

Federal Lead-Based Paint Enforcement Bench Book

Stephanie P. Brown, Esq.

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**National Center for
Healthy Housing**

This book is dedicated to the lead poisoning prevention community
in its steadfast effort to protect the health of children.

To Gerald

Foreword

This bench book is written for judges, attorneys and other persons interested in promoting enforcement to eliminate lead-based paint hazards and, thereby, prevent childhood lead poisoning. The information in this book is intended to increase awareness of federal lead-based paint and environmental laws. These laws are an important component of the inter-governmental response to lead poisoning prevention. Also, this bench book also provides an overview of federal lead-based paint enforcement programs; and suggests ways citizens, and state and local authorities can support federal enforcement.

A companion publication, *The Guidebook for Developing State and Local Lead-Based Paint Enforcement Bench Books* is a how-to manual for non-lawyers, aimed at promoting enforcement of state and local laws to address lead-based paint. The *Guidebook* does not tell which laws apply in a particular state or locality. Rather, it tells what laws to look for; how to find them; and how to compile the laws, and other information, into a useful reference for state and local judges and prosecutors. The *Guidebook* also is published by the National Center for Healthy Housing.

The author notes that the term “lead-based paint” appears in various writings as either *Lead-based Paint* or *Lead-Based Paint* when the phrase is capitalized. Official sources generally use the latter expression, although the former is grammatically correct. A similar inconsistency manifests regarding the title of the Lead Safe Housing Rule, which appears as *Lead-safe*, *Lead-Safe*, or *Lead Safe*. The author has elected to use the terms Lead-Based Paint and Lead Safe Housing Rule (except where quoting a contrary external source), and begs the indulgence of readers who would have chosen otherwise.

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Content Summary

Introduction	1
Title X and the Disclosure Rule	14
Toxic Substances Control Act	24
Resource Conservation and Recovery Act	63
Lead Safe Housing Rule	70
Federal Lead-Based Paint Enforcement Programs	73

Detailed Table of Contents

I.	Introduction	1
A.	Lead Poisoning and Lead-Based Paint	1
1.	The Problem	1
2.	National Commitment to Eliminate Lead-Based Paint Hazards	5
3.	Federal Response to Lead-Based Paint Hazards	5
4.	Federal Laws Discussed in this Bench Book	8
B.	Federal Lead-Based Paint Enforcement Bench Book	9
1.	Purpose of this Bench Book	9
2.	Intended Audience	10
3.	How this Bench Book is Organized	11
4.	Terms in this Bench Book	11
	Legally Defined Terms	11
	Acronyms and Abbreviations	13
	Generic Terms	13
II.	Title X and the Disclosure Rule	14
A.	Statutory Background	14
B.	Section 1018	14
C.	Disclosure Rule	15
1.	Overview	15
2.	Applicability and Exemptions	17
3.	Entities Subject to the Rule	17
4.	Specific Requirements	18
	Duty to Disclose	18
	Duty to Provide Opportunity for Inspection	18
	Certified Statements	19
	Record Retention	19
	Agent Responsibilities	19
5.	Enforcement	20
	Inspections	21
	Penalties	21
	Injunctive Relief	22
6.	Effect on Contracts	23
7.	Private Actions	23
III.	Toxic Substances Control Act	24
A.	Statutory Background	24
1.	Overview	24
2.	TSCA Lead-Based Paint Regulations	25
3.	Enforcement	25
B.	Lead Hazard Standard	26
1.	Overview	26
2.	Standards	27

C.	Lead-Based Paint Activities Rule	28
1.	Overview	28
2.	Scope.....	29
3.	Work Practice Standards	30
4.	Training and Certification	30
5.	Training Program Accreditation	30
6.	Recordkeeping and Notification	31
7.	Enforcement	31
D.	State and Indian Tribal Programs	32
1.	Overview	32
2.	State/Tribal Programs: LBP Activities	33
3.	State/Tribal Programs: Pre-renovation Education, and Renovation, Repair, and Painting	33
E.	Pre-renovation Education Rule.....	34
1.	Overview	34
2.	Requirements	34
F.	Renovation, Repair, and Painting Rule.....	34
1.	Background	34
2.	Overview	35
	Scope.....	35
	Affected Entities.....	36
	Regulatory Framework	36
3.	Relationship Between RRP Rule and Other LBP Regulations.....	37
4.	Summary of Provisions.....	39
4-1.	Important Terms.....	40
	Renovation	40
	Child-Occupied Facility	43
4-2.	Applicability and Exemptions	44
	Overview.....	44
	Specific Exemptions.....	44
	Lead-Free Components	44
	Emergency Renovations.....	45
	Owner-Occupant Opt-out Exemption.....	46
4-3.	Effective and Implementation Dates	47
	Overview	47
	Implementation Schedule.....	47
	Pre-renovation Education for Child-Occupied Facilities	47
	Lead Hazard Information Pamphlets.....	47
	Training Program Accreditation	47
	Firm Certification.....	47
	Individual Certification; Worker Training	48
	Work Practice Standards and Recordkeeping	48
	State/Tribal Authorization.....	48
4-4.	Pre-renovation Education	49
	Overview.....	49
	Requirements.....	50

	Renovations in Dwelling Units in Target Housing	50
	Renovations in Common Areas in Multi-unit Target Housing	50
	Renovations in Child-Occupied Facilities	50
	Written Acknowledgement	51
4-5.	Work Practice Standards	51
	Standards for Renovation Activities	51
	General Requirements	51
	Occupant Protection (Warning Signs)	51
	Work Area Containment	52
	All Renovations	52
	Interior Renovations – Additional Requirements	52
	Exterior Renovations – Additional Requirements	52
	Prohibited Practices	52
	Renovation Waste	53
	Cleaning the Work Area	53
	Post-renovation Visual Inspection	53
	All Renovations	53
	Interior Renovations	53
	Exterior Renovations	54
	Post-renovation Cleaning Verification	54
	Overview	54
	Windowsills	54
	Bare Floors and Countertops	54
	Optional Dust Clearance Testing	56
4-6.	Recordkeeping Requirements	56
	Overview	56
	Records to be Retained	56
	Information to Customers	57
4-7.	Enforcement and Inspections	57
4-8.	Recognized Test Kits	58
	Overview	58
	Negative Test Kits	58
	Positive-Negative Test Kit	58
	Recognition Process	58
4-9.	Firm Certification and Responsibilities	59
	Certification, Recertification, Amendments	59
	Firm Responsibilities	59
	Certification Suspension, Revocation, and Modification	59
4-10.	Individual Certification and Responsibilities	60
	Certification and Recertification	60
	“Grandfathering”	60
	Renovator Responsibilities	61
	Dust Sampling Technician Responsibilities	62
	Certification Suspension, Revocation, and Modification	62

IV.	Resource Conservation and Recovery Act	63
A.	Statutory Background	63
B.	Waste from Residential Lead-Based Paint Renovations and Abatements	63
C.	Imminent Hazard Authority	64
1.	Overview	64
2.	Requirements	65
3.	Enforcement Options	66
4.	Section 7003 Orders for Lead-Based Paint Hazards	66
4-1.	Overview	66
4-2.	<i>In re 17th Street Revocable Trust</i>	67
	Factual Background	67
	Conclusions of Law	68
	Actions Ordered	68
4-3.	<i>In re Group I Management and M275 LLC of Fall River, Massachusetts</i>	68
	Factual Background	68
	Conclusions of Law	69
	Actions Ordered	69
D.	Citizen Suits	69
V.	Lead Safe Housing Rule	70
A.	Statutory Background	70
B.	Applicability and Requirements	70
VI.	Federal Lead-Based Paint Enforcement Programs	73
A.	Introduction	73
B.	Enforcement's Contribution to Eliminating Lead-Based Paint Hazards	75
C.	Federal Entities that Enforce Lead-Based Paint Requirements	76
1.	U.S. Environmental Protection Agency	76
2.	U.S. Department of Housing and Urban Development	77
3.	U.S. Department of Justice	77
D.	Other Federal Entities Involved with Lead	78
1.	U.S. Centers for Disease Control and Prevention	78
2.	U.S. Consumer Product Safety Commission	78
3.	Other Agencies	78
E.	How Federal Enforcement Programs Work	79
1.	Compliance Monitoring	79
	Inspection Targets	79
	Disclosure Rule Inspections	79
	TSCA Inspections	80
2.	Enforcement Case Development	80
	Enforcement Case Information	80
	Enforcement Response Policy	81
	Supplemental Environmental Projects	82
	Child Health Improvement Projects	82

3.	Case Resolution.....	83
	Administrative versus Judicial Prosecution.....	83
	EPA Administrative Litigation.....	84
F.	Referring Cases for Potential Federal Enforcement.....	85
	1. Whom to Contact	85
	2. What Information to Provide	85
G.	Coordinated Federal and State/Local Enforcement	85
	1. Opportunities for Coordinated Enforcement	85
	2. Joint and Parallel Enforcement	86

List of Figures

Fig. 1	The Federal Regulatory Scheme to Address LBP and LBP Hazards.....	6
Fig. 2	Federal Authority to Compel LBP Risk Reduction Work	7
Fig. 3	Authority to Administer and Enforce Federal LBP Requirements	9
Fig. 4	Federal, State, and Local Laws to Compel Risk Reduction Work	11
Fig. 5	Summary of the Disclosure Rule	15
Fig. 6	Authority to Administer and Enforce the Federal Disclosure Rule	20
Fig. 7	Basic Framework of the LBP Activities Rule	30
Fig. 8	RRP Rule Regulatory Framework.....	37
Fig. 9	Summary of RRP Rule Provisions	39
Fig. 10	Comparison - Definition of “Renovation”	42
Fig. 11	Comparison - Definition of “Child-Occupied Facility”	43
Fig. 12	RRP Rule Exemptions	46
Fig. 13	RRP Rule Implementation Dates	49
Fig. 14	RRP Rule Post-renovation Cleaning Verification	55
Fig. 15	RRP Rule “Grandfathering” Provisions	61
Fig. 16	Summary - Lead Safe Housing Rule Evaluation and Risk Reduction Requirements	72
Fig. 17	Enforcement Authority for Federal LBP Laws	75
Fig. 18	Outcomes Available in Disclosure Rule Civil Enforcement Actions	83

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This book is intended solely as a reference to existing law and is not intended to constitute, or provide a substitute for, legal advice.

1. Introduction

A. Lead Poisoning and Lead-Based Paint

1. The Problem¹

Lead is a poison to the human body. Lead poisoning continues to be a major environmental health problem in the United States, although it is completely preventable.² The most common source of childhood lead poisoning is lead-based paint (LBP)³ in older homes and buildings,⁴ and the primary exposure pathway is ingestion of lead-contaminated dust.⁵

The serious, and potentially lethal, effects of lead poisoning are undisputed.⁶ Lead persists and accumulates in the body. While lead is potentially harmful to individuals of any age, it is particularly dangerous to children under the age of six, due to their normal hand-to-mouth behavior (which increases exposure by ingestion) and increased physiological ability to absorb lead.

Among its many adverse impacts, probably the most essential effect of lead poisoning is irreversible brain damage, which manifests as reduced IQ scores, and educational and behavioral problems. Research has confirmed that lead poisoning creates neurocognitive decrements in young children even at very low blood-lead concentrations (*e.g.*, less than 10 micrograms per deciliter [$>10\mu\text{g/dL}$]).

¹ This section provides an overview of the problem, rather than a scholarly review of the research. Other sources for summaries of the current knowledge regarding lead poisoning include:

- U.S. Environmental Protection Agency (EPA), *Basic Information*, www.epa.gov/lead/pubs/leadinfo.htm#health.
- The preamble to EPA's final Renovation, Repair, and Painting Rule (RRP Rule), 73 Fed. Reg. 21692 (Apr. 22, 2008), www.epa.gov/lead/pubs/renovation.htm#tenants, or www.gpoaccess.gov.
- U.S. Centers for Disease Control and Prevention (CDC), *General Lead Information: Questions and Answers* (CDC Questions & Answers), www.cdc.gov/nceh/lead/faq/about.htm.

² See *e.g.*, EPA, *Basic Information*, *supra* note 1.

³ Lead-based paint generally is defined to mean paint or other surface coating that contains lead in levels equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight ($\geq 1.0 \text{ mg/cm}^2$ or 0.5%). See *e.g.*, 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (Disclosure Rule). For discussion of this and other terms in this book, see section Part I.B.4, below.

⁴ See *e.g.*, U.S. Agency for Toxic Substances and Disease Registry (ATSDR), *Lead Toxicity: Where is Lead Found?*, www.atsdr.cdc.gov/csem/lead/pbwhere_found2.html#home.

⁵ See *e.g.*, 73 Fed. Reg. 21692, 21694, *supra* note 1. See also, *e.g.*, R. Levin, *et al.*, *Children's Lead Exposure in the USA, 2008: Implications for Prevention*. ENVTL HEALTH PERSP, Online May 19, 2008, <http://ehp.niehs.nih.gov/docs/2008/11241/abstract.html>. See also, *e.g.*, B.P. Lanphear, *et al.*, *The Contribution of Lead-Contaminated House Dust and Residential Soil to Children's Blood Lead Levels: A Pooled Analysis of 12 Epidemiologic Studies*, ENV. RESEARCH, 79:51-68, 1998, www.sciencedirect.com/science/journal/00139351.

⁶ See *e.g.*, EPA, *Basic Information*, *supra* note 1; CDC Questions & Answers, *supra* note 1. See also ATSDR Toxicological Profile for Lead, www.atsdr.cdc.gov/toxprofiles/tp13.html.

Lead exerts a broad array of deleterious effects on multiple organ systems.⁷ It causes neurological damage, including intellectual impairment, developmental delays, learning disabilities, memory loss, hearing problems, attention deficits, hyperactivity, and behavioral disorders. Severe cases of lead poisoning can result in seizures, coma, and death.⁸ Exposure to lead before or during pregnancy can alter fetal development and cause miscarriages.⁹ The damage from lead poisoning is irreversible. Studies have linked lead poisoning to aggression, juvenile delinquency, and adult criminal behavior.¹⁰ Also, exposure to lead in adults has been associated with reproductive problems in males and females, memory and concentration problems, hypertension, nerve disorders, cardiovascular damage, and other maladies.¹¹

Authoritative information about lead and lead poisoning is widely available via the internet, including at the following sites:

- The U.S. Environmental Protection Agency (EPA) Lead home page, particularly the links to the Resource Center and Technical Studies, www.epa.gov/lead/pubs/leadtpbf.htm.
- The U.S. Centers for Disease Control and Prevention (CDC), www.cdc.gov/nceh/lead.
- The U.S. Agency for Toxic Substances and Disease Registry (ATSDR), www.atsdr.cdc.gov/csem/lead, notably its *Toxicological Profile for Lead* (Aug. 2007), www.atsdr.cdc.gov/toxprofiles/tp13.html.
- The U.S. Department of Housing and Urban Development (HUD), Office of Healthy Homes and Lead Hazard Control (OHHLHC), www.hud.gov/offices/lead/.
- The National Lead Information Center (Lead Hotline), 1-800-424-LEAD [5323], or www.epa.gov/lead/pubs/nlic.htm. The Hotline provides information on lead hazards and prevention, under contract with EPA, HUD, and CDC.
- The National Center for Healthy Housing (NCHH), www.nchh.org.
- The Alliance for Healthy Homes (AFHH), www.afhh.org. AFHH moderates the Leadnet list-serve, and maintains an extensive archive of messages about research, outreach and education material, and other resources.

Although there are numerous sources of lead poisoning,¹² the major source is lead-contaminated paint, dust, and soil in pre-1978 homes, pre-schools, and other locations frequented by children. The use of lead in residential paint and certain other consumer products became illegal in 1978.¹³ Nonetheless, LBP is

⁷ 73 Fed. Reg. 21692, 21693, *supra* note 1.

⁸ *E.g.*, CDC *Questions & Answers*, *supra* note 1.

⁹ *E.g.*, EPA, *Basic Information*, *supra* note 1; CDC *Questions & Answers*, *supra* note 1.

¹⁰ J.P. Wright, *et al.*, *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, 5 PLOS MEDICINE 5, e101 (May 2008), http://medicine.plosjournals.org/archive/1549-1676/5/5/pdf/10.1371_journal.pmed.0050101-L.pdf.

¹¹ *See e.g.*, EPA, *Basic Information*, *supra* note 1; 73 Fed. Reg. 21692, 21693, *supra* note 1.

¹² Other sources of lead include toys, toy jewelry, candies, candy wrappers, cosmetics, mini-blinds, and other consumer products; hobbies (*e.g.*, pottery making, stained-glass, refinishing furniture); older furniture and items with lead-containing surface material; lead from work (*e.g.*, from automobile batteries), which can be brought into the home on hands or clothing; drinking water (lead pipes, solder, brass fixtures, valves which leach lead); food and liquids stored in lead crystal or lead-glazed porcelain or pottery; and so-called “ethnic” or “folk” home health remedies (azarcon and greta, used for indigestion; and pay-loo-ah, used for rash or fever). *See e.g.*, CDC *Questions & Answers*, *supra* note 1. Artificial turf also has been found to contain lead. *See also*, ATSDR, *Lead Toxicity: Where is Lead Found?*, *supra* note 4.

¹³ 16 C.F.R. § 1303.

pervasive in buildings across the nation constructed prior to that time.¹⁴ Approximately 38 million pre-1978 dwellings in the nation have LBP.¹⁵ Approximately 24 million of these have deteriorated (chipping, peeling, flaking) LBP, and elevated levels of lead-contaminated dust.¹⁶ More than 4 million of these dwellings are homes to one or more young children.¹⁷ (Although any pre-1978 housing may have LBP hazards, since low-income housing tends to be disproportionately burdened with such hazards, there are significant issues of disparity and environmental justice associated with lead.)

An estimated 310,000 children in the United States have elevated blood-lead levels (EBLLs),¹⁸ and millions are at risk of potential lead poisoning due to the prevalence of LBP. Even children who appear healthy can have dangerous levels of lead in their bodies.¹⁹ Furthermore, millions of people suffer the continuing adverse effects of prior lead poisoning. The costs to communities to address the effects of lead poisoning – for medical intervention; special education; and juvenile, criminal justice, social, and other services – is staggering.²⁰

Like any paint, LBP does not just disappear. It persists and eventually, chips, flakes, and chalks, or otherwise deteriorates if not properly maintained. This deterioration creates lead dust and contaminates soil. The lead content makes deteriorated paint a hazard. LBP must be eliminated, or properly maintained, using lead-safe work practices.

¹⁴ See e.g., CDC, *Tips to Prevent Lead Exposure*, www.cdc.gov/nceh/lead/faq/tips.htm.

¹⁵ See e.g., 73 Fed. Reg. 21692, 21790, *supra* note 1. See also, e.g., D.E. Jacobs, et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, ENVTL HEALTH PERSP. 110:10, A599-A606, Oct. 2002, www.ehponline.org/docs/2002/110-10/toc.html, or www.ehponline.org/members/2002/110pA599-A606jacobs/EHP110pa599PDF.PDF.

¹⁶ See CDC *Questions & Answers*, *supra* note 1. See Jacobs, *supra* note 15.

¹⁷ See CDC *Questions & Answers*, *supra* note 1. See Jacobs, *supra* note 15.

¹⁸ See CDC *Questions & Answers*, *supra* note 1. CDC defines an elevated blood-lead level to be equal to or more than 10 micrograms per deciliter ($\geq 10\mu\text{g/dL}$), www.cdc.gov/nceh/lead/surv/stats.htm. No safe exposure level has been identified.

¹⁹ See EPA, *Basic Information*, *supra* note 1.

²⁰ One study estimates that lead poisoning costs \$43.4 billion in the United States. See P.J. Landrigan, et al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, ENVTL. HEALTH PERSP. 110:7, 721-728, July 2002, <http://ehpnet1.niehs.nih.gov/docs/2002/110p721-728landrigan/abstract.html>, or www.ehponline.org/docs/2002/110p721-728landrigan/abstract.html.

Dispelling Common Myths about Lead Poisoning and Lead-Based Paint

- *As long as children don't eat paint chips or chew on windowsills, they won't be harmed by LBP.*

Actually, the greatest source of lead poisoning is lead-contaminated *dust*, which can be generated simply by opening and closing friction and impact surfaces, such as windows and doors, painted with LBP. Lead dust often is not visible, and disperses easily throughout a dwelling due to normal activities.

- *LBP is only in houses that are "in slums" "very old" "cheap" "in eastern states"*

In truth, any pre-1978 dwelling (or other building) may contain LBP – from low-cost to “upscale” housing; and in cities, suburbs, and rural areas. The older the home, however, the more likely it is to have paint with higher concentrations of lead than do homes built closer to 1978.

- *Children "outgrow" lead poisoning and get better by the time they are in school teens adults.*

In fact, the damage from lead poisoning is irreversible. Often, symptoms do not become apparent until a child has difficulty in school. Lead poisoning has been linked to problems in adolescence and adulthood, such as juvenile delinquency, criminal behavior, reproductive problems, memory and concentration problems, and hypertension.

- *Once work is done to address LBP hazards, a child is safe from lead poisoning.*

Actually, many children are poisoned (or re-poisoned) by lead dust generated when work that disturbs surfaces with LBP is performed without following lead-safe work practices²¹ – or when temporary controls are not maintained and break down over time.

- *It is extremely expensive to address LBP and LBP hazards.*

Not necessarily. Abatement²² is not always expensive. Also, a variety of low-cost measures exist to address LBP and LBP hazards, such as window or door replacement, paint repair, *etc.* Also, many jurisdictions have funding programs to help defray costs.

- *My house was painted with LBP when we were growing up and we're okay.*

Actually, in the 1960's and '70's, the adverse health effects of lead were not recognized unless a child had symptoms, such as a seizure or coma. Now, we know that even at low blood levels, lead causes subtle but pervasive neurological damage that can adversely impact children's lives. We also know that multiple impacts on children's development from poor nutrition or other causes, including lead, are cumulative and together have more negative impact than any one alone.

²¹ EPA, and many states and localities, require lead-safe work practices for “abatement” (under EPA’s regulations, meaning permanent elimination of LBP hazards). 40 C.F.R. Part 745.223. Also, once EPA’s new RRP Rule is fully effective (April 22, 2010), most renovation, repair, and painting activities must follow lead-safe work practices, and persons performing such work will need to be trained and certified. 40 C.F.R. Part 745, Subpart E. Some states already regulate renovations. *See e.g.*, Part III.F.2 of this book and citation therein, *Toxic Substances Control Act – Renovation, Repair, and Painting Rule – Overview*.

²² The meaning of the term “abatement” depends upon the context within which it is used. EPA defines “abatement” to mean permanent elimination of LBP hazards. 40 C.F.R. § 745.223. HUD defines “abatement” to mean permanent elimination of LBP *or* LBP hazards, depending upon the applicable HUD housing assistance program – and defines

2. National Commitment to Eliminate Lead-Based Paint Hazards

In 2000, the U.S. Environmental Protection Agency (EPA), U.S. Department of Housing and Urban Development (HUD), U.S. Department of Justice (DOJ), U.S. Centers for Disease Control and Prevention (CDC), and other federal entities²³ were signatories to two national goals to be achieved by 2010:

- “Eliminate lead paint hazards in housing where children under six live,” through “enforcement of lead safety laws and regulations” and other means; and
- Eliminate EBLs in children through increased blood lead screening, and inter-governmental coordination on education, technical assistance, and data collection on lead screening and abatement.²⁴

Even after 2010, continuing effort will be required to prevent lead poisoning, since LBP will be present in millions of properties for the foreseeable future.

This bench book aims primarily to promote attainment of the first “2010 Goal”: the elimination of LBP hazards through enforcement. Furthermore, achieving the first goal advances the second, the elimination of EBLs, since most lead poisonings are associated with LBP hazards.

3. Federal Response to Lead-Based Paint Hazards

Given the deleterious effects and preventability of lead poisoning, it seems unconscionable for society to abide the continuing existence of LBP in locations that young children occupy and visit. Generally, however, it is viewed as impracticable to demand that property owners eliminate all LBP from the 38 million pre-1978 dwellings in the nation. Many of these dwellings are old and located in low-income communities. The cost of removing all LBP from such properties often would exceed the value of the properties themselves. Consequently, requiring property owners to remove all LBP could precipitate unintentional adverse impacts, such as refusal to lease to families with young children, abandonment of low profit-generating properties, and a reduction in the availability of affordable housing. Federal law generally does not require LBP removal; rather, it establishes disclosure obligations and performance standards for activities that disturb LBP.

Congress has enacted or authorized an array of legal authorities pertaining to LBP and LBP hazards in housing (and other structures):

- The Residential Lead-Based Paint Hazard Reduction Act of 1992,²⁵ enacted as Title X of the Housing and Community Development Act of 1992 (Title X),²⁶ and regulations there-under:
 - The Disclosure Rule²⁷; and

“permanent” to mean “an expected design life of at least 20 years.” 24 C.F.R. § 35.110. Moreover, state law may define “abatement” to encompass both temporary and permanent measures. *See e.g.*, N.J. ADMIN. CODE tit. 8, § 81:51-1.3 (2008).

²³ Other organizations included the U.S. Department of Health and Human Services (which encompasses CDC, ATSDR, and other entities); U.S. Department of Labor, which encompasses the Occupational Safety and Health Administration (OSHA); U.S. Consumer Product Safety Commission (CPSC); the U.S. Departments of Energy, Education, and Transportation; and other federal agencies, departments, and offices. *See e.g.*, www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf.

²⁴ President’s Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards* (Feb. 2000), www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf.

²⁵ 42 U.S.C. §§ 4851-4853a.

²⁶ Pub. L. 102-550 (Oct. 28, 1992).

²⁷ 24 C.F.R. Part 35, Subpart A; 40 C.F.R. Part 745, Subpart F. Note that citations to the Disclosure Rule herein provide both the HUD codification (24 C.F.R. Part 35, Subpart A) and EPA codification (40 C.F.R. Part 745, Subpart F) although the two versions are substantively identical.

- The Lead Safe Housing Rule (LSH Rule).²⁸
 - The Toxic Substances Control Act (TSCA),²⁹ and regulations there-under:
 - The Lead Hazard Standard³⁰;
 - The Pre-renovation Education Rule (PRE Rule)³¹;
 - The Renovation, Repair, and Painting Rule (RRP Rule)³²; and
 - The Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).³³
 (Also, TSCA’s Regulations for State and Indian Tribal Programs [State/Tribal Programs Rule]³⁴ allow States and Tribes to operate EPA-approved programs under the foregoing three TSCA regulations.)
 - The Resource Conservation and Recovery Act (RCRA) Section 7003.³⁵
- See Fig. 1: *The Federal Regulatory Scheme to Address LBP and LBP Hazards.*

Fig. 1: The Federal Regulatory Scheme to Address LBP and LBP Hazards			
Statute	Title X	TSCA ¹	RCRA § 7003
Rules	- Disclosure Rule - Lead Safe Housing Rule	- PRE Rule - RRP Rule ² - LBP Activities Rule ~ : ~ - Lead Hazard Standard - State/Tribal Programs Rule	<i>No regulations</i>
¹ The first three TSCA rules on this list impose obligations on the regulated community (<i>e.g.</i> , disclosure, work practice standards), whereas the last two rules do not. ² The RRP Rule modifies the PRE Rule, LBP Activities Rule, and State/Tribal Programs Rule.			

But for two exceptions, federal LBP laws do *not* impose an affirmative obligation to perform any LBP “risk reduction” work (any measures to evaluate or address LBP or LBP hazards³⁶), and do *not* empower federal authorities to demand such work.³⁷ The two exceptions under which the federal government *can* compel risk reduction work are the Lead Safe Housing Rule and RCRA Section 7003.

²⁸ 24 C.F.R. Part 35, Subparts B-R, *pursuant to* Sections 1012 and 1013 of Title X. Title X amended the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-4846 (LBPPPA), which pertains to LBP in federally owned and assisted housing. An examination of LBPPPA is beyond the scope of this publication.

²⁹ 15 U.S.C. §§ 2601-2692. www.epa.gov/lawsregs/laws.

³⁰ 40 C.F.R. Part 745, Subpart D (§§ 745.61-745.65).

³¹ 40 C.F.R. Part 745, Subpart E (§§ 745.80-745.88), *as amended by* 73 Fed. Reg. 21692 (Apr. 22, 2008)(Final RRP Rule), www.epa.gov/lead/pubs/renovation.htm#tenants, or www.gpoaccess.gov.

³² 73 Fed. Reg. 21692, *supra* note 31, *to be codified at* 40 C.F.R. Part 745, Subparts E, L and Q (§§ 745.80-745.91, § 745.220, § 745.225, § 745.320, § 745.324, § 745.326, § 745.327, § 745.339, respectively).

³³ 40 C.F.R. Part 745, Subpart L (§§ 745.220 – 745.239), *as amended by* 73 Fed. Reg. 21692, *supra* note 31.

³⁴ 40 C.F.R. Part 745, Subpart Q (§§ 745.320-745.339), *as amended by* 73 Fed. Reg. 21692, *supra* note 31.

³⁵ 42 U.S.C. § 6973. www.epa.gov/lawsregs/laws.

³⁶ “Risk reduction” and other generic terms used in this bench book are explained in section I.B.4, below.

³⁷ Violators may commit to perform *voluntary* risk reduction work in settlement agreements that resolve federal enforcement actions against them. See Part VI.E of this book, *Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work*.

- The LSH Rule applies to federally owned or assisted pre-1978 housing, which accounts for approximately 3 percent (1.3 million) of the 38 million housing units with LBP.³⁸ Although abatement of LBP or LBP hazards may be demanded for only a subset of those properties (*e.g.*, public housing), other risk reduction measures may be required for other properties subject to the rule, depending upon the applicable HUD housing assistance program.³⁹
- RCRA Section 7003 applies to an “imminent and substantial endangerment” (also known as an “imminent hazard”) involving the handling, storage, treatment, transport, or disposal of solid or hazardous waste. EPA has invoked Section 7003 to respond to LBP hazards in two enforcement actions.⁴⁰ See Fig. 2: *Federal Authority to Compel LBP Risk Reduction Work*.

Despite the limitations of the Disclosure Rule and TSCA regulations, enforcement of these laws, coupled with creative strategies and settlement policies, can obtain risk reduction work.⁴¹ Furthermore, nothing in federal law prohibits a person from undertaking risk reduction work, or from performing work that is more protective than required by the law (such as performing an abatement where the law requires only interim controls), as long as the performance of such work complies with applicable federal requirements. (Also, as discussed below, state and local laws may impose risk reduction obligations.)

Fig. 2: Federal Authority to Compel LBP Risk Reduction Work		
Law	Authority	Applicability
Title X Disclosure Rule	No	
Title X Lead Safe Housing Rule	Yes	Federally owned/assisted target housing
TSCA PRE Rule	No	
TSCA RRP Rule	No	
TSCA LBP Activities Rule	No	
TSCA Lead Hazard Standard	Not applicable ¹	
TSCA State/Tribal Programs Rule	Not applicable ²	
RCRA § 7003	Yes	“imminent and substantial endangerment”
¹ The rule does not impose enforceable obligations. ² The rule establishes requirements for State/Tribal programs under TSCA, and does not impose obligations directly on the regulated community.		

³⁸ See *e.g.*, HUD, *Economic Analysis of the Final Rule on Lead-Based Paint: Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally-Owned Residential Property and Housing Receiving Federal Assistance*, Exhibit 4-3 (Sept. 7, 1999)(economic analysis for Lead Safe Housing Rule), www.hud.gov/offices/lead/library/enforcement/completeRIA1012.pdf.

³⁹ See Part V of this book, *Lead Safe Housing Rule*.

⁴⁰ See Part IV of this book, *Resource Conservation and Recovery Act*.

⁴¹ See Part VI.E of this book, *Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work*.

4. Federal Laws Discussed in this Bench Book

This bench book examines the following federal statutes and regulations, which have general application to pre-1978 housing (and other structures):

- Title X, and the Disclosure Rule.
- TSCA, and regulations there-under:
 - The Lead Hazard Standard.
 - The RRP Rule.
 - The LBP Activities Rule, as modified by the RRP Rule.
 - The State/Tribal Programs Rule, as modified by the RRP Rule.
 - The PRE Rule, as modified by the RRP Rule. The PRE Rule was a free-standing regulation but has been modified by, and become a constituent of, the RRP Rule. (Hence, this book may use the term “PRE/RRP Rule” in reference to terms or provisions common to both rules.)
- RCRA Section 7003.

EPA administers and enforces these laws – except that both EPA and HUD can enforce the Disclosure Rule,⁴² and States and Tribes may administer EPA-authorized TSCA LBP programs.⁴³

Also, this book discusses the Lead Safe Housing Rule, which HUD administers and enforces.⁴⁴ *See* Fig. 3: *Authority to Administer & Enforce Federal LBP Requirements*.⁴⁵

⁴² *See* Part II of this book, *Title X and the Disclosure Rule*.

⁴³ *See* Part III.D of this book, *Toxic Substances Control Act – State and Indian Tribal Programs*.

⁴⁴ *See* Part V of this book, *Lead Safe Housing Rule*.

⁴⁵ The respective roles of the various federal entities that address lead and LBP are discussed in Part VI.D and C of this book, *Federal Lead-Based Paint Enforcement Programs – Federal Entities that Enforce Lead-Based Paint Requirements, and Other Federal Entities Involved with Lead*.

Fig. 3: Authority to Administer & Enforce Federal LBP Requirements

	EPA	HUD	States/ Tribes ¹	Localities ¹
Title X Disclosure Rule	X	X		
Title X Lead Safe Housing Rule		X		
TSCA PRE Rule	X		X ²	
TSCA RRP Rule	X		X ²	
TSCA LBP Activities Rule	X		X ²	
TSCA Lead Hazard Standard	Not applicable ³			
TSCA State/Tribal Programs Rule	Not applicable ⁴			
RCRA § 7003	X			
Blank space means <i>no</i> enforcement authority. ¹ States/Tribes and local governments may enact their own laws to address LBP, and may “incorporate by reference” (replicate) federal requirements into their respective state/tribal/local codes. ² States/Tribes may operate EPA-authorized TSCA LBP programs <i>under state/tribal law, in lieu of the federal program</i> , pursuant to the State/Tribal Programs Rule. ³ The Lead Hazard Standard does not impose enforceable obligations. ⁴ The State/Tribal Programs Rule establishes requirements for State/Tribal programs, which EPA oversees. The rule does not impose direct obligations on the regulated community.				

B. Federal Lead-Based Paint Enforcement Bench Book

1. Purpose of this Bench Book

The aim of this bench book is to increase awareness of federal LBP requirements and, thereby, promote enforcement that results in the elimination of LBP hazards. This book is a practical guide, rather than scholarly treatise. It is intended to:

- Provide a summary and objective explanation of federal LBP laws and enforcement programs;
- Dispel misinformation about federal LBP laws and enforcement;
- Provide information and resources to facilitate referrals for potential federal enforcement;
- Suggest ways federal and state/local authorities can partner on enforcement; and
- Clarify the limitations of federal LBP laws and, thus, indicate where it may be effective to employ state and local laws to address LBP and LBP hazards.^{46, 47}

⁴⁶ State and local LBP enforcement bench books have been developed for a few jurisdictions. See *Lead-Based Paint: The Law in Indiana*, published by Improving Kids’ Environment in Indiana, www.ikecoalition.org/Lead. See also *Benchbook on Lead Paint Poisoning for the Circuit Court of Cook County Municipal Division Housing Court*, published by the Civitas ChildLaw Center, Loyola University Chicago School of Law, www.luc.edu/law/academics/special/center/child/special_programs.html, or www.luc.edu/law/academics/special/pdfs/leadpaint_benchbook.pdf.

⁴⁷ The National Center for Healthy Housing has published a how-to guidebook to assist health department personnel and others develop state and local LBP bench books for their respective jurisdictions. See *Guidebook for Developing State and Local Lead-based Paint Enforcement Bench Books*, www.nchh.org.

2. Intended Audience

The primary audience for this bench book is state and local judges, prosecutors, enforcement personnel, and policymakers. State and local courts and agencies do not enforce federal LBP laws. State authorities, however, have jurisdiction over state laws that administer EPA-authorized LBP programs under TSCA.⁴⁸ Also, state and local authorities have jurisdiction over state and local laws that “incorporate by reference” (replicate) federal LBP requirements into the state or local code.⁴⁹ Furthermore, state and local authorities can refer alleged federal violations to EPA and/or HUD for potential enforcement,⁵⁰ and can partner with EPA and/or HUD on enforcement efforts in their community.⁵¹ Moreover, an understanding of the scope and limitations of federal LBP laws can help state and local officials decide when to use (or enact) their own legal authorities to address LBP and LBP hazards. *See Fig. 3: Authority to Administer & Enforce Federal LBP Requirements.*

State and local laws concerning LBP, LBP hazards, deteriorated paint, and other deleterious housing conditions are important elements of a comprehensive approach to preventing lead poisoning. Many states and localities have laws that empower enforcement officials to demand risk reduction work (whereas federal law generally does not). Such state and local laws include LBP, housing, health, sanitation, and property maintenance codes; nuisance and disclosure laws; landlord-tenant laws; and rental property laws.⁵² These laws may complement or supplement the federal regulatory scheme.⁵³ *See Fig. 4: Federal, State, and Local Laws to Compel Risk Reduction Work.*

This book also is intended to aid:

- Attorneys and advocates for lead poisoned children;
- Personnel in childhood lead poisoning prevention programs, and other health department units;
- Tenants and homeowners; and
- Property owners, landlords, agents, contractors, and others subject to federal LBP laws.

⁴⁸ States and Tribes, but *not* local governments, may enact laws to administer and enforce EPA-authorized programs under TSCA’s PRE Rule, RRP Rule, and LBP Activities Rule. 40 C.F.R. Part 745 Subpart Q (State/Tribal Programs Rule). These programs need not be identical to EPA’s program, but must be at least as protective and provide for adequate enforcement. So far, EPA has authorized 44 such programs, www.epa.gov/lead/pubs/authstatus.pdf, or www.epa.gov/lead/pubs/traincert.htm. *See also* Part III.D of this book, *Toxic Substances Control Act – State and Indian Tribal Programs*.

⁴⁹ A state or local government does not need federal approval to incorporate a federal regulation.

⁵⁰ *See* Part VI.F of this book, *Federal Lead-Based Paint Enforcement Programs – Referring Cases for Potential Federal Enforcement*.

⁵¹ *See* Part VI.G of this book, *Federal Lead-Based Paint Enforcement Programs – Coordinated Federal and State/Local Enforcement*.

⁵² Some jurisdictions have adopted uniform or model laws (with or without modification), such as the International Property Maintenance Code or Uniform Residential Landlord and Tenant Act, which include provisions to address deteriorated paint and other deleterious housing conditions.

⁵³ For example, state and local governments may enact their own disclosure requirements (since they cannot enforce the federal Disclosure Rule). Such state and local laws may impose more and/or different requirements and greater sanctions than the federal rule.

Fig. 4: Federal, State, and Local Laws to Compel Risk Reduction Work

Federal LBP Laws		State and Local Laws	
Title X Disclosure Rule	No	LBP Law	The answer for each depends upon the law in the state or locality.
Title X Lead Safe Housing Rule	Yes	Housing Code	
TSCA PRE Rule	No	Property Maintenance Code	
TSCA RRP Rule	No	Nuisance Law	
TSCA LBP Activities Rule	No	Health or Sanitary Code	
TSCA Lead Hazard Standard	N/A ¹	Building Code	
TSCA State/Tribal Programs Rule	N/A ²	Laws for buildings or conditions that are “unsafe,” “unfit,” “dangerous,” “uninhabitable,” “hazardous,” <i>etc.</i>	
RCRA § 7003	Yes		
¹ The rule does not impose enforceable obligations. ² The rule does not impose obligations directly on the regulated community.		Rental property laws, such as: <ul style="list-style-type: none"> • Disclosure laws; • Multiple Dwelling Laws; • Certificate of Occupancy laws; • Rental Registry laws; • Rental Housing Quality laws; • Landlord-Tenant statutes; and • the Uniform Residential Landlord and Tenant Act. 	

3. How this Bench Book is Organized

Subsequent chapters of this book are organized as follows:

- Part II examines Title X and the Disclosure Rule.
- Part III discusses TSCA and the Lead Hazard Standard, LBP Activities Rule, State/Tribal Programs Rule, PRE Rule, and RRP Rule. The bulk of this chapter is devoted to the new RRP Rule.
- Part IV covers RCRA and Section 7003’s imminent hazard authority.
- Part V discusses the Lead Safe Housing Rule.
- Part VI provides an overview of federal LBP enforcement programs and policies, referrals, and opportunities for coordinated federal and state/local enforcement.

4. Terms in this Bench Book

Legally Defined Terms

Three defined terms are seminal to most federal LBP laws and, thus, appear throughout this book: “lead-based paint,” “target housing,” and “child-occupied facility” (COF).⁵⁴

⁵⁴ Since these terms are not used in RCRA, EPA’s enforcement authority under RCRA Section 7003 is not limited to target housing or COFs.

- Lead-Based Paint (LBP)
Title X, TSCA and regulations there-under pertain to lead-based paint (and lead-based paint hazards).

“Lead-based paint” generally is defined to mean paint or other surface coating that contains lead in concentrations “equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight” ($\geq 1.0 \text{ mg/cm}^2$ or 0.5%).⁵⁵

Sometimes, these concentration levels are referred to as “regulated” lead levels.⁵⁶ A few regulations have a slightly different definition, but the *de minimis* technical discrepancy is likely to have no legal effect.⁵⁷ (“Lead-free” is not a defined term but, as explained below, is used as a generic term in this book.)

- Target Housing
Title X, TSCA and regulations there-under apply to target housing (and certain other buildings⁵⁸).

“Target housing” means “any housing constructed prior to 1978,” *except* any “0-bedroom dwelling,” and housing for the elderly or disabled (unless a child younger than six years old resides, or is expected to reside, there).⁵⁹

- Child-Occupied Facility (COF)
TSCA regulations apply to “child-occupied facilities” such as “day-care centers, preschools and kindergarten classrooms.”⁶⁰ In short, under the PRE/RRP Rule and LBP Activities Rule:

“Child-occupied facility” means a pre-1978 building (or portion thereof) “visited regularly by the same child, 6 years of age or under” at least two days a week, “at least 3 hours” each day, “at least 6 hours” weekly, and “at least 60 hours” annually.⁶¹

Furthermore, the PRE/RRP Rule definition specifies that a COF may be located in a public or commercial building, in which case the COF also encompasses locations in the building that children routinely use, such as restrooms and cafeterias.⁶²

⁵⁵ 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (Disclosure Rule). *See also*, 42 U.S.C. § 4851b(14)(Section 1004 of Title X), *referring to* 42 U.S.C. § 4822(c)(Section 302(c) of the Lead-Based Paint Poisoning Prevention Act). *See also* 40 C.F.R. § 745.82(a)(RRP Rule lead-free exemption), and § 745.88(c)(RRP Rule test kit criterion).

⁵⁶ *E.g.*, 40 C.F.R. § 745.88(c)(RRP Rule test kit response criteria).

⁵⁷ In two EPA regulations, the concentration by weight is more than, *but not equal to*, 0.5 percent. 40 C.F.R. § 745.83 (RRP Rule “recognized test kit” definition), and § 745.223 (LBP Activities Rule “lead-based paint” definition).

⁵⁸ TSCA also covers pre-1978 public buildings, and commercial buildings, bridges, and other non-residential structures. *See* 15 U.S.C. § 2682(b).

⁵⁹ 42 U.S.C. § 4851b(27)(Section 1004 of Title X). *See also* 15 U.S.C. § 2681(17)(TSCA § 401). 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (Disclosure Rule). A “0-bedroom dwelling” is a dormitory, studio apartment, or single rental room in a residential dwelling. 24 C.F.R. § 35.86; 40 C.F.R. § 745.103.

⁶⁰ 40 C.F.R. §§ 745.83 (PRE/RRP Rule), § 745.223 (LBP Activities Rule). Members of the lead poisoning prevention community prefer the term “*child-care*” center, to the term “*day-care*” center used in the regulation.

⁶¹ 40 C.F.R. § 745.83 (PRE/RRP Rule), § 745.223 (LBP Activities Rule).

⁶² 40 C.F.R. § 745.83.

Acronyms and Abbreviations

This book also uses common acronyms and abbreviations which, for the reader's convenience, are set out below and at the beginning of each chapter within which they appear.

Commonly Used Acronyms and Abbreviations

CDC	U.S. Centers for Disease Control and Prevention
COF	Child-Occupied Facility
DOJ	U.S. Department of Justice
EBLL	Elevated Blood-Lead Level
EPA	U.S. Environmental Protection Agency
HUD	U.S. Department of Housing and Urban Development
LBP	Lead-Based Paint
LSH Rule	Lead Safe Housing Rule
LBP Activities Rule	Lead-Based Paint Activities, Certification, and Training Rule
PRE Rule	Pre-renovation Education Rule
RLBPHRA	Residential Lead-Based Paint Hazard Reduction Act of 1992 (also known as Title X of the Housing and Community Development Act of 1992)
RCRA	Resource Conservation and Recovery Act
RRP Rule	Renovation, Repair, and Painting Rule
Title X	Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)
TSCA	Toxic Substances Control Act

Generic Terms

This book also uses generic terms to describe recurring concepts:

- *EPA-run jurisdiction* or *federal jurisdiction* refers to States and Tribal jurisdictions that do *not* administer EPA-authorized TSCA LBP programs.⁶³
- *Lead-free*, *LBP-free*, *lead-based paint free*, or *free of regulated lead* refers to paint or other surface coatings that contain lead at concentrations *below* those which constitute the legal definition of “lead-based paint,” *i.e.*, lead content that is *less than* 1.0 milligram per square centimeter or 0.5 percent by weight (<1.0 mg/cm² or 0.5%).⁶⁴ (In other words, “lead-free” does not mean zero lead content.)
- *Risk reduction* refers to any work, project, activities, or measures to address LBP and/or LBP hazards, including lead hazard control, abatement, interim controls, LBP evaluation, ongoing LBP maintenance, and other activities.
- *States/Tribes*, *States/Tribal jurisdictions*, or *State/Tribal governments* refers to States, Washington D.C., federally-recognized tribal governments, territories, and possessions that administer and enforce EPA-authorized TSCA LBP programs.⁶⁵ (Local governments are not eligible for TSCA authorization.)

⁶³ See Part III.D of this book, *Toxic Substances Control Act – State and Indian Tribal Programs*.

⁶⁴ See *e.g.*, 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (Disclosure Rule; “lead-based paint free housing”). See also 40 C.F.R. § 745.82(a) (RRP Rule lead-free exemption).

⁶⁵ See *e.g.*, 15 U.S.C. § 2602(13) (TSCA § 3). See also 40 C.F.R. § 745.320 (State/Tribal Programs Rule).

2. Title X and the Disclosure Rule

Acronyms and Abbreviations in this Chapter

DOJ U.S.	Department of Justice
EPA U.S.	Environmental Protection Agency
HUD	U.S. Department of Housing and Urban Development
LBP	Lead-Based Paint
RLBPHRA	Residential Lead-Based Paint Hazard Reduction Act of 1992 (also known as Title X of the Housing and Community Development Act of 1992)
Title X	Title X of the Housing and Community Development Act of 1992 (also known as the the Residential Lead-Based Paint Hazard Reduction Act of 1992)
TSCA	Toxic Substances Control Act
TSCA Title IV	TSCA Lead Exposure Reduction Subchapter

A. Statutory Background

The Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLBPHRA) was enacted as Title X of the Housing and Community Development Act of 1992 (Title X).⁶⁶ Title X established a comprehensive federal strategy for reducing exposure to lead-based paint (LBP) hazards. In relevant part, Title X:

- Directed the U.S. Environmental Protection Agency (EPA) and U.S. Department of Housing and Urban Development (HUD) to promulgate the Disclosure Rule pursuant to Section 1018.⁶⁷
- Amended the Toxic Substances Control Act (TSCA) by adding Title IV, Lead Exposure Reduction, which charged EPA to issue a variety of LBP regulations.⁶⁸ (TSCA Title IV and the regulations thereunder are discussed in Part III of this book).
- Amended the Lead-Based Paint Poisoning Prevention Act to address LBP in federally owned and assisted property.⁶⁹ (The Lead Safe Housing Rule is discussed in Part V of this book.)

B. Section 1018

Section 1018 of Title X directed EPA and HUD to promulgate regulations to require that “sellers,” “lessors,” and “agents” disclose information regarding LBP and LBP hazards in “target housing” to prospective “purchasers” and “lessees.”⁷⁰ In brief, under Title X:

⁶⁶ Pub. L. 102-550 (Oct. 28, 1992). www.epa.gov/lead/pubs/regulation.htm.

⁶⁷ 42 U.S.C. § 4852d.

⁶⁸ Section 1021 of Title X, *creating* 15 U.S.C. §§ 2681-2692 (TSCA §§ 401 - 412).

⁶⁹ *See e.g.*, Sections 1012 and 1013 of Title X.

⁷⁰ 42 U.S.C. § 4852d(a). The terms “seller,” “lessor,” and “agent” are defined in section II.C.3, below. Note that this book generally uses the modern counterparts for terms in the rule, *i.e.*: landlord (for “lessor”), tenant (for “lessee”), and buyer (for “purchaser”).

“Target housing” means “any housing constructed prior to 1978,” except any “0-bedroom dwelling,” and most housing for the elderly or disabled.⁷¹

“Lead-based paint” means paint or other surface coatings with lead in concentrations equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.⁷²

“Lead-based paint hazard” means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects.⁷³

C. Disclosure Rule

Fig. 5: Summary of the Disclosure Rule

1. Overview
2. Applicability and Exemptions
3. Entities Subject to the Rule
4. Specific Requirements
 - Duty to Disclose
 - Duty to Provide Opportunity for Inspection
 - Certified Statements
 - Record Retention
 - Agent Responsibilities
5. Enforcement
 - Inspections
 - Penalties
 - Injunctive Relief
6. Effect on Contracts
7. Private Actions

1. Overview

In 1996, EPA and HUD promulgated the Disclosure Rule (also known as the Section 1018 Rule).⁷⁴ The rule became effective in 1996.⁷⁵ EPA and HUD have independent authority to administer and enforce the rule,⁷⁶ and each has issued three interpretive guidances on the rule.^{77, 78} (Each agency’s guidance is

⁷¹ 42 U.S.C. § 4851b(27). *See also* 24 C.F.R. § 35.86; 40 C.F.R. § 745.103. *See also* Part I.B.4 of this book, *Introduction – Terms in this Bench Book*.

⁷² 42 U.S.C. § 4851b(14); 42 U.S.C. § 4822(c). 24 C.F.R. § 35.86; 40 C.F.R. § 745.103. *See also* Part I.B.4 of this book, *Introduction – Terms in this Bench Book*.

⁷³ 42 U.S.C. § 4851b(15). 24 C.F.R. § 35.86; 40 C.F.R. § 745.103.

⁷⁴ 61 Fed. Reg. 9064 (Mar. 6, 1996), *codified at* 24 C.F.R. Part 35, Subpart A (§§ 35.80-35.98)(HUD), 40 C.F.R. Part 745, Subpart F (§§ 745.100-745.119)(EPA), www.epa.gov/lead/pubs/leadbase.htm, or www.hud.gov/offices/lead/enforcement/regulations.cfm.

⁷⁵ 24 C.F.R. § 35.84; 40 C.F.R. § 745.102.

⁷⁶ *See e.g.*, 24 C.F.R. § 35.96; 40 C.F.R. § 745.118.

⁷⁷ The EPA guidance documents, available at www.epa.gov/lead/pubs/leadbase.htm, are:

substantively identical to that of the other agency.) EPA also has issued an enforcement response and penalty policy.⁷⁹

In short, the Disclosure Rule requires that *before* a buyer or tenant is obligated under a contract to buy or lease target housing, the seller or landlord (and agent) must:

- Provide the buyer/tenant information, records, and reports about LBP and/or LBP hazards;
- Provide the buyer/tenant EPA's lead hazard information pamphlet *Protect Your Family from Lead in Your Home* (*Protect Your Family*⁸⁰), and a lead warning statement in the sale/lease contract;
- Allow the buyer to inspect the housing for LBP and/or LBP hazards before closure; and
- Obtain and retain records to confirm compliance with the rule's obligations.

The Disclosure Rule does *not* impose any obligation to conduct "evaluation" (risk assessment or inspection⁸¹) or "reduction" activities (interim controls, abatement, and other measures to reduce or eliminate exposure to LBP hazards⁸²).⁸³

Dispelling Myths about the Federal Disclosure Rule

- *The Disclosure Rule applies only to housing that gets HUD assistance.*

No. The rule applies to all target housing, without regard to whether a property receives any federal support. (By contrast, HUD's Lead Safe Housing Rule applies only to federally-owned or -assisted target housing.)

- *HUD can only enforce violations involving HUD-assisted housing, and EPA can only enforce violations involving other (non-HUD) housing.*

Actually, either EPA or HUD, or both, can enforce violations in any target housing.

- *A local government can "waive" Disclosure Rule requirements.*

No. State and local governments can neither enforce nor "waive" the federal Disclosure Rule requirements. (Conversely, the Disclosure Rule does not relieve a person from having to comply with state and local requirements.)

- *Federal agencies do not have to comply with the Disclosure Rule.*

- *Interpretative Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-based Paint in Housing* (Aug. 20, 1996) (*Disclosure Rule Interpretive Guidance*);
- *Disclosure Rule Interpretive Guidance, Part II* (Dec. 5, 1996); and
- *Disclosure Rule Interpretive Guidance, Part III* (Aug. 2, 2000).

⁷⁸ The HUD guidance documents, available at www.hud.gov/offices/lead/enforcement/disclosure.cfm, are:

- *Guidance on the Lead-based Paint Disclosure Rule: Part I* (Aug. 21, 1996);
- *Guidance on the Lead-based Paint Disclosure Rule: Part II* (Dec. 5, 1996); and
- *Guidance on the Lead-based Paint Disclosure Rule: Part III* (Aug. 2, 2000).

⁷⁹ EPA, *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) (*Disclosure Rule Enforcement Policy*), <http://cfpub.epa.gov/compliance/resources/policies/civil/tscal/>, or www.epa.gov/lead/pubs/leadbase.htm. See also Part VI.E of this book, *Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work*.

⁸⁰ See www.epa.gov/lead/pubs/leadbase.htm, www.epa.gov/lead/pubs/leadprot.htm, or www.hud.gov/offices/lead/enforcement.

⁸¹ 24 C.F.R. § 35.86; 40 C.F.R. § 745.103. See also 42 U.S.C. § 4851b(12), (22) (Section 1004 of Title X).

⁸² 24 C.F.R. § 35.86; 40 C.F.R. § 745.103. See also 42 U.S.C. § 4851b(12), (22) (Section 1004 of Title X).

⁸³ 24 C.F.R. § 35.88(a); 40 C.F.R. § 745.107(a).

In truth, federal entities (agencies, departments, *etc.*) are subject to the rule.⁸⁴

- *As long as a person complies with local laws, they need not comply with the Disclosure Rule.*

Untrue. Compliance with a local order to address LBP hazards does not excuse a person from complying with the Disclosure Rule.⁸⁵

- *A property owner that uses a management firm need not worry about complying with the Disclosure Rule.*

Actually, owners who use property management agents are subject to the rule - as are their agents.⁸⁶

2. Applicability and Exemptions

The Disclosure Rule applies to “all transactions to sell or lease target housing, including subleases,”⁸⁷ *except for*:

- Sales at foreclosure.⁸⁸
- Leases (but not sales) of target housing found to be “lead-based paint free” by a certified inspector.⁸⁹
- Short-term leases of 100 days or less *where no lease renewal or extension can occur*.⁹⁰
- Renewals of existing leases in which the landlord has previously disclosed all required information and the landlord has no new information.⁹¹

Also, since the rule covers only target housing, it does not apply to transactions involving zero-bedroom dwellings, most housing for the elderly or disabled, and housing built during or after 1978.

3. Entities Subject to the Rule

The Disclosure Rule applies to:

- “Sellers” – “any entity that transfers legal title to target housing” for consideration.⁹²
- “Lessors” (landlords) – “any entity that offers target housing for lease, rent, or sublease.”⁹³
- “Agents” – “any party who enters into a contract with a seller or lessor” (or with a seller/lessor’s representative) to sell or lease target housing.⁹⁴ “Agent” has been construed to include a:
 - Listing real estate agent or agency;

⁸⁴ See 15 U.S.C. § 2688. *But see In re: U.S. Dep’t of the Navy, Kingsville Naval Air Station*, 9 E.A.D. 19 (Mar. 17, 2000) (Navy’s “Residency Occupancy Agreement” is not “contract to lease” under the Disclosure Rule), www.epa.gov/eab.

⁸⁵ See *In re: Ronald H. Hunt*, 12 E.A.D. 774 (Aug. 17, 2006), www.epa.gov/eab.

⁸⁶ 24 C.F.R. §§ 35.88, 35.90, 35.92, 35.94. 40 C.F.R. §§ 745.107, 745.110, 745.113, 745.115.

See also *In re: Harpoon Partnership*, 12 E.A.D. 182 (May 19, 2005); *dismissed, Harpoon Partnership v. EPA*, No. 05-2806 (7th Cir., Aug. 24, 2005), www.epa.gov/eab.

⁸⁷ Oral leases are not excluded from the rule. See 61 Fed. Reg. 9064, 9068.

⁸⁸ 24 C.F.R. § 35.82(a); 40 C.F.R. § 745.101(a).

⁸⁹ 24 C.F.R. § 35.82(b); 40 C.F.R. § 745.101(b). Sale transactions are not exempt. 61 Fed. Reg. 9064, 9067.

⁹⁰ 24 C.F.R. § 35.82(c); 40 C.F.R. § 745.101(c) (emphasis added). 61 Fed. Reg. 9064, 9068 (*e.g.*, seasonal vacation rentals are exempt, but month-to-month leases are not).

⁹¹ 24 C.F.R. § 35.82; 40 C.F.R. § 745.101.

⁹² 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (*e.g.*, individuals, corporations, government and housing agencies, nonprofit organizations, *etc.*).

⁹³ 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (*e.g.*, individuals, corporations, housing authorities, *etc.*).

⁹⁴ 24 C.F.R. § 35.86; 40 C.F.R. § 745.103.

- Selling real estate agent or agency;
- Buyer's agent (unless compensated *solely* by the buyer⁹⁵);
- Contract service provider (*e.g.*, one who ensures that the transaction documents are used, completed, and signed);
- Property management firm;
- Resident manager; and
- Locator service.⁹⁶

4. Specific Requirements

Each requirement under the Disclosure Rule is a separate and distinct obligation. A person subject to the rule must fulfill each requirement, or face a potential penalty up to the statutory maximum for *each* missed obligation in *each* regulated transaction.⁹⁷

Duty to Disclose

Before a buyer or tenant is obligated under a contract to buy or lease target housing,⁹⁸ the seller or landlord must perform the following tasks:

- Provide the prospective buyer/tenant EPA's *Protect Your Family* pamphlet.⁹⁹
- Disclose to the buyer/tenant "the presence of any known" LBP and/or LBP hazards¹⁰⁰ – and "any additional information available" about these conditions.¹⁰¹
- Provide the buyer/tenant "any records or reports available" pertaining to LBP and/or LBP hazards, including in common areas and, under certain circumstances, in other residential dwellings in multi-family target housing.¹⁰²
- Disclose to each agent:
 - the "presence of any known" LBP and/or LBP hazards;
 - "the existence of any available records or reports" pertaining to LBP and/or LBP hazards; and
 - "any additional information available" about these conditions.¹⁰³

Duty to Provide Opportunity for Inspection

Before a buyer is obligated under a contract to purchase target housing, the seller must permit the buyer a 10-day period to conduct a "risk assessment"¹⁰⁴ or "inspection"¹⁰⁵ for LBP and/or LBP hazards (unless the parties agree to a different time period, or the buyer waives this opportunity in writing).¹⁰⁶

⁹⁵ 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (term does not apply to buyers, or any buyer's representative who receives all compensation from the buyer).

⁹⁶ *Disclosure Rule Enforcement Policy*, *supra* note 79, Appendix A.

⁹⁷ *See e.g.*, 24 C.F.R. § 35.96; 40 C.F.R. § 745.118. *See also Disclosure Rule Enforcement Policy*, *supra* note 79, Chapter 6.

⁹⁸ Failure to disclose in a timely manner is a violation. *See e.g., In re: Harpoon Partnership*, 12 E.A.D. 182 (May 19, 2005); *dismissed, Harpoon Partnership v. EPA*, No. 05-2806 (7th Cir., Aug. 24, 2005), www.epa.gov/eab. If disclosures occur after the buyer/tenant had made an offer, then the seller/landlord must make the disclosures before accepting the offer, and permit the buyer/tenant to review and possibly amend the offer. 24 C.F.R. § 35.88(b); 40 C.F.R. § 745.107(b).

⁹⁹ 24 C.F.R. § 35.88(a)(1); 40 C.F.R. § 745.107(a)(1)(or may give an EPA-approved equivalent).

¹⁰⁰ 24 C.F.R. § 35.88(a)(2); 40 C.F.R. § 745.107(a)(2).

¹⁰¹ Such "additional information" includes the basis for the determination that LBP and/or LBP hazards exist, their location, and the condition of painted surfaces. 24 C.F.R. § 35.88(a)(2); 40 C.F.R. § 745.107(a)(2).

¹⁰² 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4).

¹⁰³ 24 C.F.R. § 35.88(a)(3); 40 C.F.R. § 745.107(a)(3). *See supra* note 101 (additional information).

¹⁰⁴ 42 U.S.C. § 4851(25); 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 ("on-site investigation" to determine and report "existence, nature, severity and location" of LBP hazards, including visual inspection and "limited wipe sampling").

Certified Statements

Sellers and landlords also must include the following as an attachment to each sale or lease contract (in the language of such contract):

- A specified Lead Warning Statement.¹⁰⁷
- A statement by the seller/landlord disclosing the presence of known LBP and/or LBP hazards (or indicating no such knowledge) – and “any additional information available” about these matters.¹⁰⁸
- A list of any records and reports that the seller/landlord has provided the buyer/tenant about LBP and/or LBP hazards.¹⁰⁹
- A statement by the buyer/tenant affirming receipt of the required information and the *Protect Your Family* pamphlet.¹¹⁰
- A statement by any agent that he/she has informed the seller/landlord of its obligations under the law – and that the agent is aware of his/her own duty to ensure compliance.¹¹¹
- Dated signatures of the seller/landlord, any agent, and the buyer/tenant certifying the accuracy of their respective statements.¹¹²
- The buyer’s statement that he/she has received (or waived) the opportunity for an inspection or risk assessment.¹¹³

Disclosure Rule “inspections” are record reviews, rather than inspections of physical property. Enforcement actions typically result from noncompliance as indicated by the lack of, or other problems with, the required records.

Record Retention

Sellers, landlords, and agents must retain a copy of the completed attachment from each transaction for “no less than 3 years.”¹¹⁴

Agent Responsibilities

Each agent involved in any transaction to sell or lease target housing “must ensure compliance with all requirements” of the rule, and must:

- Inform the seller/landlord of the duties of sellers/landlords under the rule; and
- Ensure the seller/landlord has performed – or *personally* ensure compliance with – the rule’s disclosure, inspection opportunity, and certified statement requirements.¹¹⁵

¹⁰⁵ 42 U.S.C. § 4851(12); 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (“surface-to-surface investigation” to determine presence of LBP, and provision of report).

¹⁰⁶ 24 C.F.R. § 35.90; 40 C.F.R. § 745.110.

¹⁰⁷ 24 C.F.R. § 35.92(a)(1); 40 C.F.R. § 745.113(a)(1). Note that the statement for sales contracts is different from that for lease contracts.

¹⁰⁸ 24 C.F.R. § 35.92(a)(2), (b)(2); 40 C.F.R. § 745.113(a)(2), (b)(2). See *supra* note 101 (additional information).

¹⁰⁹ 24 C.F.R. § 35.92(a)(3), (b)(3); 40 C.F.R. § 745.113(a)(3), (b)(3)(or statement indicating no such records/reports).

¹¹⁰ 24 C.F.R. § 35.92(a)(4), (b)(4); 40 C.F.R. § 745.113(a)(4), (b)(4).

¹¹¹ 24 C.F.R. § 35.92(a)(6), (b)(5); 40 C.F.R. § 745.113(a)(6), (b)(5).

¹¹² 24 C.F.R. § 35.92(a)(7), (b)(6); 40 C.F.R. § 745.113(a)(7), (b)(6).

¹¹³ 24 C.F.R. § 35.92(a)(5); 40 C.F.R. § 745.113(a)(5).

¹¹⁴ 24 C.F.R. § 35.92(c); 40 C.F.R. § 745.113(c). Note that the statute of limitations for federal enforcement actions is five years. 28 U.S.C. § 2462. EPA may apply the longer period in pursuing enforcement actions.

¹¹⁵ 24 C.F.R. § 35.94(a); 40 C.F.R. § 745.115(a).

An agent is not responsible for the seller/landlord's failure to disclose information known to the seller/landlord but not disclosed to the agent.¹¹⁶

5. Enforcement

Only EPA and HUD can enforce the Disclosure Rule, since it is non-delegable federal law.¹¹⁷ See Fig. 6: *Authority to Administer and Enforce the Federal Disclosure Rule*.

Fig. 6: Authority to Administer and Enforce the Federal Disclosure Rule			
EPA	HUD	States/Tribes*	Local Governments
Yes	Yes	No	No
* States/Tribes may operate EPA-authorized LBP programs under TSCA, but not Title X.			

¹¹⁶ 24 C.F.R. § 35.94(b); 40 C.F.R. § 745.115(b).

¹¹⁷ Several jurisdictions have enacted their own disclosure laws, or have “incorporated by reference” the federal rule into their own codes. State and local courts can enforce their jurisdiction’s disclosure law.

Inspections

EPA and HUD conduct inspections under their inherent authority to administer and enforce Title X.¹¹⁸ Also, Section 11 of TSCA authorizes EPA to conduct inspections, including inspections of records¹¹⁹; and to issue subpoenas to require the production of reports and other information.¹²⁰ (HUD has no authority under TSCA.)

Penalties

Title X authorizes HUD to impose civil money penalties pursuant to the HUD Reform Act against any person who “knowingly violates” Section 1018.¹²¹

Title X authorizes EPA to use TSCA to enforce Section 1018 violations. Title X provides that non-compliance with the Disclosure Rule is prohibited under Section 409 of TSCA.¹²² Section 409 of TSCA subjects a person to potential civil and/or criminal penalties under Section 16 of TSCA¹²³ -- *but* Title X limits the *penalty amount* for violations of the *Disclosure Rule*.

As of August 2008, the maximum statutory civil penalty under Section 16 for *TSCA* LBP violations is \$25,000 per violation,¹²⁴ adjusted for inflation to \$32,500 per violation for those occurring after March 15, 2004.¹²⁵ (The maximum penalty *for TSCA violations* is set for re-adjustment in late 2008, to \$37,500 per violation.¹²⁶) However, while Disclosure Rule violations *are punishable* under Section 16,¹²⁷ Title X limits the penalties to \$10,000,¹²⁸ adjusted for inflation to \$11,000 per violation for those occurring after July 28, 1997.¹²⁹ (The maximum penalty *for Disclosure Rule* violations is scheduled for re-adjustment in late 2008, to \$16,000 per violation.¹³⁰)

Despite the cap imposed by Title X, penalties for Disclosure Rule violations can be significant. Since each requirement of the rule is a distinct obligation for each transaction (*i.e.*, per lease per unit), a landlord that completely fails to comply with the eleven obligations could face a penalty up to \$121,000 per transaction

¹¹⁸ See generally, 42 U.S.C. § 4852d; 24 C.F.R. § 35.96; 40 C.F.R. § 745.118.

¹¹⁹ 15 U.S.C. § 2610(a)-(b).

¹²⁰ 15 U.S.C. § 2610(c). TSCA subpoenas are enforceable in federal court. *United States v. Silverwood Realtors*, 2000 U.S. Dist. LEXIS 6577 (N.D. Ill. May 12, 2000)(granting government’s motion for summary enforcement of TSCA subpoena in Disclosure Rule action). EPA and/or HUD may issue *voluntary* “information request letters” to obtain Disclosure Rule documentation. See e.g., Part VI.E of this book, *Federal Lead-Based Paint Enforcement Program – How Federal Enforcement Programs Work*.

¹²¹ 42 U.S.C. § 4852d(b)(1). 24 C.F.R. § 35.96(a); 40 C.F.R. § 745.118(a).

¹²² 42 U.S.C. 4852d(b)(5), referring to 15 U.S.C. § 2689. 24 C.F.R. § 35.96(e); 40 C.F.R. § 745.118(e).

¹²³ 15 U.S.C. § 2615. 24 C.F.R. § 35.96(f); 40 C.F.R. § 745.118(f).

¹²⁴ 15 U.S.C. § 2615(a)(1).

¹²⁵ 40 C.F.R. Part 19.

¹²⁶ Notification will be published in the Federal Register. The adjustment also will affect civil penalties under other environmental statutes administered by EPA.

¹²⁷ 42 U.S.C. § 4852d(b)(5), referring to 15 U.S.C. § 2689; 15 U.S.C. § 2615.

¹²⁸ 42 U.S.C. § 4852d(b)(5); 24 C.F.R. § 35.96(f); 40 C.F.R. § 745.118(f).

¹²⁹ 40 C.F.R. § 745.118(f)(EPA; \$10,000 per violation on/before July 28, 1997; adjusted for inflation to \$11,000 per violation after July 28, 1997). But see 24 C.F.R. § 35.96(f)(HUD; \$10,000 per violation).

¹³⁰ Notification will be published in the Federal Register.

(11 @ \$11,000 each).¹³¹ (When the maximum penalty is re-adjusted to \$16,000 per violation, the maximum potential civil penalty will be \$176,000 per transaction.) EPA can *assess* civil penalties under Section 16 only in an *administrative* enforcement action,¹³² but can *obtain* such penalties in an administrative *or* judicial settlement.¹³³

Criminal sanctions also may be imposed under TSCA Section 16 against any person who “knowingly or willfully” violates Section 409.¹³⁴ The statutory maximum criminal penalty is \$25,000 “for each day of violation,”¹³⁵ subject to the cap imposed by Title X.¹³⁶ Imprisonment up to one year, with or without a criminal fine, also is possible. Furthermore, criminal sanctions may be in addition to or in lieu of any civil penalties.¹³⁷

Falsification of disclosure documents to EPA or HUD can form the basis of criminal prosecution under other federal law.¹³⁸

Injunctive Relief

Title X authorizes HUD’s Secretary to enjoin violations.¹³⁹ Also, the U.S. Department of Justice (DOJ), on behalf of EPA and/or HUD, may request that a court exercise its general equitable powers to require that a violator abate LBP hazards.

¹³¹ EPA and HUD, however, have wide discretion to adjust the final penalty based on the circumstances in a case. *See e.g., Disclosure Rule Enforcement Policy*, *supra* note 79. *See also* Part VI.E of this book, *Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work*.

¹³² 15 U.S.C. § 2615(a)(2)(A).

¹³³ A *judicial* settlement may include civil *administrative* penalties in exchange for the government’s covenant not-to-sue the defendant for its administrative liability.

¹³⁴ 15 U.S.C. § 2615(b).

¹³⁵ 15 U.S.C. § 2615(b).

¹³⁶ 42 U.S.C. § 4852d(b)(5).

¹³⁷ 15 U.S.C. § 2615(b).

¹³⁸ *See* 18 U.S.C. §§ 1001, 1503, 1505 (False Statement, Obstruction of Justice, Obstruction of Agency Proceeding). *See e.g., United States v. Aneckeinstein and JTA Real Estate Brokerage and Property Management* (D. N.H. 2001)(guilty plea to obstructing justice, making false statements, and Disclosure Rule violation), EPA Press Release, *Manchester Man Admits Guilt in Lead Poisoning Case; Plea to Forging Lead Hazard Disclosure Documents is Precedent Setting* (Dec. 19, 2001), www.epa.gov/region1/pr/2001/dec/011214.html.

See also, United States v. Nuyen (D. MD 2001)(guilty plea to obstruction of justice and making false statements), HUD Press Release, *Landlord Pleads Guilty to Lying about Lead Paint Hazards* (July 11, 2001), www.hud.gov/news/release.cfm?content=pr01-067.cfm.

¹³⁹ 42 U.S.C. § 4852d(b)(2). 24 C.F.R. § 35.96(b); 40 C.F.R. § 745.118(b). EPA also may seek injunctive relief for TSCA LBP violations, under Section 17(a) of TSCA. 15 U.S.C. § 2616(a), § 2689.

6. Effect on Contracts

Section 1018 does not affect the validity or enforceability of contracts for sale or lease of residential property, mortgages, loans, or liens.¹⁴⁰

An Enforcement Perspective

Since Title X does not affect the validity of lease contracts, a tenant cannot terminate a lease solely on the basis that the landlord violated the Disclosure Rule. Therefore, generally it is deemed insufficient to address violations merely by requiring that the landlord provide so-called “retroactive” (post-contractual) disclosure to the tenant. Instead, it may be appropriate to seek the court’s equitable power to compel the landlord to abate any LBP hazards at the property.

7. Private Actions

Title X provides that any person who “knowingly violates” Section 1018 is “jointly and severally liable to the purchaser or lessee” for treble damages; and the court may award court costs, reasonable attorney fees, and expert witness fees to a prevailing plaintiff.^{141 , 142}

¹⁴⁰ 42 U.S.C. § 4852d(c).

¹⁴¹ 42 U.S.C. § 4852d(b)(3)-(4). 40 C.F.R. § 35.96(c)-(d); 40 C.F.R. § 745.118(c)-(d).

¹⁴² See e.g., Alliance for Healthy Homes, *Private Causes of Action under the Federal Lead Hazard Disclosure Law*, www.afhh.org/res/res_Operation_LEAP_toolkit_disclosure_Private_Causes_of_Action.htm.

Also, state common law actions for negligence or breach of contract may be possible where a child has been poisoned by LBP in rental property.

3. Toxic Substances Control Act

Acronyms and Abbreviations in this Chapter

COF	Child-Occupied Facility
DST	Dust Sampling Technician
EPA	U.S. Environmental Protection Agency
HUD	U.S. Department of Housing and Urban Development
LBP	Lead-Based Paint
LBP Activities Rule	Lead-Based Paint Activities, Certification, and Training Rule
PRE Rule	Pre-renovation Education Rule
RCRA	Resource Conservation and Recovery Act
RRP Rule	Renovation, Repair, and Painting Rule
Title X	Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)
TSCA	Toxic Substances Control Act
TSCA Title IV	TSCA Lead Exposure Reduction Subchapter

A. Statutory Background

1. Overview

The Toxic Substances Control Act (TSCA)¹⁴³ was enacted in 1976 to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances.¹⁴⁴ EPA administers and enforces TSCA and the LBP (and other) regulations there-under. Title I of TSCA governs chemical substances, and generally provides EPA's administration and enforcement authorities.¹⁴⁵ TSCA Title II regulates asbestos in schools,¹⁴⁶ Title III governs indoor radon,¹⁴⁷ Title IV regulates lead-based paint,¹⁴⁸ and Title V pertains to healthy schools.¹⁴⁹

The Residential Lead-Based Paint Hazard Reduction Act of 1992,¹⁵⁰ known as Title X,¹⁵¹ created TSCA's Lead Exposure Reduction subchapter (TSCA Title IV).¹⁵² TSCA Title IV addresses LBP and LBP hazards in target housing (most pre-1978 housing¹⁵³), and other buildings and structures.¹⁵⁴

¹⁴³ 15 U.S.C. §§ 2601-2695d. *See e.g.*, www.epa.gov/compliance/civil/tsca.

¹⁴⁴ *See* 15 U.S.C. § 2601.

¹⁴⁵ 15 U.S.C. §§ 2601-2629.

¹⁴⁶ 15 U.S.C. §§ 2641-2656.

¹⁴⁷ 15 U.S.C. §§ 2661-2671.

¹⁴⁸ 15 U.S.C. §§ 2681-2692.

¹⁴⁹ The Energy Independence and Security Act of 2007, Pub. L. 110-140 (Dec. 19, 2007), added TSCA Title V, "Healthy High-Performance Schools," 15 U.S.C. §§ 2695-2695d. Among other things, this amendment will require EPA to develop voluntary guidelines for states to use for environmental health programs in schools.

¹⁵⁰ Pub. L. 102-550 (Oct. 28, 1992).

2. TSCA Lead-Based Paint Regulations

Pursuant to TSCA Title IV, EPA has promulgated:¹⁵⁵

- The Lead Hazard Standard.¹⁵⁶
- The Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).¹⁵⁷
- Regulations for State and Indian Tribal Programs (State/Tribal Programs Rule).¹⁵⁸
- The Pre-renovation Education Rule (PRE Rule).¹⁵⁹
- The Renovation, Repair, and Painting Rule (RRP Rule).¹⁶⁰

The RRP Rule (effective June 23, 2008) modifies the LBP Activities Rule, State/Tribal Programs Rule, and PRE Rule. Therefore, the examination of the RRP Rule herein follows that of the pre-existing regulations (in section III.F, below).

3. Enforcement

Section 409 of TSCA prohibits noncompliance with TSCA LBP requirements.^{161, 162}

Section 11 of TSCA empowers EPA to conduct inspections¹⁶³ — and to issue subpoenas to require production of documents, answers to questions, and other information; and to compel witness testimony.¹⁶⁴

¹⁵¹ RLBPA was enacted as Title X of the Housing and Community Development Act of 1992.

¹⁵² Section 1021 of Title X, *creating* 15 U.S.C. §§ 2681- 2692.

¹⁵³ *E.g.*, 15 U.S.C. § 2681(17). *See also* Part I.B.4 of this book, *Introduction – Federal Lead-Based Paint Enforcement Bench Book – Terms in this Book*.

¹⁵⁴ 15 U.S.C. § 2682 (TSCA § 402; authorizing regulations for LBP in target housing, pre-1978 public buildings, commercial buildings, bridges).

¹⁵⁵ Note that for TSCA regulations, the official date of promulgation generally is *two weeks after* the date of publication in the Federal Register. 40 C.F.R. § 23.5.

¹⁵⁶ 40 C.F.R. Part 745, Subpart D (§§ 745.61-745.65).

¹⁵⁷ 40 C.F.R. Part 745, Subpart L (§§ 745.220 – 745.239).

¹⁵⁸ 40 C.F.R. Part 745, Subpart Q (§§ 745.320-745.339).

¹⁵⁹ 40 C.F.R. Part 745, Subpart E (§§ 745.80-745.88).

¹⁶⁰ 73 Fed. Reg. 21692 (Apr. 22, 2008), *to be codified at* 40 C.F.R. Part 745, Subparts E, L and Q (amending the PRE Rule, LBP Activities Rule, and State/Tribal Programs Rule, respectively, at §§ 745.80-745.91, § 745.220, § 745.225, § 745.320, § 745.324, § 745.326, § 745.327, § 745.339). www.epa.gov/lead/pubs/renovation.htm#tenants, or www.gpoaccess.gov.

¹⁶¹ 15 U.S.C. § 2689. *See also* 40 C.F.R. § 745.87 (PRE/RRP Rule), § 745.235 (LBP Activities Rule).

¹⁶² Note that non-compliance with the Disclosure Rule also is prohibited under Section 409 of TSCA, although the Disclosure Rule is promulgated pursuant to Title X rather than TSCA. 42 U.S.C. 4852d(b)(5), *referring to* 15 U.S.C. § 2689. 24 C.F.R. § 35.96(e); 40 C.F.R. § 745.118(e). *See* Part II.C.5 of this book, *Title X and the Disclosure Rule – Disclosure Rule – Enforcement*.

¹⁶³ 15 U.S.C. § 2610(a)-(b). *See also* 40 C.F.R. § 745.87(c), (e)(PRE/RRP Rule). *See also* 40 C.F.R. § 745.235(c), § 745.237 (LBP Activities Rule).

¹⁶⁴ 15 U.S.C. § 2610(c). *See also* 40 C.F.R. § 745.87(e)(PRE/RRP Rule). *See also* *United States v. Silverwood Realtors*, 2000 U.S. Dist. LEXIS 6577 (N.D. Ill. May 12, 2000)(granting government’s motion for summary enforcement of TSCA subpoena).

Section 15 makes it illegal to fail or refuse to maintain required records, submit notices or other information, allow access to or copying of records, or allow entry or inspection.¹⁶⁵

Section 16 provides civil and criminal penalties for violations of Section 15 and Section 409.¹⁶⁶ As of this writing, the statutory maximum civil penalty under Section 16 is \$25,000 per violation,¹⁶⁷ adjusted for inflation to \$32,500 for violations which occurred after March 15, 2004.¹⁶⁸ The maximum penalty is scheduled for re-adjustment in late 2008 to \$37,500 per violation.¹⁶⁹ EPA can *assess* civil penalties under Section 16 only in an administrative enforcement action¹⁷⁰ (but can obtain such penalties in an administrative *or* judicial settlement¹⁷¹).

Also under Section 16, any person who “knowingly or willfully” violates Section 409 may face criminal sanctions (in addition to or in lieu of civil penalties) of imprisonment up to one year and/or a fine up to \$25,000 per day of violation.¹⁷²

Section 17 authorizes federal district courts to restrain any violation of TSCA Section 15 or 409, or compel the taking of any actions required by TSCA.¹⁷³

B. Lead Hazard Standard

1. Overview

Section 403 of TSCA directed EPA to promulgate regulations to define standards for “lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil.”¹⁷⁴ In short, under TSCA Title IV:

“Lead-based paint hazard” means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible, friction or impact surfaces that would result in adverse human health effects.¹⁷⁵

“Lead-contaminated dust” means surface dust in residential dwellings that contains lead in excess of levels determined to pose a threat of adverse health effects in pregnant women or young children.¹⁷⁶

¹⁶⁵ 15 U.S.C. § 2614(3)-(4). *See also* 40 C.F.R. § 745.87(b)-(c)(PRE/RRP Rule), § 745.235(b)-(c)(LBP Activities Rule).

¹⁶⁶ 15 U.S.C. § 2615. *See also* 40 C.F.R. § 745.87(d)(PRE/RRP Rule); § 745.235(e)(LBP Activities Rule).

¹⁶⁷ 15 U.S.C. § 2615(a)(1).

¹⁶⁸ 40 C.F.R. Part 19.

¹⁶⁹ Notification will be published in the Federal Register. The adjustment also will affect civil penalties under other environmental statutes administered by EPA.

¹⁷⁰ 15 U.S.C. § 2615(a)(2)(A).

¹⁷¹ A *judicial* settlement may include *administrative* penalties in exchange for the government’s covenant not-to-sue the defendant for its administrative liability. *See also* Part VI.E.3 of this book, *Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work – Case Resolution*.

¹⁷² 15 U.S.C. § 2615(b). *See also* 40 C.F.R. § 745.87(d)(PRE/RRP Rule), § 745.235(e)(LBP Activities Rule).

¹⁷³ 15 U.S.C. § 2616(a).

¹⁷⁴ 15 U.S.C. § 2683.

¹⁷⁵ *See* 15 U.S.C. § 2681(10). 40 C.F.R. § 745.223 (LBP Activities Rule). The Disclosure Rule also uses this definition. 24 C.F.R. § 35.86; 40 C.F.R. § 745.103.

¹⁷⁶ 15 U.S.C. § 2681(11).

“Lead-contaminated soil” means bare soil on residential real property that contains lead at or in excess of the levels determined to be hazardous to human health.¹⁷⁷

EPA promulgated the federal Lead Hazard Standard regulation in 2001,¹⁷⁸ and has issued an interpretive guidance.¹⁷⁹ This regulation does not impose any obligations on property owners,¹⁸⁰ or prohibit any activity. Instead, it identifies the concentration levels at which lead in paint, dust, or soil constitute a hazard under federal law. The standards are incorporated into the work practices under the LBP Activities Rule.¹⁸¹ They are intended to help identify properties that present risks to children,¹⁸² and provide federal agencies “uniform benchmarks on which to base remedial actions,” such as environmental intervention to address lead poisoning and clearance testing after lead hazard control activities.¹⁸³

2. Standards

The standards apply to target housing and child-occupied facilities (COFs).¹⁸⁴ In brief:

A “paint-lead hazard” is any LBP that meets one of the following criteria:

- Deteriorated (*e.g.*, peeling, chipping, chalking, cracking, damaged);
- On a “friction surface” where a dust-lead hazard is present underneath (*e.g.*, a window sill);
- Damaged or deteriorated on an “impact surface” (*e.g.*, where a doorknob knocks a wall); or
- On a “chewable surface” (*i.e.*, surface accessible to a young child) where there is evidence of teeth marks.¹⁸⁵

A “dust-lead hazard” is lead in dust that *equals or exceeds*:

- 40 micrograms per square foot ($\geq 40 \mu\text{g}/\text{ft}^2$) on floors; or
- 250 micrograms per square foot ($\geq 250 \mu\text{g}/\text{ft}^2$) on interior window sills.¹⁸⁶

A “soil-lead hazard” is bare soil with lead that *equals or exceeds*:

- 400 parts per million ($\geq 400 \text{ ppm}$) in a play area; or
- 1200 parts per million ($\geq 1200 \text{ ppm}$) in the rest of the yard on average.¹⁸⁷

¹⁷⁷ 15 U.S.C. § 2681(12).

¹⁷⁸ 40 C.F.R. Part 745, Subpart D (§§ 745.61-745.65). 66 Fed. Reg. 1206 (Jan. 5, 2001). www.epa.gov/lead/pubs/leadhaz.htm.

¹⁷⁹ *Interpretive Guidance for the Federal Program TSCA Sections 402/403*, www.epa.gov/lead/pubs/interpguidance.htm.

¹⁸⁰ 40 C.F.R. § 745.61(c)(nothing requires owner to evaluate property or take any action to control conditions).

¹⁸¹ 40 C.F.R. § 745.65(d)(referencing work practice requirements under LBP Activities Rule). *See also* 40 C.F.R. § 745.227(h)(determinations).

¹⁸² For example, EPA issued a LBP hazard abatement order under RCRA Section 7003 (“imminent and substantial endangerment” authority) where children had lead poisoning and lead-dust levels exceeded the federal lead hazard standard. *In re: 17th Street Revocable Trust*, RCRA-3-2000-0001TH (2000). *See also*, Part IV.C of this book, *Resource Conservation and Recovery Act – Imminent Hazard Authority*.

¹⁸³ *See e.g.*, 66 Fed. Reg. 1206, 1210. *See also*, EPA, *Residential Lead Hazard Standards – TSCA Section 403*, www.epa.gov/lead/pubs/leadhaz.htm.

¹⁸⁴ 40 C.F.R. § 745.61(b)(applicability).

¹⁸⁵ 40 C.F.R. § 745.65(a). *See also* 40 C.F.R. § 745.63 (definitions).

¹⁸⁶ 40 C.F.R. § 745.65(b). *See also* 40 C.F.R. § 745.63 (definitions).

¹⁸⁷ 40 C.F.R. § 745.65(c). *See also* 40 C.F.R. § 745.63 (definitions). The measure “parts per million” (ppm) equates to $\mu\text{g}/\text{g}$. *See* 40 C.F.R. § 745.65(c).

(This book does not examine the technical methodologies for lead hazard determinations, or for other regulated activities such as sampling, testing, and clearance determinations.¹⁸⁸)

C. Lead-Based Paint Activities Rule

1. Overview

Section 402 of TSCA directed EPA to promulgate regulations for “lead-based paint activities” to:

- Ensure that training programs are accredited, and that contractors are certified (some states use the term “licensed”);
- Ensure that individuals engaged in these activities are trained; and
- Establish work practice standards.¹⁸⁹

With respect to target housing and COFs, the term “lead-based paint activities” means inspection, risk assessment, and abatement.¹⁹⁰ In short:

“Inspection” means “a surface-by-surface investigation to determine the presence of lead-based paint,” and providing a report explaining the results.¹⁹¹

“Risk assessment” means “an on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards” (*e.g.*, visual inspection, limited wipe sampling, gathering information about the housing), and providing a report with the results and hazard reduction options.¹⁹²

“Abatement” means “measures *designed to* permanently eliminate” LBP hazards, including:

- Removal of paint and dust, permanent enclosure or encapsulation of LBP, replacement of painted surfaces/fixtures, removal or permanent covering of soil;
- Related preparation, cleanup, disposal, and clearance testing; and
- Projects which purport to, or result in, permanent elimination of LBP hazards.¹⁹³

“Abatement” does *not* include:

- “Renovation, remodeling, landscaping or other activities” that are not designed to (but may incidentally) reduce or permanently eliminate LBP hazards; or
- Interim controls or other measures designed to temporarily reduce LBP hazards.¹⁹⁴

¹⁸⁸ The methodology may be a critical regulatory determinant, such as the number of samples that must be taken, or whether determinations may be based upon a single (rather than an average) result. *See e.g.*, 40 C.F.R. § 745.227(e)(8)(post-abatement clearance sampling). It is important to consult the applicable EPA (or HUD) rules and technical guidance for a particular regulated activity. *See e.g.*, 40 C.F.R. § 745.227(a)(citing various sources of information on work practice methodologies). *See also* www.epa.gov/lead/pubs/training.htm.

¹⁸⁹ 15 U.S.C. § 2682(a)-(b).

¹⁹⁰ 15 U.S.C. § 2682(b); 40 C.F.R. § 745.223.

¹⁹¹ 15 U.S.C. § 2681(7); 40 C.F.R. § 745.223.

¹⁹² 15 U.S.C. § 2681(16); 40 C.F.R. § 745.223.

¹⁹³ 15 U.S.C. § 2681(1); 40 C.F.R. § 745.223 (emphasis added).

¹⁹⁴ 15 U.S.C. § 2681(1); 40 C.F.R. § 745.223. *Compare* 40 C.F.R. § 745.83 (RRP Rule definition of “renovation” exempts activities performed as part of an abatement).

EPA published the LBP Activities Rule in 1996.¹⁹⁵ The federal program, which operates in eleven states, became fully effective in 2000.¹⁹⁶ The Agency has issued an interpretive guidance,¹⁹⁷ and extensive training material.¹⁹⁸ As of August 2008, 44 States/Tribal jurisdictions administer EPA-authorized LBP Activities programs.¹⁹⁹ (It is important to consult the appropriate State/Tribal authority for details regarding its respective program, because a State/Tribal program need not be identical to, and may be more stringent than, the federal program.)

2. Scope

The LBP Activities Rule applies to LBP activities in target housing and child-occupied facilities.²⁰⁰ It does not apply to LBP activities performed by a do-it-yourselfer on his/her own residence, unless a child identified as having an elevated blood-lead level resides there.²⁰¹ Federal entities are explicitly subject to the rule.²⁰²

The rule does not require anyone to undertake any particular LBP activity.²⁰³ Rather, the rule:

- Requires compliance with specified work practice standards,²⁰⁴ including post-abatement clearance testing to confirm that lead hazards have been eliminated.²⁰⁵
- Establishes certification procedures and requirements for firms, and individuals (inspectors, risk assessors, supervisors, abatement workers, and project designers).²⁰⁶
- Requires that LBP activities be performed by certified firms and individuals.²⁰⁷
- Establishes procedures and requirements for the accreditation of training programs, including curriculum requirements for training courses.²⁰⁸
- Imposes notification and recordkeeping requirements.²⁰⁹

See Fig. 7: *Basic Framework of the LBP Activities Rule*.

¹⁹⁵ 40 C.F.R. Part 745, Subpart L. 61 Fed. Reg. 45778 (Aug. 29, 1996), *as amended by* 64 Fed. Reg. 42849 (Aug. 6, 1999)(extending effective dates), www.epa.gov/lead/pubs/leadcert.htm.

¹⁹⁶ 64 Fed. Reg. 42849 (Aug. 6, 1999)(extending effective date for certification and work practices to Mar. 1, 2000).

¹⁹⁷ *Interpretive Guidance for the Federal Program TSCA Sections 402/403*, www.epa.gov/lead/pubs/interpguidance.htm.

¹⁹⁸ See www.epa.gov/lead/pubs/training.htm, www.epa.gov/lead/pubs/resourcecenter.htm, or www.epa.gov/lead/pubs/traincert.htm.

¹⁹⁹ See section III.D, below.

²⁰⁰ See *e.g.*, 40 C.F.R. § 745.223 (definition “lead-based paint activities”), § 745.227(e)(5)(work practice standards for dwellings and COFs).

²⁰¹ 40 C.F.R. § 745.220(b)(not applicable to a person performing LBP activities in the dwelling that the person owns, unless the dwelling is occupied by persons *other than* that owner or his/her immediate family).

²⁰² 40 C.F.R. § 745.220(c).

²⁰³ 40 C.F.R. § 745.220(d).

²⁰⁴ 40 C.F.R. § 745.220(a)(scope), § 745.227 (work practice standards), § 745.233 (requiring that LBP activities comply with work practice standards).

²⁰⁵ 40 C.F.R. § 745.227(e)(8)-(9)(post-abatement clearance).

²⁰⁶ 40 C.F.R. § 745.220(a), *referring to id.* § 745.226.

²⁰⁷ 40 C.F.R. § 745.220(a), § 745.233.

²⁰⁸ 40 C.F.R. § 745.220(a), *referring to id.* § 745.225.

²⁰⁹ *E.g.*, 40 C.F.R. § 745.225(i), § 745.226(f), § 745.227(i).

Fig. 7: Basic Framework of the LBP Activities Rule

Training	Licensing / Authorization	Work	Other Requirements
For individuals	<ul style="list-style-type: none"> • Training Program Accreditation • Individual Certification • Firm Certification 	Work Practice Standards	<ul style="list-style-type: none"> • Notification • Recordkeeping
All regulated work must be performed by certified individuals/firms.			

3. Work Practice Standards

The rule's work practice standards apply to:

- Inspections, abatements, risk assessments, and lead hazard screens (limited risk assessments)²¹⁰;
- Collection and analysis of samples²¹¹; and
- Lead-based paint determinations.^{212, 213}

4. Training and Certification

The rule provides for:

- Training for inspectors, risk assessors, supervisors, workers, and project designers²¹⁴;
- Certification for such individuals,²¹⁵ and re-certification every three or five years, as applicable²¹⁶; and
- Certification of firms conducting LBP activities (including the requirement to submit fees every three years to maintain certification).²¹⁷

5. Training Program Accreditation

For programs seeking accreditation to train inspectors, risk assessors, supervisors, workers, and project designers, the LBP Activities Rule establishes:

- Minimum curriculum requirements for initial and refresher training²¹⁸;
- Training program qualifications²¹⁹ and application procedures²²⁰;
- Recordkeeping requirements²²¹;

²¹⁰ 40 C.F.R. § 745.227(b)-(e).

²¹¹ 40 C.F.R. § 745.227(f). The rule also requires that paint, dust, and soil samples be analyzed by accredited laboratories. 40 C.F.R. § 745.227(f)(2).

²¹² 40 C.F.R. § 745.227(h).

²¹³ Generally, the methodology for each activity is specified in technical guidance and through training. *See e.g.*, 40 C.F.R. § 745.227(a)(external sources of technical information). Readers should consult the applicable guidance and training material. *See e.g.*, www.epa.gov/lead/pubs/training.htm.

²¹⁴ 40 C.F.R. § 745.225(d)(minimum training requirements).

²¹⁵ 40 C.F.R. § 745.226.

²¹⁶ 40 C.F.R. § 745.226(e)(recertification every 3 years if prior course, test and assessment; recertification every 5 years if course and proficiency test).

²¹⁷ 40 C.F.R. § 745.226(f).

²¹⁸ 40 C.F.R. § 745.225(d).

²¹⁹ 40 C.F.R. § 745.225(c).

²²⁰ 40 C.F.R. § 745.225(b).

- Provisions for re-accreditation (every four years)²²²; and
- Provisions for the suspension, revocation, and modification of accreditation.²²³

The RRP Rule amends the LBP Activities Rule's accreditation provisions to establish two new disciplines: renovator, and dust sampling technician (DST).²²⁴

- As of June 23, 2008, a training program “must not provide, offer, or claim to provide” training courses *for EPA certification* as a renovator or DST unless accredited.²²⁵
- Training programs *may apply* for accreditation starting April 22, 2009.²²⁶

Training providers seeking accreditation as renovator and DST trainers must do the following (in addition to meeting the other requirements under the LBP Activities Rule):

- Ensure that courses cover the requisite curriculum for these new disciplines, including the responsibilities and methodologies for each;
- Provide that initial courses last a minimum of eight hours (including two hours for hands-on training), and that refresher courses last a minimum of four hours; and
- Notify EPA (or the State/Tribe) of individuals who complete training (since individual certification is accomplished through successful completion of accredited training rather than by application to EPA or a State/Tribe).²²⁷

6. Recordkeeping and Notification

The LBP Activities Rule establishes recordkeeping requirements for firms and individuals,²²⁸ and training programs.²²⁹ Also, the rule requires notification to EPA:

- A training provider must notify EPA prior to, and upon completion of, a training course.²³⁰ (EPA inspectors audit training courses.)
- A certified firm must notify EPA prior to conducting LBP activities.²³¹

7. Enforcement

In addition to the general proscriptions under TSCA, the LBP Activities Rule makes it unlawful to:

- Obtain certification “through fraudulent representation”;
- Fail to obtain EPA certification and perform work “requiring certification at a job site”; or
- “Fraudulently obtain certification” and engage in LBP activities for which certification is required.²³²

²²¹ 40 C.F.R. § 745.225(i).

²²² 40 C.F.R. § 745.225(e).

²²³ 40 C.F.R. § 745.225(f)-(h).

²²⁴ See Part III.F, below.

²²⁵ 40 C.F.R. § 745.81(a)(1), § 745.225(a)(3).

²²⁶ 40 C.F.R. § 745.225(a)(1)-(2). A training provider might be able to apply earlier if the State/Tribal jurisdiction in which it seeks to operate has an EPA-authorized accreditation program in place before April 22, 2009.

²²⁷ 40 C.F.R. § 745.225. 73 Fed. Reg. 21692, 21726-21728, *supra* note 160.

²²⁸ See 40 C.F.R. § 745.226(f)(4), *referring to id.* § 745.227(i).

²²⁹ 40 C.F.R. § 745.225(i).

²³⁰ 40 C.F.R. § 745.225(c)(13)-(14). See also 69 Fed. Reg. 18489 (Apr. 8, 2004)(final notification rule).

²³¹ 40 C.F.R. § 745.227(e)(4).

²³² 40 C.F.R. § 745.235(d).

D. State and Indian Tribal Programs

1. Overview

Section 404 of TSCA²³³ permits States/Tribes²³⁴ to administer authorized TSCA programs under the PRE Rule, LBP Activities Rule, and RRP Rule.²³⁵ (The LBP Activities Rule is discussed in section III.C, above. The PRE and RRP Rules are examined in Sections III.E and III.F, below.) Under TSCA, State/Tribal programs must be at least as protective as EPA's program²³⁶ (but not necessarily identical to it²³⁷), and must provide for "adequate enforcement."²³⁸ EPA is empowered to provide federal funds to support authorized programs.²³⁹

EPA promulgated the State/Tribal Programs Rule in 1996.²⁴⁰ This rule is an "enabling" regulation (*i.e.*, provides the capability for States/Tribes to operate federal programs), but does not impose direct obligations upon the regulated community.

As of August 2008, EPA has authorized 44 programs pursuant to the State/Tribal Programs Rule.²⁴¹ Most of these programs operate under the LBP Activities Rule; a few administer the pre-existing PRE Rule. States/Tribes may apply for authority to administer RRP Rule programs starting June 23, 2008.²⁴²

For all authorized programs, the State/Tribal Programs Rule establishes:

- Application procedures and requirements for States/Tribes²⁴³;
- Provisions for EPA's review, approval, oversight, and withdrawal of authorization²⁴⁴;
- Required elements for compliance monitoring and enforcement²⁴⁵; and
- Public notice and comment.²⁴⁶

As explained below, additional requirements apply to each type of authorized program.

²³³ 15 U.S.C. § 2684.

²³⁴ See 15 U.S.C. § 2682(13)(State, District of Columbia, territories, possessions). See also 40 C.F.R. § 745.320.

²³⁵ See 15 U.S.C. § 2682, § 2686 (programs under TSCA Sections 402 and 406).

²³⁶ 15 U.S.C. § 2684(b)(1). Programs may be more stringent. *Id.* § 2684(e).

²³⁷ See *e.g.*, 73 Fed. Reg. 21692, 21748, *supra* note 160.

²³⁸ 15 U.S.C. § 2684(b)(2). 40 C.F.R. § 745.324(b)(2), (e)(2).

²³⁹ 15 U.S.C. § 2684(g).

²⁴⁰ 40 C.F.R. Part 745, Subpart Q (§§ 745.320-745.339). 61 Fed. Reg. 45825 (Aug. 29, 1996).

²⁴¹ This number includes 39 States, three Tribes, Puerto Rico, and Washington D.C. A list of authorized programs is available at www.epa.gov/lead/pubs/authstatus.pdf, and www.epa.gov/lead/pubs/traincert.htm. (The information on EPA's lead Internet page does not distinguish whether a State/Tribe operates a PRE program versus an LBP Activities program, but does provide hyperlinks to the Internet site for each State/Tribe.) The number of authorized States/Tribes (and, conversely, EPA-run jurisdictions) is subject to change because EPA is frequently engaged in the process of approving— and potentially withdrawing, on rare occasion — federal authorization of a State/Tribal program. Further information may be obtained from the appropriate EPA Regional Lead Coordinator. www.epa.gov/lead/pubs/leadoff1.htm.

²⁴² 73 Fed. Reg. 21692, 2174, *supra* note 160, *amending* 40 C.F.R. § 745.339. See also, section III.F, below.

²⁴³ 40 C.F.R. § 745.324(a)-(d). Rather than await EPA approval of an application for authorization, a State may certify with its application that its program meets the legal requirements. With such certification, the program is deemed authorized unless EPA disapproves the application or withdraws the authorization. 40 C.F.R. § 745.324(d).

²⁴⁴ 40 C.F.R. § 745.324(e)-(i).

²⁴⁵ 40 C.F.R. § 745.327.

²⁴⁶ 40 C.F.R. § 745.324(a), (e).

2. State/Tribal Programs: LBP Activities

LBP Activity programs administered by a State/Tribe must include:

- Procedures and requirements for the accreditation of training programs, including training curriculum requirements;
- Procedures and requirements for certification of individuals *and/or* firms²⁴⁷;
- Work practice standards; and
- Requirements that LBP activities be conducted by certified contractors.²⁴⁸

See e.g., Fig. 7: Basic Framework of the LBP Activities Rule.

If a State/Tribe wants to accredit programs for RRP Rule renovators and DSTs, then its program must comply with the additional accreditation requirements for these new disciplines. (*See* section III.C.5, above.)

3. State/Tribal Programs: Pre-renovation Education, and Renovation, Repair, and Painting

Several States/Tribes administer programs under the pre-existing PRE Rule. These programs must include procedures and requirements for the distribution of lead hazard information to owners/occupants of target housing before beginning regulated renovations.²⁴⁹ EPA's new RRP Rule revised certain aspects of the PRE Rule (*e.g.*, extended information distribution requirements to renovations in COFs, and revised the exception for "minor" renovation activities).²⁵⁰ Authorized State/Tribal programs under the PRE Rule will need to comport with the rule as modified.²⁵¹

A State/Tribe may administer either the PRE program (as modified), or the RRP program *without* the PRE components (*i.e.*, training, certification, accreditation, and work practice requirements) – or the combined PRE and RRP programs.²⁵² State/Tribal RRP programs must include:

- Procedures and requirements for accrediting training programs for renovators and DSTs;
- Procedures and requirements for the certification of individuals *and/or* firms;
- Work practice standards; and
- Requirements that all renovations be conducted by certified individuals and firms.²⁵³

²⁴⁷ *See e.g.*, 73 Fed. Reg. 21692, 2174, *supra* note 160 (EPA does not require State/Tribal LBP Activities programs to certify both firms and individuals).

²⁴⁸ 40 C.F.R. § 745.325.

²⁴⁹ 40 C.F.R. § 745.326(a).

²⁵⁰ *See* Part III.F, below.

²⁵¹ *See e.g.*, 40 C.F.R. § 745.326.

²⁵² 40 C.F.R. § 745.320(c).

²⁵³ 40 C.F.R. § 745.326(a).

E. Pre-renovation Education Rule

1. Overview

TSCA Section 406(b) directed EPA to promulgate regulations to require any person “who performs *for compensation* a renovation in target housing” to distribute a lead hazard information pamphlet to the owner and occupant prior to commencing the renovation.²⁵⁴ On June 1, 1998, EPA published the Pre-renovation Education Rule (PRE Rule),²⁵⁵ sometimes called the “406(b) Rule.” The rule became effective June 1, 1999.²⁵⁶ EPA also has issued four interpretive guidance documents.²⁵⁷

2. Requirements

The PRE Rule requires that a renovator provide lead hazard information *before* (not after) conducting renovation activities, and verify compliance with this obligation. In short, the renovator must:

- Provide EPA’s *Protect Your Family from Lead in Your Home* (*Protect Your Family*)²⁵⁸ pamphlet to owners and occupants of target housing “no more than 60 days before beginning renovation activities”;
- Obtain from the owner/occupant written acknowledgement of receipt of the pamphlet (or provide other records to verify compliance with the rule); and
- Retain compliance records, and make them available to EPA, for at least three years.²⁵⁹

EPA’s RRP Rule both modifies the PRE Rule, and makes the formerly free-standing PRE Rule a constituent of the new rule.²⁶⁰ (Therefore, the details of the PRE Rule are discussed below, within the context of the RRP Rule.)

F. Renovation, Repair, and Painting Rule

1. Background

TSCA Section 402(c)(3) directed EPA to revise its regulations for lead-based paint activities “to apply the regulations to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.”²⁶¹

²⁵⁴ 15 U.S.C. § 2686(b)(emphasis added).

²⁵⁵ 40 C.F.R. Part 745, Subpart E (§§ 745.80 – 745.88). 63 Fed. Reg. 29907 (June 1, 1998), www.epa.gov/fedrgstr/EPA-TOX/1998/June/Day-01/t14437.htm.

²⁵⁶ 40 C.F.R. § 745.81.

²⁵⁷ These are:

- *Interpretive Guidance, Part I* (May 28, 1999), and *Correction to Interpretive Guidance, Part I* (May 28, 1999);
- *Interpretive Guidance, Part II* (Oct. 15, 1999);
- *Interpretive Guidance, Part III* (Jan. 2, 2002); and
- *Interpretive Guidance, Part IV* (Jan. 24, 2005). See www.epa.gov/lead/pubs/leadrenf.htm.

²⁵⁸ See www.epa.gov/lead/pubs/leadbase.htm, www.epa.gov/lead/pubs/leadprot.htm, or www.hud.gov/offices/lead/enforcement.

²⁵⁹ 40 C.F.R. Part 745, Subpart E.

²⁶⁰ Most of the provisions of the RRP Rule are codified at the subpart formerly occupied by the PRE Rule, 40 C.F.R. Part 745, Subpart E.

²⁶¹ 15 U.S.C. § 2682(c)(3), referring to 15 U.S.C. § 2682(a) and 40 C.F.R. § 745, Subpart L.

On April 22, 2008, EPA published the final Renovation, Repair, and Painting Rule.²⁶² The RRP Rule took effect June 23, 2008, but the various obligations will be phased in over two years, as discussed below. Hence, the RRP Rule will be *fully* effective April 22, 2010.²⁶³

Also on April 22, 2008, EPA published notice of its new renovation-specific lead hazard information pamphlet, *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* (*Renovate Right*).²⁶⁴ As explained below, effective December 22, 2008, the RRP Rule requires distribution of the new *Renovate Right* pamphlet, rather than the *Protect Your Family* pamphlet, prior to renovation activities.²⁶⁵

2. Overview

Scope

The RRP Rule applies to target housing *and* child-occupied facilities²⁶⁶ – and covers “all types of building renovation, repair, and painting projects . . . so long as painted surfaces are disturbed.”²⁶⁷ (An outline of the numerous provisions of the RRP Rule discussed in this chapter is set out in Fig. 9: *Summary of RRP Rule*, below.)

The rule is designed to ensure that:

- Owners and occupants of target housing and COFs receive LBP hazard information before renovations begin;
- Persons performing renovations covered by the rule are properly trained and follow lead-safe work practices; and
- Renovation firms, renovators, and DSTs are certified.²⁶⁸

The rule aims to minimize exposure to LBP hazards and dust *created during renovations* – but *not* to make renovation firms responsible for the cleanup of pre-existing hazards.²⁶⁹ The rule relies on the “combined effectiveness” of training, containment, cleaning, and cleaning verification.²⁷⁰ It employs a so-called “white glove” comparison (cleaning verification), rather than clearance testing, to verify adequate post-renovation cleanup.²⁷¹ (Clearance testing is allowed if required under a contract or another law, *and* it comports with

²⁶² 73 Fed. Reg. 21692, *supra* note 160. The final rule generally follows the Proposed Rule, as modified by the Supplemental Proposed Rule to cover child-occupied facilities. 71 Fed. Reg. 1588 (Jan. 10, 2006)(proposed rule) and 72 Fed. Reg. 31022 (June 5, 2007)(supplemental rule).

²⁶³ See 40 C.F.R. § 745.81. 73 Fed. Reg. 21692, 21748, *supra* note 160.

²⁶⁴ See 73 Fed. Reg. 21769 (Apr. 22, 2008). EPA also has developed an informational pamphlet for contractors, *Contractors Lead Safety During Renovation*, www.epa.gov/lead/pubs/renovation.htm#tenants.

²⁶⁵ See sections III.F.4-3 and 4-4, below.

²⁶⁶ The RRP applies only to target housing and COFs although TSCA Section 402(c)(3) also directed EPA to regulate renovations in pre-1978 “public buildings” and in “commercial buildings” that create LBP hazards. 15 U.S.C. § 2682(c)(3). EPA has determined that it does not have sufficient information with which to conclude that renovations in buildings not frequented by young children create LBP hazards. 73 Fed. Reg. 21692, 21707, *supra* note 160.

²⁶⁷ 73 Fed. Reg. 21692, 21709, *supra* note 160.

²⁶⁸ 40 C.F.R. § 745.80.

²⁶⁹ 73 Fed. Reg. 21692, 21701, 21739-40, *supra* note 160.

²⁷⁰ 73 Fed. Reg. 21692, 21700, 21738, *supra* note 160.

²⁷¹ 73 Fed. Reg. 21692, 21736-21743, *supra* note 160.

other requirements of the RRP Rule.) Also, the RRP Rule does not supersede more stringent federal, state, or local requirements for renovations.²⁷²

Affected Entities

The RRP Rule covers entities that typically perform renovations, such as home improvement contractors – and those that do not, such as property owners and managers, school districts, and non-profit organizations that perform property maintenance or other activities within the purview of the rule. Affected entities include:

- Builders, building inspection services;
- Contractors (*e.g.*, painters; plumbers; electricians; and heating/air conditioning, drywall, carpentry, tile, and glass contractors);
- Property managers and maintenance workers;
- Child-care services, schools with kindergarten or pre-school classrooms; and
- Technical and trade schools, and other training providers.²⁷³

EPA estimates that the RRP Rule will apply to approximately 38 million properties²⁷⁴ and 200,000 entities²⁷⁵ -- and that the rule's lead-safe work practices will be required in 8.4 million projects the first year the rule is fully implemented (2010).²⁷⁶

These staggering numbers have obvious implications for EPA's inspection and enforcement programs for the RRP Rule, and probably for other LBP rules as well, since EPA will need to focus limited resources strategically for the most effective impact on a large regulated universe.²⁷⁷

Regulatory Framework

EPA will operate the RRP Rule program nationwide, except where States/Tribes obtain authorization to administer and enforce RRP programs within their respective jurisdictions.²⁷⁸

The rule contemplates four levels of qualification for the regulated community – all of which flow from having accredited training programs in place (thus, training accreditation is the initial activity on the rule's implementation schedule), *i.e.*:

- Training programs -- must obtain *accreditation*, by application to EPA (or a State/Tribe).²⁷⁹
- Renovation Firms -- must obtain *certification*, by application to EPA (or a State/Tribe).²⁸⁰ A “firm” may

²⁷² 73 Fed. Reg. 21692, 21744, 21748, *supra* note 160. Several states regulate renovations, such as California, Colorado, Indiana, Iowa, Maine, Massachusetts, Michigan, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin, Wyoming. *See e.g.*, EPA, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities* (March 2008), www.regulations.gov.

²⁷³ 73 Fed. Reg. 21692, 21752, *supra* note 160.

²⁷⁴ 73 Fed. Reg. 21692, 21750, *supra* note 160.

²⁷⁵ 73 Fed. Reg. 21692, 21753, *supra* note 160 (189,000 small entities alone).

²⁷⁶ 73 Fed. Reg. 21692, 21750, *supra* note 160. EPA estimates 4.4 million regulated projects annually once improved test kits for “lead-free” determinations become available in 2011. *Id.*

²⁷⁷ *See* Part VI of this book, *Federal Lead-Based Paint Enforcement Programs*.

²⁷⁸ *See* section III.D, above.

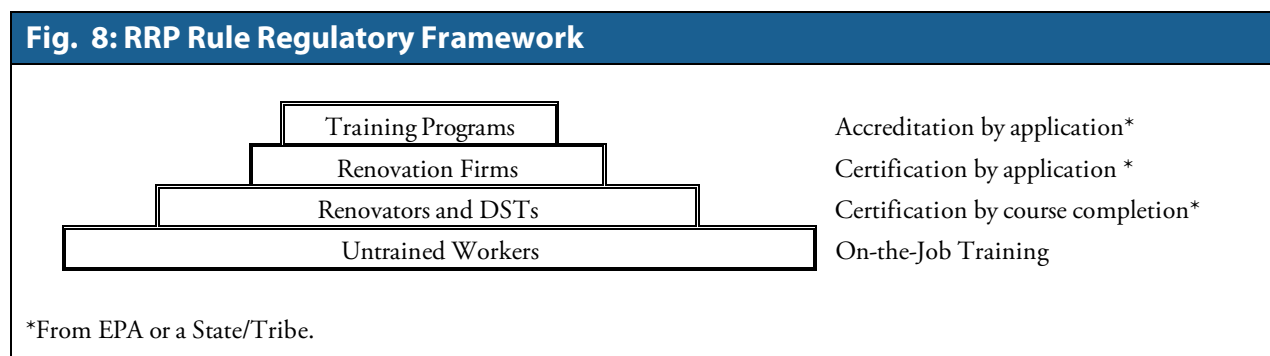
²⁷⁹ 40 C.F.R. § 745.81(a)(1); § 745.225(a)(3).

be a company; partnership; corporation; sole proprietorship; association; non-profit organization; or federal, state, tribal, or local government.²⁸¹

- Renovators and DSTs – must obtain *certification*, by completing accredited training (not by application to EPA or a State/Tribe).²⁸² Every renovator must be affiliated with a renovation firm. Therefore, an individual who performs renovations on his/her own must obtain both firm certification, and renovator certification.
- Workers – must receive on-the-job training from certified renovators.²⁸³

See Fig. 8: RRP Rule Regulatory Framework.

A State/Tribe may seek authorization to operate the PRE program, *and/or* the RRP program (*i.e.*, the RRP Rule’s training, certification, accreditation, work practice requirements).²⁸⁴ These programs must be at least as protective as EPA’s program (but not necessarily identical²⁸⁵), and must provide for adequate enforcement.²⁸⁶ The rule does not contemplate an extension of the implementation deadlines. Therefore, if a State/Tribe has not obtained authorization by April 22, 2009 (the date by which training programs may apply for accreditation), then EPA will implement the RRP program in that jurisdiction²⁸⁷ (even if the State/Tribe is in the process of seeking authorization, unless EPA extends this implementation deadline).



3. Relationship Between the RRP Rule and Other LBP Regulations

The RRP Rule modifies three TSCA LBP regulations:

- The PRE Rule;
- The LBP Activities Rule²⁸⁸; and
- The State/Tribal Programs Rule.²⁸⁹

²⁸⁰ 40 C.F.R. § 745.89(a)(1).

²⁸¹ 40 C.F.R. § 745.83.

²⁸² 40 C.F.R. § 745.90(a).

²⁸³ 40 C.F.R. § 745.90(b).

²⁸⁴ 40 C.F.R. §§ 745.320(c), 745.339. 73 Fed. Reg. 21692, 21746-21747, *supra* note 160. See also 15 U.S.C. § 2684(a).

Several State/Tribes already operate authorized PRE Rule programs. www.epa.gov/lead/pubs/traincert.htm. (The map at this internet page does not distinguish whether the State/Tribe operates a program under the PRE Rule and/or LBP Activities Rule, but does provide hyperlinks to the internet page for each State/Tribe.)

²⁸⁵ 73 Fed. Reg. 21692, 21748, *supra* note 160.

²⁸⁶ 15 U.S.C. § 2684(b). 40 C.F.R. § 745.324.

²⁸⁷ See 40 C.F.R. § 745.324(f)(2).

²⁸⁸ 40 C.F.R. Part 745 Subpart L. The RRP Rule modified the training program accreditation provisions of the LBP Activities Rule. 40 C.F.R. § 745.220, § 745.225. See also section III.C, above.

²⁸⁹ 40 C.F.R. Part 745 Subpart Q. The RRP Rule added provisions for State/Tribal RRP programs. 40 C.F.R.

The RRP Rule does not modify TSCA's Lead Hazard Standard, the Disclosure Rule, the Lead Safe Housing Rule,²⁹⁰ or RCRA Section 7003.²⁹¹

The final RRP Rule was published as only amendments to the pre-existing regulations. Pending publication of the updated Code of Federal Regulations, the National Center for Healthy Housing produced an unofficial version of the full, revised regulations.
www.centerforhealthyhousing.org/html/eparule.htm.

EPA attempted to “harmonize” the RRP Rule with the pre-existing requirements of the PRE Rule.²⁹² The RRP Rule, however, both amends the PRE rule and adds significantly to it (making the PRE Rule a component of the new rule). For example, the RRP Rule:

- Applies PRE (and other requirements) to renovations in COFs, as well as in target housing;
- Imposes work practice standards for renovations;
- Creates two new disciplines, renovators and DST, and requires certification for each;
- Requires certification for renovation firms;
- Provides new PRE options for renovations in common areas; and
- Adds new notification and recordkeeping requirements.

§ 745.320, § 745.324, § 745.326, § 745.327, § 745.339. *See also* section III.D, above.

²⁹⁰ Some of HUD's interim controls are regulated under the RRP Rule as renovations. In most cases, the HUD regulations are comparable to or more stringent than the RRP Rule. The RRP Rule, however, does not *require* dust clearance testing, which may be required by HUD after interim control activities. 73 Fed. Reg. 21692, 21753, *supra* note 160. The RRP Rule allows clearance testing *in lieu of* post-renovation cleaning verification *provided* the testing comports with RRP Rule requirements. 40 C.F.R. § 745.85(c). *See section* III.F.4-5, below.

²⁹¹ The RRP Rule does not affect the disposal of waste from renovation projects, which is regulated as solid waste under RCRA. 73 Fed. Reg. 21692, 21753, *supra* note 160. *See also*, Part I.B of this book, *Resource Conservation and Recovery Act – Waste from Residential Lead-Based Paint Renovations and Abatements*.

²⁹² 73 Fed. Reg. 21692, 21753, *supra* note 160.

4. Summary of Provisions

Fig. 9: Summary of RRP Rule Provisions

<p>4-1. Important Terms Renovation Child-occupied Facility</p> <p>4-2. Applicability and Exemptions Overview Specific Exemptions - Lead-free Components - Emergency Renovations - Owner-Occupant Opt-Out Exemption Fig. 12: <i>RRP Rule Exemptions</i></p> <p>4-3. Effective and Implementation Dates Overview Implementation Schedule - Pre-renovation Education for COFs - Lead Hazard Information Pamphlets - Training Program Accreditation - Firm Certification - Individual Certification; Worker Training - Work Practice Standards and Recordkeeping - State/Tribal Authorization Fig. 13: <i>RRP Rule Implementation Dates</i></p> <p>4-4. Pre-renovation Education Overview Requirements - Renovations in Dwelling Units in Target Housing - Renovations in Common Areas in Multi-Unit Target Housing - Renovations in Child-Occupied Facilities Written Acknowledgement</p> <p>4-5. Work Practice Standards Standards for Renovation Activities - General Requirements - Occupant Protection (Warning Signs) - Work Area Containment -- All Renovations -- Interior Renovations – Additional Requirements -- Exterior Renovations – Additional Requirements - Prohibited Practices - Renovation Waste - Cleaning the Work Area (continued, next column)</p>	<p>4-5. Work Practice Standards (continued) Post-renovation Visual Inspection: - Interior Renovations - Exterior Renovations Post-renovation Cleaning Verification - Overview - Windowsills - Bare Floors and Countertops Optional Dust Clearance Testing Fig. 14: <i>RRP Rule Post-renovation Cleaning Verification</i></p> <p>4-6. Recordkeeping Requirements Overview Records to be Retained Information to Customers</p> <p>4-7. Enforcement and Inspections</p> <p>4-8. Recognized Test Kits Overview Negative Test Kits Positive-Negative Test Kits Recognition Process</p> <p>4-9. Firm Certification and Responsibilities Certification, Recertification, Amendments Firm Responsibilities Certification Suspension, Revocation and Modification</p> <p>4-10. Individual Certification and Responsibilities Certification and Recertification “Grandfathering” Renovator Responsibilities Dust Sampling Technician Responsibilities Certification Suspension, Revocation, Modification Fig. 15: <i>“Grandfathering” Provisions</i></p>
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4-1. Important Terms

The RRP Rule introduces new regulatory terms, and substantively modifies existing ones. “Renovation” and “child-occupied facility” are seminal terms. (Other terms are discussed below in the context within which they appear in the rule.)

“Renovation”

“Renovation” means “modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces” unless part of an abatement.²⁹³

The RRP Rule and PRE Rule cover a “virtually identical” universe of activities,²⁹⁴ except for a change in the exclusion for “minor” activities (explained below). To clarify the broad reach of the new rule,²⁹⁵ however, EPA has provided a more extensive illustration of covered projects. See Fig. 10: *Comparison: Definition of “Renovation.”* Therefore, the term “renovation” *explicitly* includes:

- Removal, modification, *and repair* of painted surfaces or components²⁹⁶ (*e.g.*, modification of painted doors; and dust-generating surface preparation, such as sanding and scraping);
- Removal of “building components,” such as walls, ceilings, plumbing, windows;
- Window repair;
- Surface restoration;
- Weatherization projects (*e.g.*, cutting holes to blow-in insulation or access attics; planing thresholds for weather-stripping);
- Renovation to convert a building (or part thereof) into target housing or a COF; and
- “Interim controls that disturb painted surfaces.”²⁹⁷

“Interim controls” are “measures designed to temporarily reduce human exposure or likely exposure” to LBP hazards, including “specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring” of LBP hazards or potential hazards, and “resident education programs.”²⁹⁸

“Renovation” *excludes* “minor repair and maintenance activities”²⁹⁹ (sometimes called the “*de minimis* exception”).

“Minor” activities mean those which:

- Disrupt a painted surface of six square feet or less (≤ 6 ft.²) for interior activities, or 20 square feet or less (≤ 20 ft.²) for exterior activities,³⁰⁰ *and*

²⁹³ 40 C.F.R. § 745.83.

²⁹⁴ 73 Fed. Reg. 21692, 21708, *supra* note 160.

²⁹⁵ 73 Fed. Reg. 21692, 21709, *supra* note 160 (“all types” of renovations if paint is disturbed).

²⁹⁶ The RRP Rule added “repair” to the prior definition.

²⁹⁷ 40 C.F.R. § 745.83.

²⁹⁸ 40 C.F.R. § 745.83. Interim controls for an elevated blood-lead level (EBLL) child are partially exempt from the rule. 40 C.F.R. § 745.82(b). See also section III.F.4-2, below.

²⁹⁹ 40 C.F.R. § 745.83 (*e.g.*, minor heating, ventilation, or air conditioning work, electrical work, and plumbing).

³⁰⁰ Under the former PRE Rule, the measure for “minor” exempt activities was two (2) square feet or less. *Formerly*, 40 C.F.R. § 745.82(b)(1).

- Do *not* involve any prohibited work practices,³⁰¹ window replacement, or demolition.³⁰²

In calculating whether a project qualifies for this exception:

- Non-emergency jobs in the same room within 30 days are a considered the same job³⁰³; and
- When removing painted components (*e.g.*, baseboards or doors), the amount of surface area disturbed is the “entire surface area removed,” rather than merely the so-called “*cut-line*” around the perimeter of the component.

³⁰¹ See 40 C.F.R. § 745.85(a)(3)(torching, paint removal via high speed operation, heat gun $\geq 1,100^{\circ}\text{F}$). See section III.F.4-5, below.

³⁰² 40 C.F.R. § 745.83.

³⁰³ 40 C.F.R. § 745.83. The RRP Rule discourages “segmenting” larger jobs into smaller ones to come within the “minor” activities exemption.

Fig. 11: Comparison - Definition of “Renovation”

Renovation, Repair and Painting Rule³⁰⁴	Pre-renovation Education Rule³⁰⁵
<p><i>Renovation</i> means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR § 745.223).</p>	<p><i>Renovation</i> means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223).</p>
<p>The term renovation includes (but is not limited to):</p> <ul style="list-style-type: none"> • the removal, modification or repair of painted surfaces or painted components (<i>e.g.</i>, modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); • the removal of building components (<i>e.g.</i>, walls, ceilings, plumbing, windows); • weatherization projects (<i>e.g.</i>, cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather-stripping), and interim controls that disturb painted surfaces. • A renovation performed for the purpose of converting a building, or part of a building, into target housing or a child-occupied facility is a renovation under this subpart. 	<p>The term renovation includes (but is not limited to):</p> <ul style="list-style-type: none"> • the removal or modification of painted surfaces or painted components (<i>e.g.</i>, modification of painted doors, surface_preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); • the removal of large structures (<i>e.g.</i>, walls, ceiling, large surface replastering, major re-plumbing); and window replacement.
<p>The term renovation does not include minor repair and maintenance activities.</p>	

“Child-Occupied Facility”³⁰⁶

Under the RRP Rule (and the LBP Activities Rule³⁰⁷), a “child-occupied facility” is any pre-1978 building (or portion thereof) – such as “day care centers, preschools and kindergarten classrooms” – that is visited regularly by the same child (under six years of age) at least two different days a week, for at least three hours per day, and the combined weekly visits last at least six hours, and combined annual visits last at least 60 hours.³⁰⁸

Also, the definition states that a COF may be located:

³⁰⁴ 40 C.F.R. § 745.83.

³⁰⁵ 40 C.F.R. (former PRE Rule definition).

³⁰⁶ EPA’s Supplemental Proposed Rule added COFs to the RRP Rule. 72 Fed. Reg. 31022 (June 5, 2007).

³⁰⁷ See 40 C.F.R. § 745.227.

³⁰⁸ 40 C.F.R. §§ 745.83, 745.223.

- In target housing (*including* that of an unpaid care-giver, such as a relative³⁰⁹); or
- In a public or commercial building, in which case the COF also encompasses:
 - Common areas routinely used by the children (*e.g.*, restrooms, cafeterias) – but not areas that children only pass through (*e.g.*, hallways, stairways, garages); and
 - The exterior sides of the building immediately adjacent to the COF or common areas routinely used by children.³¹⁰

See Fig. 11: *Comparison: Definition of “Child-occupied Facility.”*

Fig. 11: Comparison - Definition of “Child-occupied Facility”	
<p>Renovation, Repair, and Painting Rule³¹¹</p> <p><i>Child-occupied facility</i> means a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week (Sunday through Saturday period), provided that each day’s visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day care centers, preschools and kindergarten classrooms. Child-occupied facilities may be located in target housing or in public or commercial buildings.</p> <p>With respect to common areas in public or commercial buildings that contain child-occupied facilities, the child-occupied facility encompasses only those common areas that are routinely used by children under age 6, such as restrooms and cafeterias. Common areas that children under age 6 only pass through, such as hallways, stairways, and garages are not included. In addition, with respect to exteriors of public or commercial buildings that contain child-occupied facilities, the child-occupied facility encompasses only the exterior sides of the building that are immediately adjacent to the child-occupied facility or the common areas routinely used by children under age 6.</p>	<p>Lead-Based Paint Activities Rule³¹²</p> <p><i>Child-occupied facility</i> means a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day’s visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day-care centers, preschools and kindergarten classrooms.</p>

³⁰⁹ Whether a property is a COF depends upon the time the child spends there, not compensation. 73 Fed. Reg. 21692, 21707, *supra* note 160.

³¹⁰ 40 C.F.R. § 745.83. The LBP Activities Rule also covers common areas, but this is not set forth in the definition of child-occupied facilities. See *e.g.*, 40 C.F.R. § 745.227(b)(2)(ii)(LBP inspections in COF common areas).

³¹¹ 40 C.F.R. § 745.83.

³¹² 40 C.F.R. § 745.223.

4-2. Applicability and Exemptions

Overview

The RRP Rule applies to “all *renovations performed for compensation*” in *target housing* and *child-occupied facilities*.³¹³

Therefore, *by its own terms*, the rule does not apply to:

- Abatements, which are excluded from the definition of “renovation”³¹⁴;
- Renovations in “0-bedroom dwellings” and *most* housing for the elderly or disabled, since these are not “target housing”³¹⁵;
- “Do-it-yourself” renovations performed in one’s own residence, since the work is not performed “for compensation”³¹⁶;
- Completely unpaid (volunteer) renovations³¹⁷; and
- “Minor repair and maintenance activities,” which are excluded from the term “renovation,”³¹⁸ as explained above.

Specific Exemptions

The RRP Rule explicitly provides full or partial exemptions for:

- Renovations that affect only so-called “lead-free” components (as explained below);
- Emergency renovations; and
- Renovations where an owner-occupant elects to “opt-out” of certain requirements.

See Fig. 12: *RRP Rule Exemptions*.

○ Lead-free Components

The rule exempts renovations properly determined to affect only components that are “free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm² or 0.5% by weight”³¹⁹ (herein, “lead-free”), *i.e.*, where:

- A certified inspector or risk assessor makes a written determination that affected “components” are lead-free, *and* the renovation firm obtains a copy of that determination³²⁰; or
- A certified renovator, properly using “an EPA recognized test kit,” determines that *each* affected component is lead-free.³²¹ (The RRP Rule also requires that the renovator give the customer³²²

³¹³ 40 C.F.R. § 745.82.

³¹⁴ 40 C.F.R. § 745.83. Abatements are regulated under the LBP Activities Rule. 40 C.F.R. Part 745, Subpart L.

³¹⁵ 15 U.S.C. § 2681(17). Housing for the elderly or disabled *lose* their exemption and fall *within* the definition of “target housing” if “any child who is less than 6 years of age resides or is expected to reside in such housing.” 24 C.F.R. § 35.86; 40 C.F.R. § 745.103 (Disclosure Rule). See also 40 C.F.R. § 745.223 (LBP Activities Rule).

³¹⁶ Do-it-yourself renovations that an owner performs on rental property are subject to the rule, since the rental proceeds are considered “compensation.” EPA plans to conduct outreach and education to encourage owners to use lead-safe work practices, or hire certified firms to do so. 73 Fed. Reg. 21692, 21702, *supra* note 160.

³¹⁷ In EPA’s view, if *anyone* performing a renovation is paid to do so, then the person *and* his/her employer must comply with the rule. For example, if a non-profit organization pays some workers to conduct a renovation, then the renovation is covered by the rule, even if the non-profit itself is not paid.

³¹⁸ 40 C.F.R. § 745.83. See section III.F.4-1, above.

³¹⁹ 40 C.F.R. § 745.82(a). 73 Fed. Reg. 21692, 21711, *supra* note 160. See also Part I.B.4 of this book, *Introduction – Federal Lead-Based Paint Enforcement Bench Book – Terms in this Bench Book*.

³²⁰ 40 C.F.R. § 745.82(a)(1). 73 Fed. Reg. 21692, 21711, *supra* note 160. The LBP Activities Rule establishes the protocol for LBP determinations in the context of an abatement, inspection, or risk assessment. 40 C.F.R. § 745.227(h). The RRP Rule, however, does not specify whether the lead-free determination for purposes of the rule’s exemption must be made in accordance with the protocol under the LBP Activities Rule.

the test results and other information within 30 days of completing the renovation.³²³ Also, the Disclosure Rule requires disclosure of results to future tenants and buyers.³²⁴)

“Components” are “specific design or structural elements or fixtures” of the interior or exterior of a building, such as ceilings, molding, walls, doors, door trim, floors, radiators, stairs, newel posts, windows and trim, shelves, built in cabinets, counter tops, painted roofing, chimneys, flashing, gutters, downspouts, soffits, bulkheads, fences, railings, siding, stairs, columns, and air conditioners.³²⁵

A “recognized test kit” is a “commercially available kit recognized by EPA” as capable of allowing a user to determine the presence of lead at regulatory levels in a paint chip, paint powder, or painted surface.³²⁶

- Emergency Renovations

Emergency renovations are unplanned activities that “result from a sudden, unexpected event” (such as equipment failure) that “if not immediately attended to, presents a safety or public health hazard” or threatens “significant damage” to equipment and/or property.³²⁷

All emergency renovation are exempt from the pre-renovation education requirements.³²⁸

Interim controls that are *performed in response to an elevated blood-lead level* in a resident child are emergency renovations – but are exempt only from pre-renovation education requirements.³²⁹

Other emergency renovations are:

- Exempt, “to the extent necessary to respond to the emergency,” from warning sign, containment, waste handling, training, and certification requirements; and
- *Not* exempt from the cleaning, cleaning verification, and recordkeeping requirements.³³⁰

³²¹ 40 C.F.R. § 745.82(a)(2). 73 Fed. Reg. 21692, 21711, *supra* note 160.

³²² The RRP Rule directs information to “the person who contracted for the renovation.” 40 C.F.R. § 745.86.

³²³ 40 C.F.R. § 745.86(c). See section III.F.4-6, below.

³²⁴ 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4). See also section III.F.4-6 below.

³²⁵ 40 C.F.R. § 745.83. See also 40 C.F.R. § 745.223 (components defined).

³²⁶ 40 C.F.R. § 745.83 (levels “equal to or in excess of 1.0 mg/cm², or more than 0.5% by weight”). This measure may be a typographical error and probably should be “equal to or in excess of 1.0 mg/cm² or 0.5% by weight,” which is the measure for the RRP Rule’s so-called lead-free exemption (§ 745.82(a)) and test kit response criterion (§ 745.88(c)). Minor technical discrepancies in the various definitions of “lead-based paint” are discussed in Part I.B.4 of this book, *Introduction – Federal Lead-Based Paint Enforcement Bench Book – Terms in this Bench Book*.

³²⁷ 40 C.F.R. § 745.82(b).

³²⁸ *Id.* See also 40 C.F.R. § 745.84 (PRE).

³²⁹ 40 C.F.R. § 745.82(b). See also 73 Fed. Reg. 21692, 21715, *supra* note 160. Interim controls *not* performed for an EBL child do not fall within the emergency exemption.

³³⁰ 40 C.F.R. § 745.82(b). Firms must comply with additional recordkeeping requirements pertaining to emergency renovations. See 40 C.F.R. § 745.86(b)(7).

○ Owner-Occupant Opt-out Exemption

The training requirements and work practice standards do not apply to renovations at owner-occupied target housing, *provided* the firm obtains the owner’s written declaration that:

- The renovation will occur in the owner’s residence;
- No child under age six “resides” there;
- No pregnant woman resides there;
- The housing is not a COF; and
- The owner acknowledges that the renovation may not follow lead safe work practices.³³¹

For this exemption, a child “resides” in the primary residence of his/her parents or legal guardians – and in the primary residence of an informal caretaker if the child lives and sleeps there most of the time.³³²

The owner’s statement also must:

- Be signed and dated;
- Include the owner’s name, and the address of the affected unit; and
- Be in the same language as any renovation contract.³³³

EPA has developed a sample statement form.³³⁴

Fig. 12: RRP Rule Exemptions (<i>X indicates requirements that do <u>not</u> apply to specific renovations</i>)				
	“Lead-free” Components	Emergency Renovations:		Owner Opt-out
		Interim Controls for EBLI Child	Other	
Training (§ 745.90)	Completely exempt when component properly determined to be “lead-free.”		X*	X
Firm Certification (§ 745.89)				
Pre-renovation Education (§ 745.84)		X	X	
Work Practices (§ 745.85)				X (Fully exempt from § 745.85 requirements)
• Warning Signs			X *	
• Containment			X *	
• Waste Handling			X *	
• Cleaning				
• Cleaning Verification				
Recordkeeping (§745.86)				
* Exempt only to extent necessary to respond to emergency.				

³³¹ 40 C.F.R. § 745.82(c).

³³² 40 C.F.R. § 745.82(c).

³³³ 40 C.F.R. § 745.86(b)(6).

³³⁴ *Future Sample Pre-renovation Form*, www.epa.gov/lead/pubs/renovation.htm#tenants.

4-3. Effective and Implementation Dates³³⁵

Overview

The RRP Rule becomes effective June 23, 2008 -- at which time, pre-renovation education applies to COFs, the new standard for exempt “minor” activities applies; and training programs cannot claim to provide training for RRP Rule certification unless accredited (although accreditation will *not* be available before April 2009).³³⁶

Implementation of other elements of the rule will be phased-in over the next two years. EPA will delay administering training program accreditation (and other requirements) until April 2009,³³⁷ to give States/Tribes time to develop authorized programs.³³⁸ Full compliance with the rule’s obligations (training, certification, work practices, and recordkeeping) is required as of April 22, 2010.³³⁹ See Fig. 13: *RRP Rule Implementation Dates*.

Implementation Schedule

- Pre-renovation Education for Child-Occupied Facilities
 - Starting June 23, 2008, pre-renovation education requirements apply to renovations in COFs, as well as in target housing.³⁴⁰
- Lead Hazard Information Pamphlets
 - Between June 23 and December 22, 2008, renovation firms may distribute either EPA’s new *Renovate Right* pamphlet, or the *Protect Your Family* pamphlet.³⁴¹
 - Beginning December 22, 2008, firms performing renovations in EPA-run jurisdictions (States/Tribal areas without authorized programs) must distribute the *Renovate Right* pamphlet.³⁴²
- Training Program Accreditation
 - As of June 23, 2008, no training program may “provide, offer, or claim to provide” any training *for EPA certification* as a renovator or DST without accreditation.³⁴³
 - As of April 22, 2009, training programs may apply for accreditation.³⁴⁴
- Firm Certification
 - Beginning October 22, 2009, renovation firms may apply for certification.³⁴⁵

³³⁵ 40 C.F.R. § 745.81.

³³⁶ 73 Fed. Reg. 21692, 21748, *supra* note 160. 40 C.F.R. § 745.81(c) and § 745.84(c)(PRE for COFs); § 745.83 (“minor” activities, 6 ft² interior or 20 ft² exterior and no prohibited practices); § 745.81(a)(1)(training programs). The final rule took effect at the same time for all covered properties without regard to when they were built prior to 1978. 73 Fed. Reg. 21692, 21712-13, *supra* note 160.

³³⁷ 40 C.F.R. § 745.81(a)(1).

³³⁸ 73 Fed. Reg. 21692, 21746, 21747, *supra* note 160.

³³⁹ 40 C.F.R. § 745.81(a)(2)-(5). 73 Fed. Reg. 21692, 21748-21749, *supra* note 160.

³⁴⁰ 40 C.F.R. § 745.81(c).

³⁴¹ 40 C.F.R. § 745.81(b). 73 Fed. Reg. 21692, 21749, *supra* note 160.

³⁴² 40 C.F.R. § 745.81(b). 73 Fed. Reg. 21692, 21749, *supra* note 160. See also 73 Fed. Reg. 21769 (Apr. 22, 2008), www.epa.gov/lead/pubs/renovation.htm#tenants.

³⁴³ 40 C.F.R. § 745.81(a)(1); § 745.225(a)(3). Entities may continue to offer lead-safe training and use EPA (or HUD) training material, but may not assert that such training is accredited or will provide EPA certification for RRP Rule renovator or DST certification.

³⁴⁴ 40 C.F.R. § 745.81(a)(1), § 745.225(a)(2).

³⁴⁵ 40 C.F.R. § 745.81(a)(2)(i). 73 Fed. Reg. 21692, 21748, *supra* note 160.

- As of April 22, 2010, firms must be certified to offer or perform renovations³⁴⁶ -- and provisions to suspend, revoke or modify firm certifications take effect.³⁴⁷
- Individual Certification; Worker Training
 - As of April 22, 2010, all renovations must be directed by certified renovators, and performed by certified renovators or by individuals properly trained by certified renovators³⁴⁸ -- and provisions to suspend, revoke or modify individual certifications become effective.³⁴⁹
- Work Practice Standards and Recordkeeping
 - As of April 22, 2010, all renovations must be performed in accordance with work practice standards, and recordkeeping requirements apply.³⁵⁰
- State/Tribal Authorization
 - As of June 23, 2008, States/Tribes may *apply* for authorization to administer EPA-approved RRP programs.³⁵¹

³⁴⁶ 40 C.F.R. § 745.81(a)(2)(ii), § 745.89(a)(1). 73 Fed. Reg. 21692, 21748, *supra* note 160.

³⁴⁷ 40 C.F.R. § 745.81(a)(5), § 745.91(a).

³⁴⁸ 40 C.F.R. § 745.81(a)(3). 73 Fed. Reg. 21692, 21748, *supra* note 160.

³⁴⁹ 40 C.F.R. § 745.81(a)(5), § 745.91(a).

³⁵⁰ 40 C.F.R. § 745.81(a)(4). 73 Fed. Reg. 21692, 21749, *supra* note 160.

³⁵¹ 40 C.F.R. § 745.339. 73 Fed. Reg. 21692, 21748, *supra* note 160.

Fig. 13: RRP Rule Implementation Dates					
Rule Published Apr. 22, 2008	6/23/08	12/22/08	4/22/09	10/22/09	4/22/10
Rule effective	X				
Pre-renovation Education					
• PRE applies to COF renovations.	X				
• <i>Renovate Right</i> pamphlet must be used.		X			
State/Tribal RRP Programs					
• State/Tribes may apply for authorization.	X				
Training Programs					
• Programs may not offer, provide, or claim to provide training for certification without accreditation.	X				
• Programs may apply for accreditation.			X		
Certification – Firms, Individuals					
• Firms may apply for certification.				X	
• Firms must be certified.					X
• Renovations must be directed & performed by certified renovators (or performed by trained individuals).					X
• Certification suspension / renovation provisions apply.					X
Work Practice Standards - Apply					X
Recordkeeping Requirements - Apply					X

4-4. Pre-renovation Education³⁵²

Overview

The RRP Rule retains the general requirements of the PRE Rule, *i.e.*, a renovator must:

- Distribute the proper lead hazard pamphlet to property owners and/or occupants *before*, but no more than 60 days before, commencing a renovation;

³⁵² 40 C.F.R. § 745.84.

- Obtain proper written acknowledgement of receipt from the owner/occupant, or a certificate of mailing 7 days before the renovation³⁵³; and
- Retain compliance records for at least three years.

The RRP Rule modifies some of these requirements. It:

- Transfers the obligations to renovation *firms*;
- Requires pre-renovation education for projects in COFs, as well as target housing;
- Requires distribution of the *Renovate Right* pamphlet as of December 22, 2008 (and either the *Renovate Right* or *Protect Your Family* pamphlet before then³⁵⁴); and
- Permits firms to post signs (in lieu of individual notification) for renovations in common areas and COFs.

Neither the pre-existing PRE Rule, nor the RRP Rule, imposes *post*-renovation education requirements.

Requirements

• Renovations in Dwelling Units in Target Housing

No more than 60 days before beginning a renovation (but *not* after), the renovation firm must:

- Provide the unit's owner the appropriate pamphlet, and obtain written acknowledgment of receipt or a certificate of mailing; and
- Provide the appropriate pamphlet to an adult occupant of the affected unit *if* the owner does not occupy the unit, and obtain written acknowledgment of receipt or a certificate of mailing.³⁵⁵

• Renovations in Common Areas in Multi-unit Target Housing

No more than 60 days before beginning a renovation, the firm must:

- Provide the owner the appropriate pamphlet, and obtain written acknowledgment of receipt or a certificate of mailing; and
- Provide the occupants of each unit information about the renovation, and the pamphlet, in one of two ways:
 - *Prior to the renovation*, distribute the requisite written notice to each affected unit, and make the pamphlet available upon request (and provide further notice to owners/occupants if planned renovation activities change); or
 - While the *renovation is ongoing*, post proper informational signs, along with the pamphlet or information telling how to review or obtain a no-cost copy of the pamphlet.³⁵⁶
- Prepare a statement describing the actions taken to inform occupants.³⁵⁷

• Renovations in Child-Occupied Facilities

No more than 60 days before beginning a renovation, the firm must:

- Provide the building owner the appropriate pamphlet, and obtain written acknowledgment of receipt or a certificate of mailing.

³⁵³ Alternatively, a renovator may provide a written certification explaining unsuccessful attempts to obtain written acknowledgement. 40 C.F.R. § 745.84(a)(2)(i). The RRP Rule also retains this option.

³⁵⁴ Note that the *Protect Your Family* pamphlet contains old information that does not comport with the RRP Rule. For instance, the pamphlet describes the “minor” activities exemption using the old standard (<2 ft.²), rather than the new one (<6 ft.² and no prohibited practices). See section III.F.4-2, above.

³⁵⁵ 40 C.F.R. § 745.84(a).

³⁵⁶ 40 C.F.R. § 745.84(b). The information must include the general nature, location, and starting and ending dates of the renovation activities. 40 C.F.R. § 745.84(b)(2).

³⁵⁷ 40 C.F.R. § 745.84(b)(3).

- Provide the pamphlet to an adult representative of the COF *if* the COF owner is not the building owner, and obtain acknowledgment of receipt or a certificate of mailing.
- Provide the parents/guardians of the children using the COF information about the renovation, and the pamphlet, in one of two ways:
 - Mail or hand-deliver the information and pamphlet to each parent/guardian; or
 - While the renovation is ongoing, post proper informational signs, along with the pamphlet or information telling how to review or obtain a no-cost copy of the pamphlet.³⁵⁸
- Prepare a statement describing the actions taken to inform parents/guardians.³⁵⁹

Written Acknowledgement

The RRP Rule (like the PRE Rule) requires that each written acknowledgement:

- Record the owner/occupant's name, signature, date, acknowledgement of timely receipt, and the address of the affected unit;
- Be a separate sheet, or part of a written contract for the renovation; and
- Be in the same language as the renovation contract -- or for rental property, be in the same language as the lease or pamphlet.³⁶⁰

EPA has developed a sample acknowledgement form for the RRP Rule.³⁶¹

4-5. Work Practice Standards³⁶²

Standards for Renovation Activities

- General Requirements

Renovations must be performed by certified firms using certified renovators.³⁶³ The certified renovator is responsible for ensuring compliance with the work practice standards, and must *personally* perform the post renovation visual inspection and cleaning verification. (See section III.F.4-10, below.)³⁶⁴

- Occupant Protection (Warning Signs)

Firms must post signs before beginning renovations. The signs must:

- Define the “work area,” *i.e.*, the area that the certified renovator establishes (as a matter of judgment³⁶⁵) to contain the dust and debris generated by a renovation³⁶⁶;
- Warn occupants not to enter the work area (in the occupant’s primary language, as practicable); and
- Remain in place and readable throughout the renovation and post-renovation cleaning verification.³⁶⁷

³⁵⁸ 40 C.F.R. § 745.84(c)(information to include renovation nature, location and completion date).

³⁵⁹ 40 C.F.R. § 745.84(c)(3).

³⁶⁰ 40 C.F.R. § 745.84(d).

³⁶¹ *Future Sample Pre-Renovation Form* (effective April 2010), www.epa.gov/lead/pubs/renovation.htm#tenants. EPA also has a sample form for the PRE Rule, *Current Sample Pre-Renovation Form* (effective *until* April 2010), www.epa.gov/lead/pubs/renovation.htm#tenants.

³⁶² 40 C.F.R. § 745.85.

³⁶³ 40 C.F.R. § 745.85(a).

³⁶⁴ The rule specifies that activities “that do not disturb paint, such as applying paint to walls that have already been prepared” are not regulated “if they are conducted after post-renovation cleaning verification has been performed.” 40 C.F.R. § 745.85(d).

³⁶⁵ The renovator has discretion in defining the work area. See *generally* 73 Fed. Reg. 21692, 21728-21729, *supra* note 160.

³⁶⁶ 40 C.F.R. § 745.83.

³⁶⁷ 40 C.F.R. § 745.85(a)(1). Additional signs are not necessary if OSHA- or HUD-approved signs are posted. *Id.*

- Work Area Containment
 - All Renovations

Firms must use plastic sheeting or other impermeable material to contain the work area and stationary items therein, and use tape to seal exposed edges. The firm must:

 - Isolate the work area before the renovation so that no dust or debris leaves the area during the renovation;
 - Maintain the integrity of the containment;
 - Ensure that no dust or debris leaves the work area; and
 - Ensure that containment does not prevent emergency egress.³⁶⁸
 - Interior Renovations – Additional Requirements

The firm also must:

 - Remove, or cover and seal, all objects (*e.g.*, furniture, rugs, window coverings);
 - Close and cover duct openings, close windows and doors, and cover doors;
 - Cover and seal the floor surface *at least 6 feet beyond* the perimeter of the renovation surface; and
 - Ensure that personnel, tools, and other items are free of dust and debris before leaving the work area.³⁶⁹
 - Exterior Renovations – Additional Requirements

The firm also must:

 - Close doors and windows within 20 feet of the renovation (including, those on the same floor and on all lower floors for a multi-story building);
 - Ensure that doors are covered, but also allow worker ingress/egress while confining dust and debris to the work area;
 - Cover the ground for at least *10 feet beyond* the perimeter of the renovation surface; and
 - “Take extra precautions” to ensure that renovation dust and debris do not contaminate other areas or properties.³⁷⁰
- Prohibited Practices
 - The RRP Rule prohibits:
 - Open-flame burning or torching of LBP;
 - Operating a heat gun on LBP at temperatures at or above 1,100 degrees Fahrenheit ($\geq 1,100^{\circ}\text{F}$ ³⁷¹); and
 - Using machines that remove LBP “through high speed operation” (such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting³⁷²) without “HEPA” exhaust control.³⁷³

³⁶⁸ 40 C.F.R. § 745.85(a)(2). *See also* 73 Fed. Reg. 21692, 21728-21729, *supra* note 160 (if an EPA inspector observes dust or debris escaping from the containment, then the renovator and firm would be in violation; renovator must determine size and type of containment for each project to prevent the escape of dust and debris; EPA believes at least 6 feet of containment is necessary for most projects).

³⁶⁹ 40 C.F.R. § 745.85(a)(2)(i).

³⁷⁰ 40 C.F.R. § 745.85(a)(2)(ii). *See* 73 Fed. Reg. 21692, 21729, *supra* note 160 (*e.g.*, vertical containment in windy conditions or when properties abut).

³⁷¹ 40 C.F.R. § 745.85(a)(3).

³⁷² EPA sources indicate that this prohibition is intended to include hydroblasting.

³⁷³ 40 C.F.R. § 745.85(a)(3).

“HEPA vacuum” means a vacuum cleaner which has been designed with a high-efficiency particulate air (HEPA) filter as the last filtration stage. A HEPA filter is a filter that is capable of capturing particles of 0.3 microns with 99.97% efficiency. The vacuum cleaner must be designed so that all the air drawn into the machine is expelled through the HEPA filter with none of the air leaking past it.³⁷⁴

The rule does not prohibit dry hand-scraping or dry hand-sanding.³⁷⁵

- Renovation Waste

Waste from renovation activities must be contained to prevent releases of dust and debris:

- Before being removed from the work area for storage or disposal;
- At the end of each work day and end of the renovation; and
- During transport from the renovation site.³⁷⁶

- Cleaning the Work Area

After the renovation, the firm must clean the work area “until no dust, debris or residue remains.”³⁷⁷

- Interior *and* Exterior Renovations

The firm must:

- Collect all paint chips and debris, and seal them in “a heavy-duty bag” without any dispersal; and
- Properly remove, mist, fold, seal and dispose of protective sheeting.³⁷⁸

- Interior Renovations - Additional Requirements

The firm also must properly clean all objects and surfaces *in, and within 2 feet of*, the work area, cleaning from higher to lower:

- Clean walls, from ceiling to floor, with a HEPA vacuum and damp cloth.
- Vacuum remaining surfaces and objects (*e.g.*, furniture and fixtures) with a properly equipped HEPA vacuum.
- Wipe remaining surfaces and objects (except carpeted or upholstered surfaces) with a damp cloth. Properly mop bare (uncarpeted) floors.³⁷⁹

Post-renovation Visual Inspection

- All Renovations

A certified renovator must perform a visual inspection “to determine whether dust, debris or residue is still present.” If so, then re-cleaning and another visual inspection are required.³⁸⁰ All renovations must pass this visual inspection.

³⁷⁴ 40 C.F.R. § 745.83. 73 Fed. Reg. 21692, 21734-21736, *supra* note 160.

³⁷⁵ 73 Fed. Reg. 21692, 21709, 21731, *supra* note 160. By contrast, the LBP Activities Rule restricts dry scraping. 40 C.F.R. § 745.227(e)(6)(iii).

³⁷⁶ 40 C.F.R. § 745.85(a)(4).

³⁷⁷ 40 C.F.R. § 745.85(a)(5).

³⁷⁸ 40 C.F.R. § 745.85(a)(5)(i).

³⁷⁹ 40 C.F.R. § 745.85(a)(5)(ii).

³⁸⁰ 40 C.F.R. § 745.85(b)(1)(i), (b)(2).

- Interior Renovations
After a successful visual inspection, a certified renovator must perform the post-renovation cleaning verification.³⁸¹
- Exterior Renovations
After a successful visual inspection, the warning signs may be removed. Post-renovation cleaning verification is not required for exterior renovations.³⁸²

Post-renovation Cleaning Verification³⁸³

- Overview
A certified renovator must perform the post-renovation cleaning verification to confirm that windowsills, bare floors and countertops in the work area have been “adequately cleaned.”³⁸⁴ In short, the renovator must wipe the surface *up to* three times with a wet or dry “disposable cleaning cloth,” perform *up to* one additional cleaning, and perform the so-called “white glove” test by visually comparing the whiteness of the used cloth versus a “cleaning verification card.” See Fig.14: *RRP Rule Post-renovation Cleaning Verification*.

A “dry disposable cleaning cloth” is “a commercially available dry, electrostatically charged, white disposable cloth designed for cleaning hard surfaces.”³⁸⁵

A “wet disposable cleaning cloth” is “a commercially available, pre-moistened white disposable cloth” designed for cleaning hard surfaces.³⁸⁶

A “cleaning verification card” is an EPA-approved card for determining whether post-renovation cleaning has been completed properly.³⁸⁷ The card is based on a “photographic standard” which correlates to contamination at or below the dust-lead hazard standard.³⁸⁸

- Interior Windowsills
 - The renovator must wipe the surface with a wet cloth and compare the cloth to the card. If the cloth matches or is lighter than the card, then the verification is done.
 - If the cloth is darker than the card, then the renovator must properly re-clean and re-wipe the surface, and compare the cloth and card. If the cloth matches or is lighter than the card, then the verification is done.
 - If the cloth still is darker than the card, then the renovator must wait at least 1 hour for the surface to dry, then wipe it with a dry cloth. Thereafter, the surface is deemed “adequately

³⁸¹ 40 C.F.R. § 745.85(b)(1)(i).

³⁸² 40 C.F.R. § 745.85(b)(2).

³⁸³ 40 C.F.R. § 745.85(b).

³⁸⁴ 40 C.F.R. § 745.85(b)(1)(ii). See also 73 Fed. Reg. 21692, 21738, *supra* note 160 (windowsills, then floors and counter tops).

³⁸⁵ Swiffer® and Chlorox Ready Mops® are *examples* (no endorsement intended or implied).

³⁸⁶ 40 C.F.R. § 745.83.

³⁸⁷ 40 C.F.R. § 745.83. EPA intends to make cards available through accredited renovator training and the National Lead Information Center (Lead Hotline). 73 Fed. Reg. 21692, 21743, *supra* note 160. The Hotline can be reached at 1-800-424-LEAD (5323) or www.epa.gov/lead/pubs/nlic.htm.

³⁸⁸ 73 Fed. Reg. 21692, 21736, *referring to* 40 C.F.R. § 745.65(b).

cleaned” and the verification is complete (without further comparison, or even if the cloth is still darker than the card).³⁸⁹

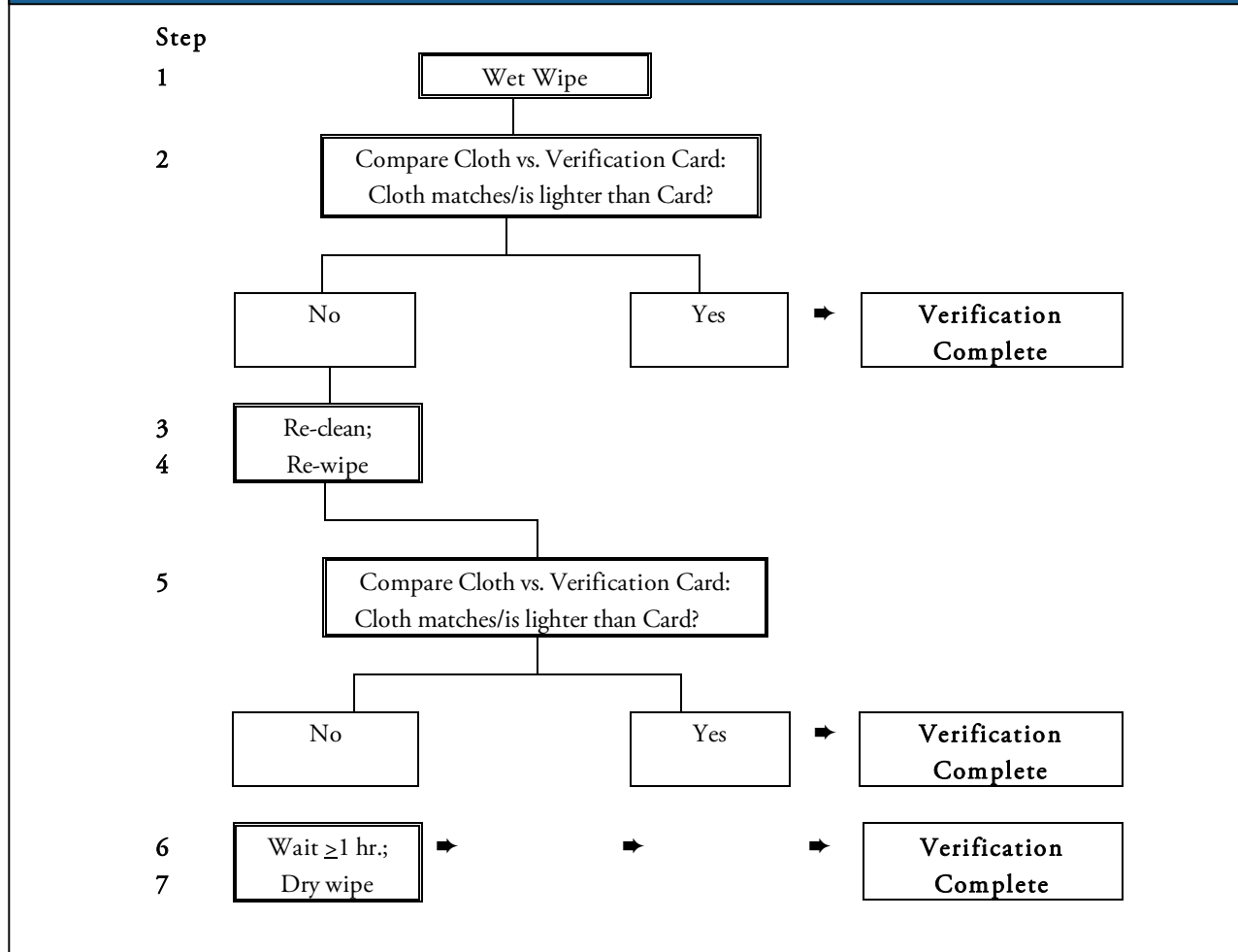
- Interior Bare Floors and Countertops³⁹⁰

The verification process for countertops and uncarpeted floors is the same as for windowsills, except that the renovator must:

- Use the proper equipment and wet wiping techniques for floors; and
- For surfaces greater than 40 square feet, divide the surface into roughly equal sections of 40 square feet or less – and wipe, re-clean, and verify each section separately.³⁹¹

The warning signs can be removed when the work area “passes” the post-renovation cleaning verification,³⁹² either because the cloth matches or is lighter than the card, or because all of the required wipes have been performed. *See Fig. 14: RRP Rule Post-renovation Cleaning Verification.*

Fig. 14: RRP Rule Post-renovation Cleaning Verification



³⁸⁹ 40 C.F.R. § 745.85(b)(1)(ii)(A).

³⁹⁰ There is no post-renovation cleaning verification for carpets.

³⁹¹ 40 C.F.R. § 745.85(b)(1)(ii)(B).

³⁹² 40 C.F.R. § 745.85(b)(1)(iii).

Optional Dust Clearance Testing

Cleaning verification is not required if the renovation contract or applicable law requires the renovation firm to perform post-renovation dust clearance testing, and requires:

- a certified inspector, risk assessor or DST to collect the dust clearance samples; and
- the firm to re-clean the work area until the sample results are below the applicable clearance standards.³⁹³

The firm must give the customer a copy of the dust sampling report within 30 days after completing the renovation.³⁹⁴ (The Disclosure Rule requires disclosure of results to future tenants and buyers.³⁹⁵)

4-6. Recordkeeping Requirements³⁹⁶

Overview³⁹⁷

The RRP Rule (like the PRE Rule) requires regulated entities to retain records for three years, and make records available to EPA upon request.³⁹⁸ The new rule also requires retention of the same records as under the PRE Rule, plus records pertaining to new RRP Rule obligations.

Records to be Retained

The RRP Rule (like the PRE Rule) requires that firms retain:

- Reports certifying lead-free determinations by a certified inspector (or risk assessor³⁹⁹);
- The owner/occupant's acknowledgement of receiving the lead pamphlet, or certification of mailing or attempted delivery⁴⁰⁰; and
- Records of pre-renovation education for work in common areas.⁴⁰¹

Also, the RRP requires firms to retain:

- Records of pre-renovation education to parents at COFs⁴⁰²;
- Owners' declarations for the owner-occupant opt-out exemption⁴⁰³;
- Records for the emergency exemption, stating the nature of the emergency and the provisions not followed⁴⁰⁴; and
- Detailed certifications regarding compliance with the work practice standards -- including that a certified renovator was assigned to the project, the renovator provided on-the-job training for uncertified workers,

³⁹³ 40 C.F.R. § 745.85(c).

³⁹⁴ 40 C.F.R. § 745.86(d).

³⁹⁵ 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4). *See also* section III.F.4-6, below.

³⁹⁶ 40 C.F.R. § 745.86.

³⁹⁷ The RRP Rule deleted as “duplicative” the TSCA Confidential Business Information (CBI) provisions in the PRE Rule, formerly 40 C.F.R. § 745.84. TSCACBI provisions are set forth at 40 C.F.R. Part 2.

³⁹⁸ 40 C.F.R. § 745.86(a). Firms must hold records longer if required to do so by other laws or obligations. *Id.* *See also id.* § 745.87 (make records available or accessible for copying for enforcement purposes).

³⁹⁹ 40 C.F.R. § 745.86(b)(1). There are apparent typographical errors in the published rule. Section 745.86(b)(1) states that a firm must retain reports of lead-free determinations “made by an inspector . . . as described in § 745.82(b)(1)” – whereas it probably should state “made by an inspector or a risk assessor . . . as described in § 745.82(a)(1).” *See* 40 C.F.R. § 745.82(a)(1).

⁴⁰⁰ 40 C.F.R. § 745.86(b)(2)-(4). The firm may use EPA's sample form. *Future Sample Pre-Renovation Form*, www.epa.gov/lead/pubs/renovation.htm#tenants.

⁴⁰¹ 40 C.F.R. § 745.86(b)(5).

⁴⁰² 40 C.F.R. § 745.86(b)(5).

⁴⁰³ 40 C.F.R. § 745.86(b)(6). *See Future Sample Pre-Renovation Form, supra*, note 400.

⁴⁰⁴ 40 C.F.R. § 745.86(b)(7).

and the renovator performed (or directed uncertified workers who performed) the required work practice tasks and post-renovation cleaning verification.⁴⁰⁵

EPA has developed a recordkeeping checklist and certification statement.⁴⁰⁶

Information to Customers

Within 30 days of completing a renovation, a firm must provide to “the person who contracted for the renovation” (the customer) the following information:

- If a test kit was used (for a lead-free determination), then the kit manufacturer and model, a description of the components tested, and the test kit results.⁴⁰⁷
- If dust clearance sampling was performed (in lieu of cleaning verification), then a copy of the dust sampling report.⁴⁰⁸

The RRP Rule does not require that this information be provided to any other persons including the residents. The federal Disclosure Rule, however, requires that this information be provided to subsequent tenants (and purchasers) of the renovated property if the owner or agent has it.⁴⁰⁹ Also, a current tenant who renews a lease is entitled to this new information upon lease renewal if it has not already been disclosed.⁴¹⁰

An Enforcement Perspective

Full adherence to recordkeeping requirements is important. The majority of EPA (and HUD) LBP “inspections” are record reviews – and most enforcement actions are based upon non-compliance as indicated by absent or defective records.⁴¹¹ Moreover, EPA has announced that for the RRP Rule “EPA has determined that a review of the records maintained by renovation firms will be an effective method of determining whether a particular firm is generally complying with the regulations or not.”⁴¹² Notwithstanding EPA’s potential focus on record review inspections, it may conduct on-site inspections, particularly where an ongoing hazard is alleged.

4-7. Enforcement and Inspections⁴¹³

The RRP Rule (like the PRE Rule) provides that EPA may conduct inspections and issue subpoenas under Section 11 of TSCA, and that noncompliance may subject violators to civil or criminal penalties under Section 16 of TSCA.⁴¹⁴ The RRP Rule adds a presumption that LBP is present in regulated renovations.⁴¹⁵

⁴⁰⁵ 40 C.F.R. § 745.86(b)(7).

⁴⁰⁶ *Future Sample Renovation Recordkeeping Checklist* (effective April 2010), www.epa.gov/lead/pubs/renovation.htm#contractors.

⁴⁰⁷ 40 C.F.R. § 745.86(c).

⁴⁰⁸ 40 C.F.R. § 745.86(d).

⁴⁰⁹ 73 Fed. Reg. 21692, 21718, *supra* note 160, referring to 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4) (seller and landlord must provide any records or reports pertaining to LBP and/or LBP hazards).

⁴¹⁰ 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4).

⁴¹¹ See Part VI of this book, *Federal Lead-Based Paint Enforcement Programs*.

⁴¹² 73 Fed. Reg. 21692, 21746, *supra* note 160.

⁴¹³ 40 C.F.R. § 745.87.

⁴¹⁴ 40 C.F.R. § 745.87, referring to 15 U.S.C. §§ 2610, 2614, 2615.

⁴¹⁵ 40 C.F.R. § 745.87(e).

4-8. Recognized Test Kits⁴¹⁶

Overview

As explained in section 4-2, above, the RRP Rule exempts renovations that affect only so-called “lead-free” components as determined by a certified renovator using an “EPA recognized test kit.”⁴¹⁷ (Also, as explained in section 4-2, above, the exemption states the component must be “free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm² or 0.5% by weight” -- and this discussion uses the term “lead-free” for convenience.)

A “recognized test kit” is “a commercially available kit” with which a user can determine the presence of lead at regulated levels -- *i.e.*, “lead at levels equal to or in excess of 1.0 milligram per square centimeter, or more than 0.5% lead by weight” ($\geq 1.0 \text{ mg/cm}^2$ or $> 0.5\%$) -- in a paint chip, paint powder, or painted surface.⁴¹⁸

Negative Test Kits

The “negative response criteria” means that “for paint containing lead at or above the regulated level, 1.0 mg/cm² or 0.5% by weight” the test kit *fails* to identify it only five percent of the time or less (*i.e.*, accurately confirms its presence 95% of the time).⁴¹⁹ As of April 2008, EPA had identified a few potentially approvable negative criteria kits. EPA intended to officially recognize kits confirmed to meet this criteria by June 23, 2008.⁴²⁰ Until September 1, 2010, kits only have to meet the negative response criteria.⁴²¹

Positive-Negative Test Kits

The “positive response criteria” means that “for paint containing lead below the regulated level, 1.0 mg/cm² or 0.5% by weight,” the kit will give a *false positive* result only ten percent of the time or less (*i.e.*, accurately confirms its absence 90% of the time).⁴²² EPA’s favors the commercial availability of dual criteria (positive-negative) test kits.⁴²³ Therefore, EPA will recognize kits that meet both criteria (and cease to recognize negative-only test kits) as soon as EPA publishes recognition of the first test kits that meet both criteria.⁴²⁴ After September 1, 2010, test kits must meet both criteria.⁴²⁵

Recognition Process

Effective September 1, 2008, EPA will post information about approved kits on its website.⁴²⁶

⁴¹⁶ 40 C.F.R. § 745.88.

⁴¹⁷ 40 C.F.R. § 745.82(a)(2).

⁴¹⁸ 40 C.F.R. § 745.83. *But see supra* note 326 (probably should say $\geq 1.0 \text{ mg/cm}^2$ or 0.5%).

⁴¹⁹ 40 C.F.R. § 745.88(c)(1)(for paint containing lead $\geq 1.0 \text{ mg/cm}^2$ or 0.5% by weight, “a demonstrated probability, with 95% confidence, of a negative response less than or equal to 5% of the time”).

⁴²⁰ 40 C.F.R. § 745.88(a). EPA will post recognition on its internet site.

⁴²¹ 40 C.F.R. § 745.88(b)(3).

⁴²² 40 C.F.R. § 745.88(c)(2)(for paint containing lead $< 1.0 \text{ mg/cm}^2$ or 0.5% by weight, “a demonstrated probability, with 95% confidence, of a positive response less than or equal to 10% of the time”).

⁴²³ 73 Fed. Reg. 21692, 21712, *supra* note 160.

⁴²⁴ 40 C.F.R. § 745.88(a), (b)(3).

⁴²⁵ 40 C.F.R. § 745.88(b)(4).

⁴²⁶ 40 C.F.R. § 745.88(b)(1), (5). 73 Fed. Reg. 21692, 21713, *supra* note 160.

4-9. Firm Certification and Responsibilities⁴²⁷

Certification, Recertification, Amendments

Firms that perform renovations for compensation must obtain certification from EPA (or an authorized State/Tribe) to perform renovations or dust sampling.⁴²⁸ EPA certification lasts five years,⁴²⁹ and allows the firm to perform renovations in any EPA-run jurisdiction (*i.e.*, jurisdiction without an authorized State/Tribal program).⁴³⁰

EPA will not approve certification, or re-certification, if it determines that “the environmental compliance history” of the firm, its principals, or key employees “demonstrates an unwillingness or inability to maintain compliance with environmental statutes or regulations.”⁴³¹

EPA may consider an applicant firm is unwilling or unable to comply with environmental laws if, during the past three years, the firm has:

- A federal criminal environmental conviction;
- An administrative or civil judgment for a *willful* violation of federal environmental law; or
- More than one administrative or civil judgment for a federal environmental violation (but violations that involve only recordkeeping requirements will not be considered).⁴³²

A firm must amend its certification within 90 days of the date “a change occurs to information” in the firm’s application – and may not perform renovations or dust sampling until its certification is properly amended.⁴³³

Firm Responsibilities

Firms must ensure that:

- All persons performing renovations are certified renovators, or have been properly trained by a certified renovator;
- A certified renovator is assigned to each renovation, and discharges all of the responsibilities of a certified renovator;
- All renovations comply with the requisite work practice standards; and
- The pre-renovation education and recordkeeping requirements are fulfilled.⁴³⁴

Certification Suspension, Revocation and Modification

EPA may suspend, revoke, or modify a firm’s certification if the firm:

- Submits false or misleading information in its certification/re-certification application;
- Fails to maintain or falsifies required records;
- Fails to comply with federal LBP laws (or an individual working on the firm’s behalf fails to do so). An administrative or judicial *finding* of a violation, or *settlement* of an enforcement action, constitutes evidence of such failure to comply.⁴³⁵

⁴²⁷ 40 C.F.R. § 745.89

⁴²⁸ 40 C.F.R. § 745.89(a)(1).

⁴²⁹ 40 C.F.R. § 745.89(a)(2)(i), (b).

⁴³⁰ 40 C.F.R. § 745.89(a)(2)(i). A multi-state firm may need certification from EPA, and from one or more States/Tribes.

⁴³¹ 40 C.F.R. § 745.89(a)(2)(i), (a)(2)(iii), (b)(2)(i), (b)(2)(iii).

⁴³² 73 Fed. Reg. 21692, 21725, *supra* note 160.

⁴³³ 40 C.F.R. § 745.89(c).

⁴³⁴ 40 C.F.R. § 745.89(d).

The rule also details the procedures EPA will follow in suspending, revoking or modifying a firm's certification.⁴³⁶

4-10. Individual Certification and Responsibilities⁴³⁷

Certification and Recertification⁴³⁸

To become a certified renovator or DST, a person must successfully complete the appropriate EPA (or State/Tribal) accredited course, and complete a refresher course every five years to maintain certification.⁴³⁹

Certification allows the individual to perform renovations, or dust clearance sampling *for renovations*, in any EPA-run jurisdiction.⁴⁴⁰

"Grandfathering"

Individuals who have "successfully completed" *certain* accredited lead-safe work practices training can obtain RRP certification as a renovator or DST by taking a four-hour RRP refresher course, rather than the eight-hour initial course⁴⁴¹:

- A person may obtain *renovator* certification if he/she has completed an:
 - Accredited abatement worker course;
 - Accredited abatement supervisor course; or
 - EPA, HUD, or EPA/HUD "model renovator training course."⁴⁴²
- A person may obtain DST certification if he/she has completed an accredited LBP inspector or risk assessor course.⁴⁴³

See Fig. 15: RRP Rule "Grandfathering" Provisions.

Grandfathering provisions do *not* apply to:

- Renovation firms;
- *Certified* LBP inspectors and risk assessors, since they are already qualified to perform dust sampling as part of a lead hazard screen, risk assessment, or abatement⁴⁴⁴; or
- Completion of HUD's Lead Maintenance course.⁴⁴⁵

⁴³⁵ 40 C.F.R. § 745.91(a)(2).

⁴³⁶ 40 C.F.R. § 745.91(b).

⁴³⁷ 40 C.F.R. § 745.90.

⁴³⁸ 40 C.F.R. § 745.90.

⁴³⁹ 40 C.F.R. § 745.90(a)(1), (4).

⁴⁴⁰ 40 C.F.R. § 745.90(a)(1).

⁴⁴¹ 40 C.F.R. § 745.90(a)(2)-(3). 73 Fed. Reg. 21692, 21724, *supra* note 160.

⁴⁴² 40 C.F.R. § 745.90(a)(2). EPA sources indicate that only the following courses qualify:

- EPA's model course, "Minimizing Lead-Based Paint Hazards During Renovation, Remodeling, and Painting";
- HUD's course entitled "Addressing Lead-Based Paint Hazards During Renovation, Remodeling and Rehabilitation in Federally Owned and Assisted Housing"; and
- The EPA-HUD curriculum entitled "Lead Safety for Remodeling, Repair, and Painting."

⁴⁴³ 40 C.F.R. § 745.90(a)(3).

⁴⁴⁴ 73 Fed. Reg. 21692, 21721, 21724, *supra* note 160.

⁴⁴⁵ 73 Fed. Reg. 21692, 21721, *supra* note 160.

Fig. 15: RRP Rule “Grandfathering” Provisions

Prior Training (Completion of the prior training listed below)	+ RRP Refresher (Completion of the RRP refresher course listed below)	= RRP Certification (Qualifies one for the RRP certification listed below)
Abatement Worker Training	Refresher Renovator Course	Renovator
Abatement Supervisor Training		
EPA &/or HUD Model Renovation Training		
LBP Inspector Training	Refresher DST Course	DST
LBP Risk Assessor Training		

Renovator Responsibilities⁴⁴⁶

Certified renovators must ensure compliance with work practice standards – and must:

- Perform the visual inspection and post-renovation cleaning verification.⁴⁴⁷ (This function and the other tasks cannot be delegated.)
- Perform, or direct uncertified workers who perform, renovation activities (posting signs, containment, prohibited practices, waste control, and cleaning).⁴⁴⁸
- Train uncertified workers on lead-safe work practices for their assigned tasks.⁴⁴⁹
- Be “physically present at the work site” when warning signs are posted, and during work area containment and cleaning.⁴⁵⁰
- “Regularly direct” work performed by others to ensure adherence to the work practices, including “maintaining the integrity of containment barriers and ensuring that dust or debris does not spread beyond the work area.”⁴⁵¹
- Be available on-site or by telephone at all times that renovations are underway.⁴⁵²
- When requested by the customer, must use an acceptable test kit to determine whether affected components are lead-free (as explained above).⁴⁵³
- Have copies of their course completion certificate (which serves as the renovator’s certification⁴⁵⁴) with them at the work site.⁴⁵⁵
- Prepare records required to verify compliance with the work practices.⁴⁵⁶

⁴⁴⁶ 40 C.F.R. § 745.90(b).

⁴⁴⁷ 40 C.F.R. § 745.90(b)(1).

⁴⁴⁸ *Id.*

⁴⁴⁹ 40 C.F.R. § 745.90(b)(2).

⁴⁵⁰ 40 C.F.R. § 745.90(b)(3).

⁴⁵¹ 40 C.F.R. § 745.90(b)(4). In EPA’s view, the renovator must be present “often enough to ensure that no violation” occurs.

⁴⁵² 40 C.F.R. § 745.90(b)(5).

⁴⁵³ 40 C.F.R. § 745.90(b)(6). Nothing in the rule prohibits a contractor from using a test kit at times other than upon customer request.

⁴⁵⁴ 73 Fed. Reg. 21692, 21723, *supra* note 160.

⁴⁵⁵ 40 C.F.R. § 745.90(b)(7).

⁴⁵⁶ 40 C.F.R. § 745.91(b)(8). The renovator may use EPA’s sample checklist. *Future Sample Renovation Recordkeeping Checklist*, www.epa.gov/lead/pubs/renovation.htm#contractors.

Dust Sampling Technician Responsibilities

DSTs must:

- Properly collect dust samples, send them to an EPA-recognized laboratory, and properly compare the results to clearance levels⁴⁵⁷; and
- Have copies of their course completion certificate (which serves as a DST's certification⁴⁵⁸) with them at the work site.⁴⁵⁹

Certification Suspension, Revocation and Modification

EPA may suspend, revoke, or modify the certification of:

- An *individual* (renovator or DST) if he/she fails to comply with federal LBP requirements.
- A *certified renovator* if he/she fails to ensure that all assigned renovations comply with the rule's work practice standards.⁴⁶⁰

An administrative or judicial finding of a violation or settlement of an enforcement action is evidence of failure to comply with LBP requirements.⁴⁶¹ The rule details the procedures EPA will use in suspending, revoking or modifying a certification.⁴⁶²

⁴⁵⁷ 40 C.F.R. § 745.90(c)(1). *See also id.* § 745.227(e)(8).

⁴⁵⁸ 73 Fed. Reg. 21692, 21723, *supra* note 160.

⁴⁵⁹ 40 C.F.R. § 745.90(c)(2).

⁴⁶⁰ 40 C.F.R. § 745.91(a)(1).

⁴⁶¹ 40 C.F.R. § 745.91(a)(1).

⁴⁶² 40 C.F.R. § 745.91(b).

4. Resource Conservation and Recovery Act

Acronyms and Abbreviations in this Chapter

AOC	Administrative Order on Consent
DOJ	U.S. Department of Justice
EBLL	Elevated Blood-Lead Level
EPA	U.S. Environmental Protection Agency
LBP	Lead-Based Paint
MSWLF	Municipal Solid Waste Landfill
RCRA	Resource Conservation and Recovery Act
UAO	Unilateral Administrative Order

A. Statutory Background

The Resource Conservation and Recovery Act (RCRA)⁴⁶³ was enacted in 1976, and consists of the Solid Waste Disposal Act of 1965 and subsequent amendments thereto.⁴⁶⁴ RCRA regulates the generation, transportation, treatment, storage, and disposal of hazardous waste (Subtitle C⁴⁶⁵); provides a framework for the management of non-hazardous waste, including standards for municipal solid waste landfills (MSWLFs)(Subtitle D⁴⁶⁶); and regulates underground storage tanks (Subtitle I⁴⁶⁷). Section 7003 of RCRA authorizes EPA to address an “imminent and substantial endangerment,”⁴⁶⁸ and Section 7002 provides for citizen suits to address such hazards.⁴⁶⁹

B. Waste from Residential Lead-Based Paint Renovations and Abatements

EPA considers lead paint debris generated by contractors or residents from residential abatements, renovations, and remodeling projects to be “household waste,” exempt from RCRA’s hazardous waste regulations.⁴⁷⁰ Therefore, contractors and residents may dispose of LBP waste from residential projects as household garbage into MSWLFs,⁴⁷¹ subject to applicable State regulations.⁴⁷² (Some state and local

⁴⁶³ 42 U.S.C. §§ 6901 – 6992k. www.epa.gov/lawsregs/laws.

⁴⁶⁴ See www.epa.gov/compliance/civil/rcra.

⁴⁶⁵ 42 U.S.C. §§ 6921-6939e.

⁴⁶⁶ 42 U.S.C. §§ 6941-6949a.

⁴⁶⁷ 42 U.S.C. §§ 6991-6991m.

⁴⁶⁸ 42 U.S.C. § 6973.

⁴⁶⁹ 42 U.S.C. § 6972.

⁴⁷⁰ EPA Memorandum, E. Cotsworth, *Regulatory Status of Waste Generated by Contractors and Residents from Lead-Based Paint Activities Conducted in Households* (July 31, 2000)(RCRA LBP Policy), www.epa.gov/lead/pubs/leaddebr.htm. Some states with delegated authority to implement RCRA may have different rules or take different interpretations.

⁴⁷¹ Residential lead-based paint waste also may be disposed of a construction and demolition landfills. 40 C.F.R. Part 257. 68 Fed. Reg. 36487 (June 18, 2003). See also www.epa.gov/garbage/landfill/pb-paint.htm.

requirements may impose additional restrictions on the disposal of this waste.) This policy does not affect EPA's ability to reach such waste under its RCRA *statutory* authorities, including its authority to address imminent hazards under Section 7003.⁴⁷³

C. Imminent Hazard Authority

1. Overview

Section 7003 of RCRA⁴⁷⁴ establishes EPA's authority to respond to an "imminent and substantial endangerment" (which, in some EPA and other documents, is called an "imminent hazard" or ISE). In short, Section 7003 provides that:

When EPA receives evidence "that the past or present *handling, storage, treatment, transportation or disposal* of any *solid waste* or hazardous waste may present an *imminent and substantial endangerment* to health or the environment," EPA may bring suit against any person who has contributed or is contributing to such activity to restrain the person from such activity, order such person to take other action as may be necessary, or both.⁴⁷⁵

Section 7003 imposes strict liability, and joint and several liability.⁴⁷⁶ It authorizes EPA to obtain clean-up, through the Agency's or court's order authority, but does not provide for the assessment of penalties. The Agency's authority under Section 7003 is *not* limited to target housing or child-occupied facilities. There are no Section 7003 regulations, and no reported opinions applying it to LBP hazards.

EPA applied Section 7003 to LBP hazards in two known enforcement orders (examined in section 4, below):

- *In re 17th Street Revocable Trust (17th Street Trust)*⁴⁷⁷; and
- *In re: Group I Management and M275 LLC of Fall River, Massachusetts (Fall River)*.⁴⁷⁸

These orders illustrate the potentially broad applicability of RCRA 7003 to LBP hazards, since these cases involved:

- *Actual* lead poisoning (*17th Street Trust*), as well as *potential* poisoning (*Fall River*); and
- The potential *generation* of new LBP hazards (*Fall River*), as well as the *continuing presence* of LBP hazards (*17th Street Trust*).⁴⁷⁹

⁴⁷² RCRA LBP Policy at 2, *supra* note 470.

⁴⁷³ RCRA LBP Policy at 3 and citations therein, *supra* note 470.

⁴⁷⁴ 42 U.S.C. § 6973.

⁴⁷⁵ 42 U.S.C. § 6973(a)(emphasis added).

⁴⁷⁶ See EPA, *Guidance on the Use of Section 7003 of RCRA* (Oct. 1997)(*RCRA Section 7003 Guidance*), and citations therein, www.epa.gov/Compliance/resources/policies/civil/rcra/rcrasect7003-rpt.mem.pdf, or www.epa.gov/Compliance/resources/policies/cleanup/rcra/use-sec7003-mem.pdf.

⁴⁷⁷ RCRA-3-2000-0001 TH (2000)(*17th Street Trust UAO*). The discussion herein refers to the modified UAO and revised statement of work.

⁴⁷⁸ RCRA-01-2001-0072 (Sept. 4, 2001)(*Fall River UAO*).

⁴⁷⁹ For additional perspectives on the use of RCRA Section 7003 to address LBP, see T. Neltner, *Lead Dust as Solid Waste: a New Legal Strategy for Achieving Lead Safety*, and citations therein, CLEARINGHOUSE REV. J.L. & POL'Y, Mar.-April 2006, 665-675. See also Alliance for Healthy Homes, *Using the Resource Conservation and Recovery Act (RCRA) to Control Lead Hazards in Housing* (Updated 10/04), www.afhh.org/res/res_Operation_LEAP_toolkit.htm.

2. Requirements

EPA must make three seminal determinations to invoke Section 7003:

- A person⁴⁸⁰ has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of a “solid waste.”
The statute defines “solid waste” to include “refuse . . . and other discarded material,”⁴⁸¹ and this term has been liberally construed.⁴⁸² EPA determined that lead dust and deteriorated LBP constituted RCRA solid waste in *17th Street Trust* and *Fall River*.
- The potential endangerment stems from the past or present “handling, storage, treatment, transportation, or disposal” of the solid waste.
EPA need only show that one of these activities has occurred or is occurring,⁴⁸³ and need not necessarily distinguish which one. (In *17th Street Trust* and *Fall River*, the Agency made no distinction.) “Handling” has been construed liberally – and “storage,” “transportation,” and “disposal” also may apply to a LBP case.⁴⁸⁴
- The condition “may present an imminent and substantial endangerment to human health or the environment.”
EPA determines whether a situation may present an “imminent and substantial endangerment” on a case-by-case basis. An “endangerment” may be actual or potential harm. An endangerment is “imminent” even if not realized for years; and is “substantial” if there is reasonable cause for concern of serious harm to health or the environment.⁴⁸⁵

In deciding whether an imminent and substantial endangerment exists, EPA considers several factors, such as the sensitivity of the at-risk population, bioaccumulation, the exposure pathway, and the level of contaminant.⁴⁸⁶ Federal lead hazard standards provide a basis for the determination of an imminent and substantial endangerment, since they establish the concentration levels at which the presence of lead constitutes a hazard.⁴⁸⁷

Typically, the Agency uses Section 7003 in response to natural resource contamination.⁴⁸⁸ In *17th Street Trust* and *Fall River*, however, EPA found an imminent and substantial endangerment where LBP hazards had caused, or likely would cause, childhood lead poisoning.

⁴⁸⁰ 42 U.S.C. § 6903(15) (e.g., individual, trust, company, association, state or federal entity).

⁴⁸¹ 42 U.S.C. § 6903(27).

⁴⁸² *RCRA Section 7003 Guidance*, section IV and citations therein, *supra* note 476.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* “Treatment” is generally inapplicable to LBP hazards, since this term usually applies to *hazardous waste* Treatment, Storage, and Disposal facilities. *Id.*

⁴⁸⁵ *See id.*

⁴⁸⁶ *RCRA Section 7003 Guidance*, at 11 and citations therein, *supra* note 476.

⁴⁸⁷ 40 C.F.R. Part 745, Subpart D. *See* Part II.B of this book, *Toxic Substances Control Act – Lead Hazard Standard*.

⁴⁸⁸ RCRA 7003 has been used to respond to lead shot in wildlife; leakage of landfill leachate, chemicals, and waste into soil and water. *See e.g., RCRA Section 7003 Guidance*, at 11-12 and citations therein, *supra* note 476.

3. Enforcement Options⁴⁸⁹

In deciding whether to invoke Section 7003 rather than another legal authority, EPA considers the following:

- The risk to health or the environment, with highest priority to “serious risks”;
- The strength of evidence for each requirement of Section 7003;
- The technical capability, and financial ability, of the responsible person to perform the required actions;
- EPA’s ability to oversee performance of the required actions; and
- The availability of other legal authorities to require the same actions.⁴⁹⁰

Section 7003 permits EPA to sue to restrain a person, order such person “to take such other action as may be necessary,” or both.⁴⁹¹ If EPA wants to restrain a person, then the Agency must ask the U.S. Department of Justice (DOJ) to seek injunctive relief from the court. Alternatively, EPA may use its administrative order authority and either:

- Issue a unilateral administrative order (UAO) without negotiation with the responsible person; or
- Enter into a negotiated administrative order on consent (AOC). EPA has developed a model RCRA 7003 AOC.⁴⁹²

4. Section 7003 Orders for Lead-Based Paint Hazards

4-1. Overview

EPA issued RCRA 7003 unilateral administrative orders for the abatement of lead dust and deteriorated LBP in:

- *17th Street Trust*⁴⁹³; and
- *Fall River*.⁴⁹⁴

In the absence of Section 7003 regulations, or written guidance on applying this law to LBP, these UAOs are highly instructive and, thus, are set out in detail below. In both cases:

- EPA became involved at the request of state/local authorities;
- Lead-contaminated dust and/or deteriorated LBP were pervasive in the subject properties;
- Tests confirmed that dust and paint chips/flakes contained lead in excess of federal lead hazard standards⁴⁹⁵ -- and, in *17th Street Trust*, exceeded the standards by orders of magnitude; and
- Young children resided in or frequented (or would frequent) the properties.

⁴⁸⁹ The State of Indiana mandates state action in response to a Section 7003 endangerment. Other states may have a comparable requirement.

⁴⁹⁰ See *RCRA Section 7003 Guidance*, at 2-3, *supra* note 476. Other federal law generally is not available to require risk reduction in response to LBP hazards in housing. See Part I.A of this book, *Introduction – Federal Response to Lead-based Paint Hazards*.

⁴⁹¹ 42 U.S.C. § 6973(a).

⁴⁹² See www.epa.gov/Compliance/resources/policies/cleanup/rcra/7003-aoc-05-mem.pdf.

⁴⁹³ *17th Street Trust UAO*, *supra* note 477. See also EPA Press Release, *D.C. Landlord Agrees to Emergency Cleanup of Lead-Based Paint*, (7/12/2000),

<http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/3e91102a2ecbe7af852570d60070fb60!OpenDocument>.

⁴⁹⁴ *Fall River UAO*, *supra* note 478.

⁴⁹⁵ 40 C.F.R. § 745.65.

4-2. In re 17th Street Revocable Trust

Factual Background

EPA Region 3 (Philadelphia) issued a UAO to 17th Street Revocable Trust and other owners of a 77-unit apartment building in Washington, D.C. in 2000.⁴⁹⁶ The building (constructed in 1914) included a child care center on the ground floor. Although this UAO pre-dated EPA's promulgation of the federal lead hazard standard,⁴⁹⁷ the presence of longstanding and pervasive LBP hazards was unequivocal.

From 1990 through 1997, the District of Columbia government learned of at least five lead poisoned children residing at the property, including two with EBLs greater than 20 µg/dL. During this period, the city inspected the property, and issued Housing Deficiency Notices for six separate units, for a total of 15 lead violations.⁴⁹⁸

In spring 2000, in response to additional reports of lead poisoned children at the property, the city provided for LBP inspections. The inspections "revealed the presence of extremely high levels" of LBP and "lead-based paint waste" (defined to mean dust containing lead, and detached lead-based paint chips or flakes). Specifically, the inspection reported:

- Deteriorated paint throughout each of the 20 units reported, and lead dust in 17 of the 20⁴⁹⁹;
- Paint chips containing lead up to 29.31% by weight⁵⁰⁰ (whereas federal law defines LBP to mean paint with lead content equal to or in excess of 0.5% by weight⁵⁰¹); and
- In 39 dust wipe samples (for 18 units), lead levels in window sills and wells up to 4,934,400 µg/ft², an *average* reading in excess of 300,000 µg/ft², most readings in the mid-six figures µg/ft², and several in the *millions* µg/ft².⁵⁰² (By comparison, the federal standard for dust-lead hazards on window sills is 250 µg/ft².⁵⁰³)

Also, EPA observed peeling paint on door frames; and paint chips, flakes, and dust near and on windows.

Consequently, EPA determined that:

- The level of lead in dust and paint chips "clearly far exceeded any levels that would be considered hazardous."
- The "dust that contains lead, and detached lead-based paint chips or flakes . . . are refuse and discarded materials."
- The LBP in many instances was located on impact or friction surfaces, and repeated opening of windows and doors results in "the continuing process of new lead-based paint wastes being generated" including new LBP dust, chips, and flakes.
- The "dust containing lead and detached lead-based paint chips and flakes . . . may present an imminent and substantial endangerment to human health and the environment" because they cause EBLs "associated with adverse human health effects" which "present a substantial risk to the health of tenants" especially young children.

⁴⁹⁶ 17th Street Trust UAO, *supra* note 477.

⁴⁹⁷ 40 C.F.R. Part 745, Subpart D; 66 Fed. Reg. 1206 (Jan. 5, 2001).

⁴⁹⁸ 17th Street Trust UAO, *supra* note 477, section V.Z.

⁴⁹⁹ 17th Street Trust UAO, *supra* note 477, section V.Z.

⁵⁰⁰ 17th Street Trust UAO, *supra* note 477, section V.Z.

⁵⁰¹ See e.g., 40 C.F.R. § 745.103 (EPA Disclosure Rule).

⁵⁰² 17th Street Trust UAO, *supra* note 477, section V.CC.

⁵⁰³ 40 C.F.R. § 745.65(c).

- The respondents, “either directly or indirectly through contractors or employees” were responsible for the maintenance of the property.⁵⁰⁴

Conclusions of Law

EPA concluded as a matter of law that:

- The respondents were “persons” under RCRA.
- The “lead-based paint waste” (dust containing lead, and detached LBP chips or flakes) constituted “solid waste.”
- The solid waste was being “handled, stored, treated and/or disposed of” at the property.
- There “may be an imminent and substantial endangerment to human health and the environment arising from the past or present handling, storage, treatment or disposal of lead-based paint waste at and/or from the property.”
- Respondents were “persons who have contributed to and are contributing to” the handling, storage, treatment, and/or disposal of solid waste.
- The actions required by EPA’s UAO were “necessary to protect human health and the environment.”⁵⁰⁵

Actions Ordered

The UAO required that respondents:

- Perform interim controls in all 77 residential units and all interior common and maintenance areas in the property within 40 working days of the order.
- Distribute EPA’s *Protect Your Family*⁵⁰⁶ lead hazard information pamphlet to all tenants.
- Provide for LBP inspections and risk assessments in residential units, interior common areas, and maintenance areas not previously evaluated.
- Within one year of EPA’s approval of its work plan, “permanently abate all lead-based paint waste and deteriorating lead-based paint” in all 77 residential units, and interior common and maintenance areas; and clean such areas.
- Comply with clearance testing, performance standards, and record-keeping requirements.⁵⁰⁷

4-3. Group I Management and M275 LLC of Fall River, Massachusetts

Factual Background

In 2001, EPA Region 1 (Boston) issued a UAO to Group I Management and M275 LLC, owners of a commercial building. The owners had engaged a contractor to sandblast paint from the first floor of the building. During the work, tenants observed dust coming through the floor and out of the windows, and lead-contaminated debris in a trash dumpster. One of the tenants was a dance school, set to begin classes for children two weeks hence. The dance instructor was pregnant. State authorities contacted EPA in response to complaints.

EPA personnel inspected the property and observed dust throughout the building. EPA sampling found that dust on the floor contained lead at “1,290 ppm” and “2,790 ppm.”⁵⁰⁸ (By comparison, the

⁵⁰⁴ *17th Street Trust UAO*, *supra* note 477, section V.FF-JJ.

⁵⁰⁵ *17th Street Trust UAO*, *supra* note 477, section VI.

⁵⁰⁶ *Protect Your Family from Lead in Your Home*, www.epa.gov/lead/pubs/leadbase.htm, www.epa.gov/lead/pubs/leadprot.htm, or www.hud.gov/offices/lead/enforcement.

⁵⁰⁷ *17th Street Trust UAO* (revised statement of work).

⁵⁰⁸ *Fall River UAO*, *supra* note 477, section I.

federal lead hazard standard is 40 µg/ft² for dust on floors – and for soil is 400 ppm in play areas, and 1200 ppm elsewhere in a yard.⁵⁰⁹)

Conclusions of Law

EPA concluded as a matter of law that:

- The respondents were persons under RCRA.
- The lead dust constituted “solid waste.”
- The solid waste “has been and/or is currently being handled, stored, treated, or disposed of” at the property.
- Conditions at the property “may present an imminent and substantial endangerment to health and the environment” arising from the “past or present handling, storage, treatment or disposal of lead dust.”
- One respondent had been and was “currently contributing to the handling and/or storage, treatment and/or disposal” of the solid waste.
- The actions required by EPA’s order were consistent with RCRA, and necessary to protect health and/or the environment.⁵¹⁰

Actions Ordered

EPA ordered the respondent to abate the lead at the property, beginning with the dance studio. The abatement was to include lead dust on all interior surfaces and furniture, lead contaminated debris and equipment, and other objects contaminated with lead dust. The UAO also required the respondent to perform related measures, including occupant protection, clearance testing, and reporting to EPA.⁵¹¹

D. Citizen Suits

Section 7002 of RCRA allows any person to initiate a civil action against a person “who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal” of a solid waste (or hazardous waste) which “may present an imminent and substantial endangerment to health or the environment.”⁵¹² Since Sections 7003 and 7002 contain an endangerment standard and many other identical terms, analysis of the requirements for a Section 7003 action is instructive in construing Section 7002.⁵¹³

Section 7002 differs significantly from Section 7003 in that a person may *not* commence a Section 7002 action:

- If EPA (or the state) has commenced and is “diligently prosecuting” an action in court to require compliance with RCRA; or
- Unless the person has provided 90 days prior notice to EPA, the violator, and the state in which the alleged violation occurs.⁵¹⁴

⁵⁰⁹ 40 C.F.R. § 745.65(b)-(c).

⁵¹⁰ *Fall River UAO*, *supra* note 478, section I.

⁵¹¹ *Fall River UAO*, *supra* note 478, section II.

⁵¹² 42 U.S.C. § 6972(a)(1)(B). For an example of the use of RCRA Section 7002 to address LBP, *see* Neltner, *supra* note 479.

⁵¹³ *See e.g., RCRA Section 7003 Guidance*, at 5 and citations therein, *supra* note 476.

⁵¹⁴ 42 U.S.C. § 6972(b). Private actions also may be possible under state and/or local laws, including common law claims for negligence or breach of contract where a child has been poisoned by LBP in rental property.

5. Lead Safe Housing Rule

Acronyms and Abbreviations in this Chapter

EPA	U.S. Environmental Protection Agency
HUD	U.S. Department of Housing and Urban Development
LBP	Lead-Based Paint
LSH Rule	Lead Safe Housing Rule
Title X	Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)

A. Statutory Background

Title X amended the Lead-Based Paint Poisoning Prevention Act, and authorized the Lead Safe Housing Rule (LSH Rule).⁵¹⁵ HUD promulgated the LSH Rule in 1999,⁵¹⁶ and updated it in 2004.⁵¹⁷ Also, HUD has issued an interpretive guidance.⁵¹⁸

B. Applicability and Requirements

The Lead Safe Housing Rule applies to federally owned and assisted target housing.⁵¹⁹ The regulated universe accounts for approximately 1.3 million (approximately 3 percent⁵²⁰) of the 38 million dwellings in the nation with LBP.⁵²¹

In sum, the LSH Rule requires various forms of notification, paint evaluation, and risk reduction work. The specific requirements applicable to a particular property depend upon the type and level of federal assistance (or federal ownership) associated with the property. The requirement also depends upon other factors, such as the age of the building and whether it is managed through a rental or homeownership

⁵¹⁵ 24 C.F.R. Part 35, Subparts B-R (§§ 35.100 – 35.1355). www.hud.gov/offices/lead/enforcement/regulations.cfm.

⁵¹⁶ 64 Fed. Reg. 50139 (Sept. 15, 1999).

⁵¹⁷ 69 Fed. Reg. 34262 (June 21, 2004).

⁵¹⁸ *Interpretive Guidance on HUD's Lead Safe Housing Rule: The HUD Regulation on Controlling Lead-based Paint Hazards in Housing Receiving Federal Assistance and Federally Owned Housing Being Sold (24 CFR Part 35)*, www.hud.gov/offices/lead/enforcement/lshr.cfm.

⁵¹⁹ See www.hud.gov/offices/lead/enforcement/lshr.cfm.

⁵²⁰ Arguably, the potential impact of the rule is more significant than indicated by the size of the regulated universe, since the rule applies to low-income housing which tends to be inordinately burdened with LBP hazards.

⁵²¹ See e.g., HUD, *Economic Analysis of the Final Rule on Lead-Based Paint: Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally- Owned Residential Property and Housing Receiving Federal Assistance*, Exhibit 4-3 (Sept. 7, 1999)(economic analysis for Lead Safe Housing Rule). www.hud.gov/offices/lead/library/enforcement/completeRIA1012.pdf.

program. The rule encompasses more than a dozen housing program classifications, generally covering HUD programs for rental assistance, homeownership promotion, housing rehabilitation, and housing sales.⁵²² See Fig. 16: *Summary – Lead Safe Housing Rule Evaluation and Risk Reduction Requirements*.

For virtually all subject housing, the LSH Rule requires distribution of EPA’s *Protect Your Family* pamphlet,⁵²³ and notice to occupants regarding evaluation results and risk reduction activities. Also, depending upon the applicable housing program, the rule mandates the performance of specific LBP evaluation and risk reduction measures.

- Evaluation includes:
 - Lead-based paint inspection (a surface-by-surface investigation to determine the presence of LBP, and a report of results)⁵²⁴;
 - Risk assessment (an on-site investigation to determine the existence, nature, severity, and location of LBP hazards; and a report of the results and response options)⁵²⁵;
 - Visual assessment (looking for deteriorated paint; visible surface dust, debris, and residue; or the completion or failure of a hazard reduction measure)⁵²⁶; and
 - Paint testing prior to disturbing paint to determine the presence of LBP.⁵²⁷
- Risk reduction measures include:
 - Abatement (measures to eliminate LBP or LBP hazards for at least 20 years, such as removal of LBP, enclosure or encapsulation, component replacement, clearance testing and related work)⁵²⁸;
 - Interim controls (measures to temporarily reduce exposure to LBP hazards, such as repairs, painting, temporary containment, specialized cleaning, clearance, ongoing LBP maintenance, management and resident education programs)⁵²⁹;
 - Paint repair, or paint stabilization (repairing physical defects in the substrate that cause paint deterioration, removing loose paint, and repainting)⁵³⁰; and
 - Ongoing maintenance of LBP.

Abatement is required by only a few of HUD’s programs, such as those for conventional public housing, and major rehabilitations. Furthermore, the rule contemplates two different levels of abatement, depending upon the housing program involved, *i.e.*, abatement to address all LBP, and abatement to address only LBP hazards. See Fig. 16: *Summary – Lead Safe Housing Rule Evaluation and Risk Reduction Requirements*. Also under certain programs, the LSH Rule requires timely response where a child is identified as having an elevated blood-lead level that requires an environmental intervention. Clearance is required after abatement, interim controls, paint stabilization, or standard treatments.⁵³¹

⁵²² An examination of the various housing assistance programs under the Lead Safe Housing Rule is beyond the scope of this publication.

⁵²³ See *e.g.*, 24 C.F.R. § 35.130. Appendix 13, *Protect Your Family from Lead in Your Home*.

⁵²⁴ See 24 C.F.R. § 35.110.

⁵²⁵ See *id.*

⁵²⁶ See *id.* A visual assessment alone is not a formal evaluation. *Id.*

⁵²⁷ See *id.* (testing by a certified LBP inspector or risk assessor; LBP presumed if test not determinative).

⁵²⁸ See *id.* (definitions of “abatement” and “permanent”).

⁵²⁹ See *id.*

⁵³⁰ See *id.*

⁵³¹ See *e.g.*, www.hud.gov/offices/lead/enforcement/lshr_summary.cfm. “Standard treatments” means “a series of hazard reduction measures” to reduce LBP hazards in a dwelling *without* a risk assessment or other evaluation. 35 C.F.R. § 35.110.

**Fig. 16: Summary – Lead Safe Housing Rule¹
Evaluation and Risk Reduction Requirements**

		Requirement									
HUD Housing Program		Evaluation:				Risk Reduction Measures:					
Rule Subpart		LBP Inspection	Risk Assessment	Visual Assessment	Paint Testing	Ongoing LBP Maintenance	Paint Repair	Paint Stabilization	Interim Controls	Abatement of LBP	Abatement of LBP Hazards
Federal Agencies <i>Other than</i> HUD											
C	Disposition by an Agency										
	- Pre-1960	X	X								X
	- 1960-77	X	X								
D	Project-based Assistance ²		X						X		
Other Properties											
F	HUD-owned Single Family Sold w/ HUD-insured Mortgage			X				X			
G	Multifamily Mortgage Insurance										
	1. Currently Residential										
	- Pre-1960		X			X			X		
	- 1960-77					X					
	2. Conversions / Major Renovations	X								X	
H	HUD Project-based Assistance ²										
	1. Multifamily @ >\$5,000/unit/year		X			X			X		
	2. Multifamily @ ≤\$5,000/unit/year			X		X		X			
	3. Single family			X		X		X			
I	HUD-owned Multifamily ²	X	X			X			X		
J	Rehabilitation Assistance										
	1. ≤\$5,000/unit				X						
	2. >\$5,000-\$25,000/unit		X		X	X			X		
	3. >\$25,000/unit		X		X	X					X
K	Acquisition, Leasing, Support Services or Operation			X		X		X			
L	Public Housing ²	X	X						X	X	
M	Tenant-based Rental Assistance ²			X		X		X			

¹ 24 C.F.R. Part 35, Subparts B-R.
² Also requires response to child with elevated blood-lead level.
This chart is adapted from HUD's *Summary of Lead-safe Housing Rule Requirements*, www.hud.gov/offices/lead/enforcement/lshr_summary.cfm. See also 24 C.F.R. § 35.100(c). See also *HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*, www.hud.gov/offices/lead/lbp/hudguidelines.

6. Federal Lead-Based Paint Enforcement Programs

Acronyms and Abbreviations in this Chapter

ALJ	Administrative Law Judge
AOC	Administrative Order on Consent
ATSDR	Agency for Toxic Substances and Disease Registry
AUSA	Assistant United States Attorney
CDC	U.S. Centers for Disease Control and Prevention
CHIP	Child Health Improvement Project
CLPPP	Childhood Lead Poisoning Prevention Program
DOJ	U.S. Department of Justice
EAB	Environmental Appeals Board (EPA)
EBLL	Elevated Blood-Lead Level
ENRD	Environment and Natural Resources Division (DOJ)
EPA	U.S. Environmental Protection Agency
FDA	U.S. Food and Drug Administration
HUD	U.S. Department of Housing and Urban Development
IRL	Information Request Letter
LBP	Lead-Based Paint
LBP Activities Rule	Lead-Based Paint Activities, Certification, and Training Rule
PRE Rule	Pre-renovation Education Rule
OECA	Office of Enforcement and Compliance Assurance (EPA)
OHHLHC	Office of Healthy Homes and Lead Hazard Control (HUD)
OPPTS	Office of Prevention, Pesticides and Toxic Substances (EPA)
RCRA	Resource Conservation and Recovery Act
RRP Rule	Renovation, Repair, and Painting Rule
SEP	Supplemental Environmental Project
Title X	Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)
TSCA	Toxic Substances Control Act

A. Introduction

This chapter provides an overview of federal LBP enforcement programs, focusing primarily on Disclosure Rule enforcement.⁵³² As discussed in the foregoing chapters, a variety of federal laws impose enforceable obligations (generally, disclosure and performance standards) concerning LBP and LBP hazards, *i.e.*:

- Title X and regulations there-under:

⁵³² This discussion focuses largely on *civil* enforcement of the Disclosure Rule – and on EPA’s enforcement program. As discussed below, EPA’s and HUD’s enforcement programs are similar, but not identical.

- The Disclosure Rule⁵³³; and
 - The Lead Safe Housing Rule.⁵³⁴
 - The Toxic Substances Control Act (TSCA) and its LBP regulations:
 - The Pre-renovation Education Rule (PRE Rule)⁵³⁵;
 - The Renovation, Repair, and Painting Rule (RRP Rule)⁵³⁶; and
 - The Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).^{537, 538}
 - Section 7003 of the Resource Conservation and Recovery Act (RCRA).⁵³⁹
- Of these, only two -- the Lead Safe Housing Rule,⁵⁴⁰ and RCRA Section 7003⁵⁴¹ -- may be used to compel the performance of risk reduction work.⁵⁴²

Most federal LBP enforcement activity is directed to the Disclosure Rule. Only EPA and HUD enforce the Disclosure Rule, because it is non-delegable federal law (*i.e.*, EPA and HUD cannot delegate enforcement responsibilities to state or local government). Most TSCA LBP enforcement takes place at the state or tribal level, since EPA has authorized more than 40 State/Tribal programs under the PRE Rule and/or LBP Activities Rule.⁵⁴³ Most provisions of the new RRP Rule are not yet enforceable, and it is unclear how many States/Tribes will administer the program.⁵⁴⁴ The Lead Safe Housing Rule applies to a very small portion (approximately 3 percent) of the nation's housing stock with LBP.⁵⁴⁵ EPA has used RCRA Section 7003 to address LBP hazards on only two occasions.⁵⁴⁶ See Fig. 17: *Enforcement Authority for Federal LBP Laws*.

⁵³³ 24 C.F.R. Part 35, Subpart A (HUD); 40 C.F.R. Part 745, Subpart F (EPA).

⁵³⁴ 24 C.F.R. Part 35, Subparts B-R.

⁵³⁵ 40 C.F.R. Part 745, Subpart E.

⁵³⁶ 73 Fed. Reg. 21692 (Apr. 22, 2008), *to be codified at* 40 C.F.R. Part 745, Subparts E, L, and Q.

⁵³⁷ 40 C.F.R. Part 745, Subpart L.

⁵³⁸ The Lead Hazard Standard does not impose enforceable obligations; and the State/Tribal Programs Rule is a program authorization regulation.

⁵³⁹ 42 U.S.C. § 6973.

⁵⁴⁰ See Part V of this book, *The Lead Safe Housing Rule*.

⁵⁴¹ See Part IV of this book, *Resource Conservation and Recovery Act*.

⁵⁴² See *e.g.*, Part I.A.3 of this book, *Introduction – Lead Poisoning and Lead-Based Paint – Federal Response to Lead-Based Paint Hazards*. The Disclosure Rule, Lead Hazard Standard, and LBP Activities Rule state that they do not require evaluation or risk reduction activities. 24 C.F.R. § 35.88(a)(HUD Disclosure Rule). 40 C.F.R. § 745.107(a)(EPA Disclosure Rule), § 745.61(c)(Lead Hazard Standard), § 745.220(d)(LBP Activities Rule).

⁵⁴³ See Part III.D of this book, *Toxic Substances Control Act - State and Indian Tribal Programs*, www.epa.gov/lead/pubs/authstatus.pdf, or www.epa.gov/lead/pubs/traincert.htm.

⁵⁴⁴ Although some provisions are enforceable as of June 23, 2008, most will not be until 2010. 40 C.F.R. § 745.81. State/Tribes can *apply* for authorization starting June 23, 2008. 40 C.F.R. § 745.339. See also Part III.F of this book, *Toxic Substances Control Act - Renovation, Repair, and Painting Rule*.

⁵⁴⁵ See Part V of this book, *Lead Safe Housing Rule*.

⁵⁴⁶ See Part IV.C of this book, *Resource Conservation and Recovery Act – Imminent Hazard Authority*.

Fig. 17: Enforcement Authority for Federal LBP Laws

	Enforceable by:		
	EPA	HUD	State/Tribe
Title X Disclosure Rule	X	X	
Title X Lead Safe Housing Rule		X	
TSCA LBP Activities Rule	X		X ¹
TSCA PRE Rule	X		X ¹
TSCA RRP Rule	X		X ²
RCRA 7003	X		
Blank space means <i>no</i> enforcement authority.			
¹ EPA runs the TSCA LBP program in eleven states – and has authorized over 40 State/Tribal LBP programs, which operate <i>in lieu of</i> the federal program, under <i>state/tribal</i> law.			
² States/Tribes may apply for RRP Rule authorization starting June 23, 2008.			

B. Enforcement's Contribution to Eliminating Lead-Based Paint Hazards

EPA and HUD were signatories to the national goal to “eliminate lead paint hazards in housing where children under six live” by 2010, through “enforcement of lead safety laws and regulations” and other means.⁵⁴⁷ Given the limited authority to demand risk reduction measures, federal LBP enforcement programs strive to promote compliance with the law and *voluntary* risk reduction work.⁵⁴⁸ EPA and HUD enforcement actions have obtained LBP abatement, risk assessments, and inspections in hundreds of thousands of dwellings across the nation⁵⁴⁹ by employing creative policies and strategies, such as:

- Supplemental Environmental Projects (SEPs)⁵⁵⁰;
- Child Health Improvement Projects (CHIPs)⁵⁵¹; and
- Coordinated compliance monitoring (inspections) and enforcement efforts with state and local agencies.⁵⁵²

⁵⁴⁷ President's Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards* (Feb. 2000), www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf.

⁵⁴⁸ See e.g., EPA's *National Program Managers' Guidance*.

⁵⁴⁹ See e.g., EPA Press Release, *Connecticut Landlords Agree to Settle Lead-Based Paint Disclosure Case: 174 units will be lead-safe at a cost of more than \$400,000* (Sept. 12, 2007), http://yosemite.epa.gov/opa/admpress.nsf/names/r01_2007-9-12_lead. See also e.g., HUD Press Release, *HUD, EPA and U.S. Attorney in Minnesota Announce Legal Settlement with Minneapolis and St. Paul Landlords: Agreement requires 179 units to become 'lead-safe'* (Jan. 28, 2008), www.hud.gov/news/release.cfm?content=pr08-005.cfm.

⁵⁵⁰ See section VI.E, below.

⁵⁵¹ See *id.*

⁵⁵² See section, VI.F and G, below.

Coordinated Federal/State/Local Enforcement

EPA and HUD engage in coordinated Disclosure Rule inspection and enforcement campaigns with state and/or local enforcement authorities. Participating agencies can leverage their respective information, resources, and legal authority through *joint* (unified) or *parallel* (complementary) enforcement actions.⁵⁵³

C. Federal Entities That Enforce Lead-Based Paint Requirements

EPA and HUD each can unilaterally enforce the Disclosure Rule, although they often cooperate; and either may enforce violations in any target housing.⁵⁵⁴ Under a 1997 Memorandum of Understanding⁵⁵⁵ and accompanying guidance,⁵⁵⁶ EPA and HUD envisioned that EPA would focus on non-HUD-assisted target housing, and HUD would be primarily responsible for HUD-assisted target housing.⁵⁵⁷ The original intent and current application of these documents may be in dispute. Nonetheless, these instruments do not nullify the statutory authority of either agency -- and have not prevented either from pursuing Disclosure Rule enforcement actions against any type of target housing.⁵⁵⁸

1. U.S. Environmental Protection Agency

EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS) writes the Agency's LBP regulations; conducts research studies; provides for compliance assistance, public outreach, and education; and performs other functions to administer TSCA.⁵⁵⁹

The Agency's Office of Enforcement and Compliance Assurance (OECA) directs EPA's national LBP compliance monitoring and enforcement program.⁵⁶⁰ OECA sets national enforcement policy and priorities, and works on nationally significant enforcement cases.

⁵⁵³ See section, VI.G, below.

⁵⁵⁴ See 24 C.F.R. § 35.96; 40 C.F.R. § 745.118.

⁵⁵⁵ *Memorandum of Understanding Between The Environmental Protection Agency and the Department of Housing and Urban Development for the Enforcement of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992* (Nov. 18, 1997).

⁵⁵⁶ *Guidance on Coordination Between EPA & HUD - Section 1018 Lead-Based Paint Disclosure Rule Investigations – Consistent with the HUD-EPA MOU* (Mar. 2, 1998).

⁵⁵⁷ Approximately 38 million pre-1978 dwellings have LBP. Of these, approximately 4.8 million receive some form of government assistance but are not necessarily subject to the Lead Safe Housing Rule.

⁵⁵⁸ See e.g., EPA Press Release, *Salem Housing Authority Faces over \$200,000 in Penalties for Lead Paint Disclosure Violations* (June 14, 2007), http://yosemite.epa.gov/opa/admpress.nsf/names/r01_2007-6-14_sha.

⁵⁵⁹ See www.epa.gov/oppts/pubs/aboppts.htm, or www.epa.gov/epahome/organization.htm. Within OPPTS, the Office of Pollution Prevention and Toxics, and its National Program Chemicals Division, are directly responsible for LBP matters.

⁵⁶⁰ See www.epa.gov/compliance, or www.epa.gov/epahome/organization.htm. Within OECA:

- The Office of Compliance is responsible for LBP compliance monitoring;
- The Office of Civil Enforcement, and its Waste and Chemical Enforcement Division, are responsible for LBP civil enforcement; and
- The Office of Criminal Enforcement and Forensics Training handles criminal matters.

EPA's LBP enforcement and compliance monitoring programs, like many of EPA's activities, are decentralized across ten regional offices.⁵⁶¹ Each Region has a Regional lead coordinator,⁵⁶² and a separate lead enforcement coordinator.⁵⁶³ Although the Agency strives for national consistency in enforcement approaches and results, Regional operations may vary. Generally, each Region selects its inspection targets, determines and prioritizes enforcement cases, formulates case strategy, and determines appropriate penalties (within discretion provided by national policy). Consequently, anyone interested in a particular enforcement matter should be aware of both the relevant national policies, and operations in the affected Region.⁵⁶⁴

2. U.S. Department of Housing and Urban Development

The U.S. Department of Housing and Urban Development's (HUD's) LBP enforcement program is centralized within its Office of Healthy Homes and Lead Hazard Control (OHHLHC). OHHLHC enforces the Disclosure Rule, provides funds to state and local governments to reduce LBP hazards, provides public outreach and technical assistance, and conducts technical studies about health and safety hazards in the home.⁵⁶⁵

3. U.S. Department of Justice

The U.S. Department of Justice (DOJ) represents federal entities in litigation.⁵⁶⁶ Therefore, to obtain judicial review and relief (such as injunctive relief), EPA and HUD must "refer" a case to DOJ. They often do so jointly. HUD and EPA submit referrals to either the Environment and Natural Resources Division (ENRD) at DOJ headquarters, or to the appropriate local Assistant United States Attorney (AUSA).

Within ENRD, the Environmental Enforcement Section handles civil prosecutions, and the Environmental Crimes Section handles criminal prosecutions. ENRD views Title X enforcement as one of its primary responsibilities.⁵⁶⁷ DOJ has encouraged AUSAs to prosecute Disclosure Rule cases, resulting in several civil⁵⁶⁸ and criminal⁵⁶⁹ enforcement actions. Each AUSA, however, determines the prosecutorial priorities for his/her jurisdiction.

⁵⁶¹ See www.epa.gov/epahome/locate2.htm.

⁵⁶² See www.epa.gov/lead/pubs/leadoff1.htm.

⁵⁶³ Each Region's Lead Coordinator can identify the Region's current enforcement coordinator. See www.epa.gov/lead/pubs/leadoff1.htm.

⁵⁶⁴ Several other EPA offices also work on lead issues. See www.epa.gov/lead/pubs/resources.htm.

⁵⁶⁵ See www.hud.gov/offices/lead/about.cfm.

⁵⁶⁶ See www.usdoj.gov/enrd/About_ENRD.html.

⁵⁶⁷ See *id.* It is noteworthy that ENRD views Title X enforcement as a priority since, *by standard measures* (multi-million dollar penalties, and tons of pollutants reduced), the outcomes obtained in most other ENRD litigation dwarfs that available in a typical Disclosure Rule case.

⁵⁶⁸ See e.g., EPA Press Release, *Connecticut Landlords Agree to Settle Lead-Based Paint Disclosure Case: 174 units will be lead-safe at a cost of more than \$400,000* (Sept. 12, 2007), http://yosemite.epa.gov/opa/admpress.nsf/names/r01_2007-9-12_lead. See also e.g., HUD Press Release, *HUD, EPA and U.S. Attorney in Minnesota Announce Legal Settlement with Minneapolis and St. Paul Landlords: Agreement requires 179 units to become 'lead-safe'* (Jan. 28, 2008), www.hud.gov/news/release.cfm?content=pr08-005.cfm.

⁵⁶⁹ See e.g., U.S. Attorney's Office, Oregon Press Release, *Landlord in Lead-Based Paint Case Pleads Guilty to Making False Statements* (Apr. 5, 2005), www.usdoj.gov/usao/or/PressReleases/20050415_landlord_pleads_guilty.htm. See also, *United States v. Aneckstein and JTA Real Estate Brokerage and Property Management* (D. N.H. 2001)(guilty plea to obstructing justice,

D. Other Federal Entities Involved with Lead

Other federal agencies also deal with lead and lead poisoning, such as the following.

1. U.S. Centers for Disease Control and Prevention

The U.S. Centers for Disease Control and Prevention (CDC) is a unit of the U.S. Department of Health and Human Services.⁵⁷⁰ CDC provides technical and financial assistance to state and local childhood lead poisoning prevention programs (CLPPPs). CLPPPs work to ensure that screening, lead hazard reduction, new legislation, and other prevention mechanisms occur throughout the country. CDC also has established a national system to identify children with elevated blood-lead levels (EBLLs). In addition, CDC provides guidance for the proper care of children identified as having EBLLs – and provides national guidance and policy for the prevention of childhood lead poisoning.⁵⁷¹

2. U.S. Consumer Product Safety Commission

The U.S. Consumer Product Safety Commission (CPSC) is charged with protecting the public from unreasonable risk of serious injury or death from consumer products under the commission's purview. CPSC tests and recalls lead-contaminated toys and other products. CPSC has jurisdiction for more than 15,000 types of consumer products, including toys, children's furnishings, power tools, and household chemicals.⁵⁷²

3. Other Agencies⁵⁷³

The U.S. Occupational Safety and Health Administration (OSHA) is a unit of the U.S. Department of Labor. OSHA develops work practice standards and worker exposure limits to protect employees from occupational lead exposure.⁵⁷⁴

The U.S. Food and Drug Administration (FDA) is a unit of the U.S. Department of Health and Human Services. FDA regulates lead in food and food canning.⁵⁷⁵

making false statements, and Disclosure Rule violation), EPA Press Release, *Manchester Man Admits Guilt in Lead Poisoning Case; Plea to Forging Lead Hazard Disclosure Documents is Precedent Setting* (Dec. 19, 2001), www.epa.gov/region1/pr/2001/dec/011214.html. See also, *United States v. Nuyen* (D. MD 2001) (guilty plea to obstruction of justice and making false statements), HUD Press Release, *Landlord Pleads Guilty to Lying about Lead Paint Hazards* (July 11, 2001), www.hud.gov/news/release.cfm?content=pr01-067.cfm.

⁵⁷⁰ A fellow agency, the U.S. Agency for Toxic Substances and Disease Registry (ATSDR), also works on lead issues. ATSDR is the lead federal public health agency responsible for determining human health effects associated with toxic exposures, largely associated with Superfund sites. www.atsdr.cdc.gov/mission.html. ATSDR also is responsible for health consultations concerning specific hazardous substances, health surveillance and registries, applied research in support of public health assessments, and other activities. www.atsdr.cdc.gov/about.html.

⁵⁷¹ See www.cdc.gov/nceh/lead/faq/about.htm.

⁵⁷² See www.cpsc.gov/. CPSC recall information is available at www.cpsc.gov/cpscpub/prerel/prerel.html.

⁵⁷³ Other members of the Federal Interagency Lead-Based Paint Task Force include the U.S. Department of Defense, Veteran's Administration, National Institutes of Standards and Technology, U.S. Public Health Service, National Aeronautics and Space Administration, U.S. Department of Agriculture, Government Accountability Office, National Institute for Environmental Health Sciences, ATSDR, and National Institute for Occupational Safety and Health. See e.g., 71 Fed. Reg. 1588, 1594 (Jan. 10, 2006).

⁵⁷⁴ See www.osha.gov/SLTC/lead.

⁵⁷⁵ See e.g., 21 C.F.R. § 189.240 (prohibiting packaging of food in cans with lead solder).

E. How Federal Enforcement Programs Work

Generally, EPA and HUD place high priority on investigating and enforcing violations that involve lead poisoned children, particularly when associated with target housing linked to multiple and/or successive cases of lead poisoning.

An enforcement case typically proceeds through three stages:

- Compliance monitoring (inspection and investigation);
- Enforcement case development; and
- Case resolution, via settlement or litigation.

1. Compliance Monitoring

EPA and HUD conduct Disclosure Rule inspections nationwide. For TSCA LBP programs, EPA performs inspections in EPA-run jurisdictions, and States/Tribes conduct inspections in their respective jurisdictions for the TSCA program(s) for which they are authorized.

Inspection Targets

EPA (and HUD) typically determine inspection targets from among:

- Tips and complaints from citizens⁵⁷⁶;
- Informal referrals from state and local agencies⁵⁷⁷; and
- Strategic plans based on objective data (such as blood-lead surveillance data).

Strategic plans are increasingly important, since they allow the agencies to focus limited resources on lead poisoning “hot spots” (*i.e.*, communities with a high occurrence of children with EBLs).⁵⁷⁸

Disclosure Rule Inspections

EPA (and HUD) Disclosure Rule “inspections” involve reviewing sale and lease transaction records that an owner/lessor/agent is required to retain under the rule.⁵⁷⁹ Most violations come to light when the requisite documentation is absent or substantively deficient.

Typically, inspections occur at the owner/landlord/agent’s place of business.⁵⁸⁰ (There is no physical inspection of the target housing itself, unless the necessary records happen to be retained at that location.) Alternatively, EPA or HUD may send an Information Request Letter (IRL) requesting voluntary submission of a sample, or all, of the required records. EPA also may exercise its TSCA subpoena authority,⁵⁸¹ with or without a prior IRL. Since HUD has no TSCA authority, EPA may

⁵⁷⁶ See www.epa.gov/compliance/complaints, or www.hud.gov/offices/lead/enforcement. See also section VI.F, below. If a tip/complaint alleges a TSCA LBP violation in an authorized State/Tribal jurisdiction, then EPA will refer the matter to the appropriate State/Tribal authorities.

⁵⁷⁷ See sections VI.F and G, below.

⁵⁷⁸ EPA also considers reducing the incidence of EBLs a national environmental justice priority. See EPA Memorandum, S. Johnson, *Reaffirming the U.S. Environmental Protection Agency’s Commitment to Environmental Justice* (Nov. 4, 2005), and references therein, www.epa.gov/compliance/resources/policies/ej/admin-ej-commit-letter-110305.pdf.

⁵⁷⁹ See Part II.C of this book, *Title X and the Disclosure Rule – The Disclosure Rule*.

⁵⁸⁰ HUD and EPA have inherent authority for Disclosure Rule inspections. See generally 42 U.S.C. § 4852d; 24 C.F.R. § 35.96; 40 C.F.R. § 745.118. EPA also has explicit inspection authority under Section 11 of TSCA. 15 U.S.C. § 2610(a)-(b).

⁵⁸¹ 15 U.S.C. § 2610(c).

issue a subpoena on HUD's behalf when the agencies are cooperating on an enforcement case. TSCA subpoenas, unlike IRLs, are enforceable in federal court.⁵⁸²

TSCA Inspections

EPA's TSCA inspections may be either record reviews, or on-site inspections.

- PRE Rule inspections are record reviews, since this regulation (like the Disclosure Rule) is limited to information transmittal.
- LBP Activities Rule inspections may be either record reviews, or on-site inspections (since the regulation imposes performance requirements for training programs and work).⁵⁸³

Record review inspections for the PRE and LBP Activities Rules monitor the documentation required to be retained under each rule.⁵⁸⁴ EPA may conduct record review inspections at the regulated entity's place of business,⁵⁸⁵ send an IRL, and/or issue a TSCA subpoena.⁵⁸⁶ EPA has authority to conduct work site inspections and may do so where, for example, a violation allegedly involves a hazard at an ongoing abatement project. Also, EPA audits training courses. State/Tribal compliance monitoring practices may differ from EPA's since State/Tribal programs need not be identical to the federal program.

2. Enforcement Case Development

Enforcement Case Information

If a Disclosure Rule inspection identifies a violation, then EPA (and HUD) likely will compile the evidence to support a potential enforcement action. The enforcement case file generally includes the inspection report, and other relevant facts such as information about:

- The violator's compliance history (*e.g.*, prior warnings, violations, or enforcement actions);
- The subject target housing (*e.g.*, age, condition, presence of LBP hazards, relevant housing code violations);
- Other target housing that the violator owns or controls; and
- Any other mitigating or aggravating circumstances, such as whether any child with an EBLL is associated with the property.

EPA compiles a comparable enforcement case file for a potential TSCA LBP enforcement action.

⁵⁸² *E.g., United States v. Silverwood Realtors*, 2000 U.S. Dist. LEXIS 6577 (N.D. Ill. May 12, 2000)(granting U.S. motion for enforcement of TSCA subpoena in Disclosure Rule action).

⁵⁸³ When the RRP Rule is fully implemented (April 2010), inspections probably will primarily involve record reviews. Renovation work site inspections are possible (*e.g.*, if a real-time complaint alleges an ongoing hazard), but unlikely since the rule does not require prior notification of renovation projects to EPA. See Part III.F of this book, *Toxic Substances Control Act - Renovation, Repair, and Painting Rule*.

⁵⁸⁴ See Parts II.C and E of this book, *Toxic Substances Control Act - Lead-Based Paint Activities Rule* and *Pre-renovation Education Rule*, respectively.

⁵⁸⁵ 15 U.S.C. § 2610(a)-(b). Also, refusal to provide records or to permit entry is a violation of TSCA. 15 U.S.C. § 2610(3)-(4)(TSCA § 15), § 2689 (TSCA § 409); 40 C.F.R. § 745.87(b)-(c)(PRE Rule/RRP Rule), § 745.235(b)-(c)(LBP Activities Rule).

⁵⁸⁶ 15 U.S.C. § 2610(c).

Enforcement Response Policy

Title X caps Disclosure Rule civil penalties at \$11,000 per violation (soon to be adjusted to \$16,000 per violation).⁵⁸⁷ EPA (and HUD) have wide discretion to adjust penalties up to the statutory maximum. EPA uses its Disclosure Rule enforcement and penalty policy⁵⁸⁸ as guidance in determining the appropriate enforcement response and civil penalty in a case consistent with Section 16 of TSCA.⁵⁸⁹ EPA may use the penalty it formulates for litigation or settlement purposes.

EPA first formulates a “gravity-based penalty” considering the:

- “nature” of the violation;
- “circumstance” of the violation; and
- “extent of the harm that may result” from the violation.⁵⁹⁰

Then, EPA may adjust the penalty up or down considering:

- the violator’s ability to pay (or continue in business), history of prior violations, and culpability;
- any voluntary disclosure by the violator; and
- “such other factors as justice may require.”⁵⁹¹

Such “other factors” may include litigation risk, the violator’s cooperativeness, and the violator’s commitment to perform a Supplemental Environmental Project.⁵⁹²

The Potential “Cost” of Disclosure Rule Noncompliance

Since each Disclosure Rule requirement is a distinct obligation, failure to comply with any requirement constitutes a violation.⁵⁹³ Currently, Disclosure Rule violations are punishable up to \$11,000 per violation. Thus, a landlord who completely fails to comply with the eleven obligations under the rule faces a potential penalty up to \$121,000 per lease transaction (or \$176,000 when the penalty is readjusted in late 2008 to \$16,000⁵⁹⁴). Potential penalties can easily reach seven figures because an enforcement action typically involves multiple lease transactions for multiple target housing units. Although EPA and HUD have comparable enforcement authority, they may hold different views on whether and how to apply this principle in a given case.

⁵⁸⁷ 42 U.S.C. § 4852d(b)(5). 40 C.F.R. § 745.118(f)(EPA; \$10,000 per violation on/before July 28, 1997; \$11,000 per violation after July 28, 1997). See also Part II.C.5 of this book, *Title X and the Disclosure Rule – The Disclosure Rule – Enforcement*.

⁵⁸⁸ EPA, *Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) (*Disclosure Rule Enforcement Policy*), <http://cfpub.epa.gov/compliance/resources/policies/civil/tscal>. EPA has not yet issued final enforcement response/penalty policies for the PRE Rule or LBP Activities Rule.

⁵⁸⁹ Title X makes Disclosure Rule violations enforceable under Section 409 of TSCA which, in turn, subjects a person to penalties under Section 16 of TSCA. 42 U.S.C. § 4852d(b)(5), referring to 15 U.S.C. § 2689; 15 U.S.C. § 2615.

⁵⁹⁰ *Disclosure Rule Enforcement Policy*, *supra* note 588, chapter 5.

⁵⁹¹ *Id.*

⁵⁹² 15 U.S.C. § 2615(a)(2)(C)(EPA may modify penalty with, or without, conditions). See also *Disclosure Rule Enforcement Policy*, *supra* note 588, chapter 7 and Appendix D.

⁵⁹³ See, 24 C.F.R. § 35.96; 40 C.F.R. § 745.118. See also *Disclosure Rule Enforcement Policy*, *supra* note 588, chapter 6.

⁵⁹⁴ See Part II.C.5, *Title X and the Disclosure Rule – Disclosure Rule – Enforcement*.

Supplemental Environmental Projects (SEPs)

SEPs are environmentally beneficial projects which a respondent agrees to undertake but is not otherwise legally obligated to perform.⁵⁹⁵ LBP abatement SEPs are only available in negotiated administrative settlements with EPA.

The general SEP policy permits EPA to mitigate up to 75 percent (75%) of the gravity-based penalty in a case.⁵⁹⁶ Under the SEP policy for LBP cases, however, the Agency may mitigate up to ninety percent (90%) of the penalty if the SEP provides for LBP abatement or blood-lead testing for non-Medicaid children.⁵⁹⁷ Usually the respondent must perform the SEP. Under certain circumstances, however, a third party may perform the SEP,⁵⁹⁸ such as where the SEP funds blood-lead testing by a local health department or LBP risk reduction work by a community organization.⁵⁹⁹

Child Health Improvement Projects (CHIPs)

Child Health Improvement Projects are voluntary beneficial projects that a defendant commits to perform as partial settlement of an enforcement action. They are a form of SEP, but used in judicial settlements (consent decrees). The guidelines in EPA guidance documents for SEPs apply equally to CHIPs. EPA is not a necessary party for a judicial settlement with a CHIP. Therefore, HUD and DOJ may enter into settlements that include CHIPs without EPA (although EPA often participates in such settlements).

CHIPs have included the purchase and donation of portable blood test analysis kits to local community health centers⁶⁰⁰; the purchase of a mobile lead-screening van⁶⁰¹; and work with a community non-profit organization to replace windows in low-income properties.⁶⁰²

⁵⁹⁵ EPA's SEP policy home page is located at <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

⁵⁹⁶ EPA Memorandum, S. Herman, *Issuance of Final Supplemental Environmental Projects Policy* (April 10, 1998), 63 Fed. Reg. 24796 (May 5, 1998), www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf, or <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

⁵⁹⁷ EPA Memorandum, T. Skinner, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004), www.epa.gov/compliance/resources/policies/civil/seps/sepssection1018-leadbasedpaint112304.pdf, or <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

⁵⁹⁸ EPA Memorandum, J. Suarez, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds* (Dec. 15, 2003), www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf, or <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

⁵⁹⁹ See e.g., *Disclosure Rule Enforcement Policy*, *supra* note 588, Appendix D. See also *In re Forest City Residential Management, Inc.* (TSCA HQ-2006-5003)(respondent provides \$50,000 to housing organization for LBP inspections and risk assessments), www.epa.gov/eab.

⁶⁰⁰ *United States v. Cornerstone Real Estate Management LLC*, No. 1:99CV01906, 64 Fed. Reg. 43717 (Aug. 11, 1999)(consent decree lodged, DC, July 15, 1999), www.epa.gov/EPA-GENERAL/1999/August/Day-11/g20743.htm.

⁶⁰¹ *United States v. Gorman Park Properties, LLLP*, No. 05-cv-00648-DSD-SRN, 70 Fed. Reg. 28956 (May 19, 2005)(consent decree lodged, MN, Apr. 1, 2005), www.epa.gov/EPA-TOX/2005/May/Day-19/t9944.htm.

⁶⁰² *United States v. VIP Properties, LLC*, No. 08-CV-246 (PJS/RLE), 73 Fed. Reg. 8364 (Feb. 13, 2008)(consent decree lodged, MN, Jan. 28, 2008).

3. Case Resolution

Administrative versus Judicial Enforcement⁶⁰³

EPA, and HUD, may pursue *civil* enforcement actions either administratively following their respective organization’s rules,⁶⁰⁴ or judicially via a referral to DOJ. (Criminal enforcement is always judicial.)

EPA generally favors administrative enforcement for Disclosure Rule cases. Most actions result in settlements (called “consent agreements” or “administrative orders on consent” [AOCs]) with penalties, and often with SEPs. HUD prefers judicial enforcement, alone or in collaboration with EPA. DOJ’s LBP enforcement efforts on behalf of HUD and/or EPA have resulted in numerous consent decrees with penalties⁶⁰⁵ and CHIPs. In either venue, EPA and HUD generally encourage settlement and adjust penalties accordingly within the discretion provided by the law and their respective policies. See Fig. 18: *Outcomes Available in Disclosure Rule Civil Enforcement Actions*.

Fig. 18: Outcomes Available in Disclosure Rule Civil Enforcement Actions		
Venue	Civil Penalties	Risk Reduction Work ¹
Administrative (by EPA or HUD)	<ul style="list-style-type: none"> - EPA may impose under TSCA § 16. - Available in settlement. 	<ul style="list-style-type: none"> - Available as SEP in EPA settlement.
Judicial (by DOJ, on behalf of EPA &/or HUD)	<ul style="list-style-type: none"> - Available in settlement (to resolve <i>administrative</i> liability). 	<ul style="list-style-type: none"> - Available as CHIP in settlement; or - DOJ may ask court for injunctive relief.
¹ Abatement, interim controls, or other risk reduction measures.		

⁶⁰³ The internet sites for EPA, HUD and DOJ provide information (*e.g.*, press releases) about numerous LBP enforcement actions and settlements. See www.epa.gov, www.hud.gov/offices/lead/enforcement, and www.doj.gov. See also Alliance for Healthy Homes, *Summary of Federal Lead Hazard Disclosure Consent Agreements and Consent Decrees* (Updated 12/04), www.afhh.org/res/res_Operation_LEAP_toolkit.htm.

⁶⁰⁴ See *e.g.*, 40 C.F.R. Part 22 (EPA administrative rules).

⁶⁰⁵ TSCA does not authorize a court to assess civil penalties, but a judicial consent decree (settlement) may include administrative penalties in exchange for the government’s covenant not-to-sue the defendant for its civil *administrative* liability.

EPA Administrative Litigation

If EPA is unable to obtain settlement in an administrative case, then the Agency generally will file an administrative complaint for penalties, particularly if a violation involves lead poisoning. An EPA Administrative Law Judge (ALJ), referred to also as the Presiding Officer or Regional Judicial Officer,⁶⁰⁶ conducts the initial adjudication.⁶⁰⁷ ALJs have ruled in several Disclosure Rule cases, but these rulings are not deemed precedential because they are not “final” Agency decisions.

EPA’s Environmental Appeals Board (EAB) hears appeals filed by petitioners challenging ALJ decisions, and issues final Agency decisions on behalf of EPA’s Administrator.⁶⁰⁸ Accordingly, EAB rulings serve as precedent for EPA enforcement. Petitioners may appeal EAB final rulings to federal court. The EAB has issued three substantive Disclosure Rule opinions.⁶⁰⁹

- *In re: Ronald H. Hunt*⁶¹⁰ illustrates that compliance with a local LBP order does *not* excuse a person from Disclosure Rule obligations. The EAB upheld an ALJ’s \$84,224 civil penalty assessment against five respondents (owners and a property management agent) for 32 violations based on ten leases. The EAB rejected respondents’ claim that they should have received a lower penalty since they had complied with prior local health department orders by conducting lead encapsulation. The health department had sent the respondents correspondence citing lead paint hazards in the properties, but this information was not disclosed to prospective tenants. Several of the tenants had children under the age of six when they entered into the leases.
- *In re: Harpoon Partnership*⁶¹¹ illustrates that property agents *and* owners are subject to the rule, and that *timely* (pre-contractual) disclosure is required. The EAB affirmed an ALJ’s \$37,037 civil penalty assessment for violations involving nine leases for an apartment building owned by the respondent. Two transactions involved children, one of which was younger than six years of age. The respondent had argued that it was a “passive owner,” and that its property management agent was the “lessor” for purposes of the rule. The ALJ disagreed, concluding that the term “lessor” includes owners that retain management companies. The EAB upheld the ALJ’s decision in its entirety, finding that Harpoon (a) had fair notice that it was a “lessor,” and (b) was liable because all requirements applicable to lessors (in this case, certification as to the accuracy of its statements) must be completed before a tenant becomes obligated under a lease. Harpoon appealed to the U.S. Seventh Circuit Court of Appeals, which dismissed the petition after the United States argued that Harpoon failed to timely file its appeal.
- *In re: U.S. Dep’t of the Navy, Kingsville Naval Air Station*⁶¹² was an interlocutory appeal by the Navy, which argued that its “Residency Occupancy Agreements” for naval personnel did not constitute “contracts to lease” under the Disclosure Rule. The EAB agreed, reversing the ALJ and

⁶⁰⁶ See 40 C.F.R. § 22.3.

⁶⁰⁷ See www.epa.gov/oalj/.

⁶⁰⁸ The EAB also approves LBP settlements reached by OECA (but not those entered into by the Regions), and hears other matters on behalf of EPA’s Administrator.

⁶⁰⁹ See also *In re: Billy Yee*, 10 E.A.D. 1 (May 29, 2001), www.epa.gov/eab/; *dismissed, Billy Yee v. EPA*, No. 01-2627 (8th Cir. Jan. 24, 2002) (\$29,700 penalty against landlord, rejecting defense that rule was not in effect when violations occurred).

⁶¹⁰ 12 E.A.D. 774 (Aug. 17, 2006), www.epa.gov/eab/.

⁶¹¹ 12 E.A.D. 182 (May 19, 2005), www.epa.gov/eab/; *dismissed, Harpoon Partnership v. EPA*, No. 05-2806 (7th Cir., Aug. 24, 2005).

⁶¹² 9 E.A.D. 19 (Mar. 17, 2000), www.epa.gov/eab/.

dismissing EPA's complaint. The EAB reasoned that a fair reading of the rule indicates it had not contemplated encompassing the particular type of agreement used by the Navy.

F. Referring Cases for Potential Federal Enforcement

1. Whom to Contact

EPA encourages citizens, and state and local enforcement authorities, to report possible Disclosure Rule (and other) violations to the Agency's central point of contact,⁶¹³ or directly to the appropriate Region. HUD also welcomes tips and complaints directly to its Office of Healthy Homes and Lead Hazard Control.⁶¹⁴ The National Lead Information Center (Lead Hotline) also accepts tips and complaints.⁶¹⁵

2. What Information To Provide

The minimum information that should be provided is:

- A description of the suspected violation, when, and where it occurred; and
- The suspected violator's identity, and location or contact information.

Also, it is helpful to provide other relevant information that may be available, such as:

- Whether a child associated with the property has been identified as having an EBL. (EPA and HUD are authorized under federal law to receive such information to enforce federal LBP laws.⁶¹⁶)
- The existence of any records or reports concerning LBP and/or LBP hazards at the property.
- Any outstanding orders, demands, or notices for LBP abatement or other risk reduction work issued by the local health department, housing code enforcers, or other authorities.
- Any work done on the property that may have disturbed LBP and generated lead-contaminated dust or debris.
- Any LBP enforcement actions conducted by another enforcement authority.⁶¹⁷
- The age and condition of the property.

G. Coordinated Federal and State/Local Enforcement

EPA and HUD welcome opportunities to partner with state and local authorities on Disclosure Rule compliance monitoring and enforcement efforts. Such partnerships allow each organization to leverage its respective information, resources, and legal authority.

1. Opportunities for Coordinated Enforcement

When a local health department identifies a child with an EBL, the department may be legally empowered to inspect the child's residence and order the landlord to abate any LBP hazards found there. During such an investigation, the department also may find reason to believe that the landlord failed to comply with the

⁶¹³ See www.epa.gov/compliance/complaints.

⁶¹⁴ See www.hud.gov/offices/lead/enforcement.

⁶¹⁵ 1-800-424-LEAD [5323], or www.epa.gov/lead/pubs/nlic.htm.

⁶¹⁶ See Joint Letters, CDC-EPA (Mar. 2, 2005) and CDC-HUD (Undated) re: *Confidentiality of Childhood Lead Poisoning Data*, www.cdc.gov/nceh/lead/Legislation%20&%20Policy/Legislation.htm.

⁶¹⁷ The reader is encouraged to review *Making the Most of the Federal Lead Hazard Disclosure Toolkit*, published by the Alliance for Healthy Homes, www.afhh.org/res/res_Operation_LEAP_toolkit.htm.

Disclosure Rule. While the health department is not authorized to pursue Disclosure Rule violations, it may informally refer the suspected violation to EPA and/or HUD.

This type of referral may be particularly appropriate where, for example:

- A property owner unjustifiably fails to comply with a local abatement order despite local enforcement efforts; and/or
- Local authorities are aware that the same entity owns or controls more than one target housing with EBL children and/or LBP hazards.

If there are several such cases in a community, then it may be helpful to “batch” the referrals, so that they can be handled more efficiently. If EPA and/or HUD pursue the matter, then they can make the violator’s compliance with any outstanding local order an obligation in any settlement reached to resolve the federal violation.

2. Joint and Parallel Enforcement

EPA and/or HUD – generally with DOJ or the local AUSA – conduct coordinated campaigns in selected cities.⁶¹⁸ In so doing, they typically solicit the participation of the local health department, housing code enforcement authority, and similar governmental entities. Such local entities can provide valuable information, such as:

- The age and condition of the housing stock in various neighborhoods;
- The identity of properties with multiple and/or severe LBP hazards, or housing code violations;
- Neighborhood EBL surveillance data; and
- The record title holder and/or agent for specific target housing.

EPA and HUD welcome such information even if state/local authorities are unable to participate more fully in compliance monitoring and enforcement efforts.

In *joint* enforcement, the participating agencies pursue a unified enforcement action under federal authority, and sign a single instrument if settlement is reached. In *parallel* enforcement, federal and state/local agencies pursue separate, but complementary and contemporaneous, actions under their respective legal authorities. Each sovereign negotiates its own settlement terms. For example, the federal agreement may provide for federal penalties and a SEP or CHIP for LBP abatement -- whereas the state settlement may provide for state law penalties, and a voluntary project other than one that would qualify under the federal SEP or CHIP policy.

⁶¹⁸ See e.g., Press Release (HUD), “HUD, EPA, DOJ, State of California Announce Joint Settlement Agreement with California Landlord,” www.hud.gov/news/release.cfm?content=pr07-064.cfm. See also e.g., HUD Press Release, HUD, EPA and U.S. Attorney in Minnesota Announce Legal Settlement with Minneapolis and St. Paul Landlords: Agreement requires 179 units to become ‘lead-safe’ (Jan. 28, 2008), www.hud.gov/news/release.cfm?content=pr08-005.cfm.