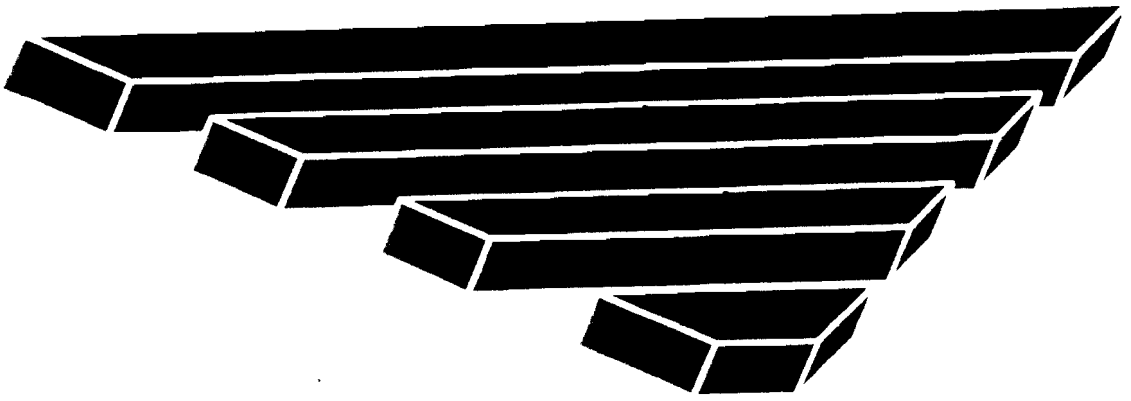
Typical Production Run Details

Production runs can vary greatly from very small runs (for handmade toys) to very large runs (for mass produced toys). An average production run for a mass produced toy is around 250k samples. This production run can last anywhere from 2 to 4 weeks depending on the factory's capacity.

By using spray samples, the aforementioned example demonstrates that the number of samples required for testing is greatly reduced from 250 to 5 samples. At first glance, it would seem that testing 250 samples would offer better quality assurance than testing 5 samples as the larger number of samples would be more representative of the entire production run. However, since there is currently no process in place that guarantees that the 250 samples are randomly selected throughout the entire production run (i.e. samples can technically be handpicked by the supplier for testing), there is actually very little to no difference in overall quality assurance between testing 250 or 5 samples. To better illustrate this concept, a breakdown of the daily and hourly output of a typical production run is shown below.

Basic Assumptions: (250k samples produced in one production run; 3 week production run; 6 day work week; 10 hour work day)



As illustrated in the example above, approximately 1400 samples can be produced in an hour. Without any random sampling controls, the 250 samples (required for testing) can easily be drawn from one hour of production just as easily as 5 samples could. Without a proper sampling procedure in place, neither 5 nor 250 samples would be representative of the entire production run.

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July 9, 2009

VIA FEDERAL EXPRESS

Todd Stevenson
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway, #502
Bethesda, MD 20814

Re: PETITION TO AUTHORIZE THE USE OF "SPRAY SAMPLING," "MULTIPLE STAMPING," AND "FINISHED COMPONENT TESTING" TO THE LEAD PAINT STANDARD (16 C.F.R. § 1303)

Dear Mr. Stevenson:

Enclosed please find an original and five copies of a petition to the above referenced petition to the Commission.

I very much appreciate your prompt attention and processing of this petition.

Sincerely,

Quin D. Dodd

2009 JUL 10 P 1:54