Federal Lead-Based Paint Enforcement Bench Book

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For the National Center for Healthy Housing
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nchh.org
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 (expect where quoting a contrary external source), and begs the indulgence of readers who would have chosen otherwise.
Federal Lead-Based Paint Enforcement Bench Book

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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.*
A. Lead Poisoning and Lead-Based Paint

1. The Problem

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. The most common source of childhood lead poisoning is lead-based paint (LBP) in older homes and buildings, and the primary exposure pathway is ingestion of lead-contaminated dust.

The serious, and potentially lethal, effects of lead poisoning are undisputed. 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 [>10µg/dL]).

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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.
- 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.
- See e.g., EPA, Basic Information, supra note 1.

2 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 (>1.0 mg/cm² 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.

3 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., 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. 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. Exposure to lead before or during pregnancy can alter fetal development and cause miscarriages. The damage from lead poisoning is irreversible. Studies have linked lead poisoning to aggression, juvenile delinquency, and adult criminal behavior. 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.

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 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, 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. Nonetheless, LBP is

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8 E.g., CDC Questions & Answers, supra note 1.
9 E.g., EPA, Basic Information, supra note 1; CDC Questions & Answers, supra note 1.
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 lead paint); 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.\(^\text{14}\) Approximately 38 million pre-1978 dwellings in the nation have LBP.\(^\text{15}\) Approximately 24 million of these have deteriorated (chipping, peeling, flaking) LBP, and elevated levels of lead-contaminated dust.\(^\text{16}\) More than 4 million of these dwellings are homes to one or more young children.\(^\text{17}\) (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),\(^\text{18}\) 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.\(^\text{19}\) 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.\(^\text{20}\)

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.


\(^{18}\) 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 (\(>10\mu g/dL\)), www.cdc.gov/nceh/lead/surv/stats.htm. No safe exposure level has been identified.

\(^{19}\) See EPA, *Basic Information, supra* note 1.

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 practices\(^{21}\) – or when temporary controls are not maintained and break down over time.

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

  **Not necessarily.** Abatement\(^{22}\) 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.

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\(^{21}\) 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 entities 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 EBLLs in children through increased blood lead screening, and inter-governmental coordination on education, technical assistance, and data collection on lead screening and abatement.

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 EBLLs, 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, enacted as Title X of the Housing and Community Development Act of 1992 (Title X), and regulations there-under:
  - The Disclosure Rule; 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).

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.


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).\textsuperscript{28}  
- The Toxic Substances Control Act (TSCA),\textsuperscript{29} and regulations there-under:
  - The Lead Hazard Standard\textsuperscript{30};
  - The Pre-renovation Education Rule (PRE Rule)\textsuperscript{31};
  - The Renovation, Repair, and Painting Rule (RRP Rule)\textsuperscript{32}; and
  - The Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).\textsuperscript{33}
  (Also, TSCA’s Regulations for State and Indian Tribal Programs [State/Tribal Programs Rule]\textsuperscript{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.\textsuperscript{35}

See Fig. 1: The Federal Regulatory Scheme to Address LBP and LBP Hazards.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Title X</th>
<th>TSCA ¹</th>
<th>RCRA § 7003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules</td>
<td>- Disclosure Rule</td>
<td>- PRE Rule</td>
<td>No regulations</td>
</tr>
<tr>
<td></td>
<td>- Lead Safe Housing Rule</td>
<td>- RRP Rule \textsuperscript{2}</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- LBP Activities Rule</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Lead Hazard Standard</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- State/Tribal Programs Rule</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{1} The first three TSCA rules on this list impose obligations on the regulated community (e.g., disclosure, work practice standards), whereas the last two rules do not.

\textsuperscript{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 hazards\textsuperscript{36}), and do not empower federal authorities to demand such work.\textsuperscript{37} The two exceptions under which the federal government can compel risk reduction work are the Lead Safe Housing Rule and RCRA Section 7003.

\textsuperscript{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.


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


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

\textsuperscript{37} Violators may commit to perform voluntary risk reduction work in settlement agreements that resolve federal enforcement actions against them. See Part VLE 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{40} See Fig. 2: \textit{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.\textsuperscript{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.)

<table>
<thead>
<tr>
<th>Law</th>
<th>Authority</th>
<th>Applicability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title X Disclosure Rule</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Title X Lead Safe Housing Rule</td>
<td>Yes</td>
<td>Federally owned/assisted target housing</td>
</tr>
<tr>
<td>TSCA PRE Rule</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>TSCA RRP Rule</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>TSCA LBP Activities Rule</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>TSCA Lead Hazard Standard</td>
<td>Not applicable \textsuperscript{1}</td>
<td></td>
</tr>
<tr>
<td>TSCA State/Tribal Programs Rule</td>
<td>Not applicable \textsuperscript{2}</td>
<td></td>
</tr>
<tr>
<td>RCRA § 7003</td>
<td>Yes</td>
<td>“imminent and substantial endangerment”</td>
</tr>
</tbody>
</table>

\textsuperscript{1} The rule does not impose enforceable obligations.

\textsuperscript{2} The rule establishes requirements for State/Tribal programs under TSCA, and does not impose obligations directly on the regulated community.

\textsuperscript{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.

\textsuperscript{39} See Part V of this book, \textit{Lead Safe Housing Rule}.

\textsuperscript{40} See Part IV of this book, \textit{Resource Conservation and Recovery Act}.

\textsuperscript{41} See Part VLE of this book, \textit{Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work}.  

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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, 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

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

<table>
<thead>
<tr>
<th></th>
<th>EPA</th>
<th>HUD</th>
<th>States/Tribes</th>
<th>Localities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title X Disclosure Rule</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Title X Lead Safe Housing Rule</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TSCA PRE Rule</td>
<td>X</td>
<td></td>
<td>X ²</td>
<td></td>
</tr>
<tr>
<td>TSCA RRP Rule</td>
<td>X</td>
<td></td>
<td>X ²</td>
<td></td>
</tr>
<tr>
<td>TSCA LBP Activities Rule</td>
<td>X</td>
<td></td>
<td>X ²</td>
<td></td>
</tr>
<tr>
<td>TSCA Lead Hazard Standard</td>
<td>Not applicable</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TSCA State/Tribal Programs Rule</td>
<td>Not applicable</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RCRA § 7003</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

Blank space means no 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 under state/tribal law, in lieu of the federal program, 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.

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**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

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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.

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\(^{48}\) 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

<table>
<thead>
<tr>
<th>Federal LBP Laws</th>
<th>State and Local Laws</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Title X Disclosure Rule</td>
<td>No</td>
<td>LBP Law</td>
</tr>
<tr>
<td>Title X Lead Safe Housing Rule</td>
<td>Yes</td>
<td>Housing Code</td>
</tr>
<tr>
<td>TSCA PRE Rule</td>
<td>No</td>
<td>Property Maintenance Code</td>
</tr>
<tr>
<td>TSCA RRP Rule</td>
<td>No</td>
<td>Nuisance Law</td>
</tr>
<tr>
<td>TSCA LBP Activities Rule</td>
<td>No</td>
<td>Health or Sanitary Code</td>
</tr>
<tr>
<td>TSCA Lead Hazard Standard</td>
<td>N/A ¹</td>
<td>Building Code</td>
</tr>
<tr>
<td>TSCA State/Tribal Programs Rule</td>
<td>N/A ²</td>
<td>Laws for buildings or conditions that are &quot;unsafe,&quot; &quot;unfit,&quot; &quot;dangerous,&quot; &quot;uninhabitable,&quot; &quot;hazardous,&quot; etc.</td>
</tr>
</tbody>
</table>
| RCRA § 7003                   | Yes                  | Rental property laws, such as:  
|                               |                      |  • 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. |

¹ The rule does not impose enforceable obligations.  
² The rule does not impose obligations directly on the regulated community.

### 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).  

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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” (≥1.0 mg/cm² or 0.5%).

55 Sometimes, these concentration levels are referred to as “regulated” lead levels. A few regulations have a slightly different definition, but the de minimis technical discrepancy is likely to have no legal effect. (“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 buildings).

  “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).


• Child-Occupied Facility (COF)
  TSCA regulations apply to “child-occupied facilities” such as “day-care centers, preschools and kindergarten classrooms.”

  “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.

60 In short, under the PRE/RRP Rule and 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.

62 40 C.F.R. § 745.83 (PRE/RRP Rule), § 745.223 (LBP Activities Rule).

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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).


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.

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

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.)

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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

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOJ U.S.</td>
<td>Department of Justice</td>
</tr>
<tr>
<td>EPA U.S.</td>
<td>Environmental Protection Agency</td>
</tr>
<tr>
<td>HUD</td>
<td>U.S. Department of Housing and Urban Development</td>
</tr>
<tr>
<td>LBP</td>
<td>Lead-Based Paint</td>
</tr>
<tr>
<td>RLBPHRA</td>
<td>Residential Lead-Based Paint Hazard Reduction Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)</td>
</tr>
<tr>
<td>Title X</td>
<td>Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)</td>
</tr>
<tr>
<td>TSCA</td>
<td>Toxic Substances Control Act</td>
</tr>
<tr>
<td>TSCA Title IV</td>
<td>TSCA Lead Exposure Reduction Subchapter</td>
</tr>
</tbody>
</table>

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). 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.
- Amended the Toxic Substances Control Act (TSCA) by adding Title IV, Lead Exposure Reduction, which charged EPA to issue a variety of LBP regulations. (TSCA Title IV and the regulations hereunder 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. (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.” In brief, under Title X:

67 42 U.S.C. § 4852d.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{73}

\section*{C. Disclosure Rule}

\begin{center}
\begin{tabular}{|l|}
\hline
\textbf{Fig. 5: Summary of the Disclosure Rule} \\
\hline
1. Overview \\
2. Applicability and Exemptions \\
3. Entities Subject to the Rule \\
4. Specific Requirements \
\hspace{1cm} Duty to Disclose  \
\hspace{1cm} Duty to Provide Opportunity for Inspection  \
\hspace{1cm} Certified Statements  \
\hspace{1cm} Record Retention  \
\hspace{1cm} Agent Responsibilities \\
5. Enforcement \
\hspace{1cm} Inspections  \\
\hspace{1cm} Penalties  \\
\hspace{1cm} Injunctive Relief  \\
6. Effect on Contracts \\
7. Private Actions  \\
\hline
\end{tabular}
\end{center}

\section*{1. Overview}

In 1996, EPA and HUD promulgated the Disclosure Rule (also known as the Section 1018 Rule).\textsuperscript{74} The rule became effective in 1996.\textsuperscript{75} EPA and HUD have independent authority to administer and enforce the rule,\textsuperscript{76} and each has issued three interpretive guidances on the rule.\textsuperscript{77, 78} (Each agency’s guidance is

\begin{itemize}
\item \textsuperscript{71} 42 U.S.C. § 4851b(27). \textit{See also} 24 C.F.R. § 35.86; 40 C.F.R. § 745.103. \textit{See also} Part I.B.4 of this book, \textit{Introduction – Terms in this Bench Book.}
\item \textsuperscript{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. \textit{See also} Part I.B.4 of this book, \textit{Introduction – Terms in this Bench Book.}
\item \textsuperscript{73} 42 U.S.C. § 4851b(15). 24 C.F.R. § 35.86; 40 C.F.R. § 745.103.
\item \textsuperscript{75} 24 C.F.R. § 35.84; 40 C.F.R. § 745.102.
\item \textsuperscript{76} \textit{See e.g.}, 24 C.F.R. § 35.96; 40 C.F.R. § 745.118.
\item \textsuperscript{77} The EPA guidance documents, available at www.epa.gov/lead/pubs/leadbase.htm, are:
\end{itemize}
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 Family80), 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.**

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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


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).
2. Applicability and Exemptions
The Disclosure Rule applies to “all transactions to sell or lease target housing, including subleases,” except for:

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

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

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86 24 C.F.R. §§ 35.88, 35.92, 35.94. 40 C.F.R. §§ 745.107, 745.110, 745.113, 745.115.
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.
o Selling real estate agent or agency;
o Buyer’s agent (unless compensated solely by the buyer95);
o Contract service provider (e.g., one who ensures that the transaction documents are used, completed, and signed);
o Property management firm;
o Resident manager; and
o 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:
o the “presence of any known” LBP and/or LBP hazards;
o “the existence of any available records or reports” pertaining to LBP and/or LBP hazards; and
o “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.
- 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.
- A list of any records and reports that the seller/landlord has provided the buyer/tenant about LBP and/or LBP hazards.
- A statement by the buyer/tenant affirming receipt of the required information and the Protect Your Family pamphlet.
- 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.
- Dated signatures of the seller/landlord, any agent, and the buyer/tenant certifying the accuracy of their respective statements.
- The buyer’s statement that he/she has received (or waived) the opportunity for an inspection or risk assessment.

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.”

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.
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.

<table>
<thead>
<tr>
<th>EPA</th>
<th>HUD</th>
<th>States/Tribes*</th>
<th>Local Governments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

* 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. EPA and HUD conduct inspections under their inherent authority to administer and enforce Title X. Also, Section 11 of TSCA authorizes EPA to conduct inspections, including inspections of records; and to issue subpoenas to require the production of reports and other information. (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.

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. Section 409 of TSCA subjects a person to potential civil and/or criminal penalties under Section 16 of TSCA. However, while Disclosure Rule violations are punishable under Section 16, Title X limits the penalties to $10,000, adjusted for inflation to $11,000 per violation for those occurring after July 28, 1997. (The maximum penalty for Disclosure Rule violations is scheduled for re-adjustment in late 2008, to $16,000 per violation.)

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.

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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.
128 42 U.S.C. § 4852(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.

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\(^{131}\) 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.*


\(^{133}\) A judicial settlement may include civil administrative penalties in exchange for the government’s covenant not-to-sue the defendant for its administrative liability.


\(^{136}\) 42 U.S.C. § 4852d(b)(5).


\(^ {139}\) 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.\(^\text{140}\)

**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.\(^\text{141}, \text{142}\)

\(^{140}\) 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).


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.
A. Statutory Background

1. Overview

The Toxic Substances Control Act (TSCA)\textsuperscript{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.\textsuperscript{144} EPA administers and enforces TSCA and the LBP (and other) regulations thereunder. Title I of TSCA governs chemical substances, and generally provides EPA’s administration and enforcement authorities.\textsuperscript{145} TSCA Title II regulates asbestos in schools,\textsuperscript{146} Title III governs indoor radon,\textsuperscript{147} Title IV regulates lead-based paint,\textsuperscript{148} and Title V pertains to healthy schools.\textsuperscript{149}

The Residential Lead-Based Paint Hazard Reduction Act of 1992,\textsuperscript{150} known as Title X,\textsuperscript{151} created TSCA’s Lead Exposure Reduction subchapter (TSCA Title IV).\textsuperscript{152} TSCA Title IV addresses LBP and LBP hazards in target housing (most pre-1978 housing\textsuperscript{153}), and other buildings and structures.\textsuperscript{154}

\textsuperscript{143} 15 U.S.C. §§ 2601-2695d. See e.g., www.epa.gov/compliance/civil/tsca.
\textsuperscript{144} See 15 U.S.C. § 2601.
\textsuperscript{147} 15 U.S.C. §§ 2661-2671.
\textsuperscript{151} 15 U.S.C. §§ 2601-2695d.
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 RLBPRA was enacted as Title X of the Housing and Community Development Act of 1992.
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).
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 I.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).
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 action\(^ {170}\) (but can obtain such penalties in an administrative or judicial settlement\(^ {171}\)).

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.\(^ {173}\)

\section*{B. Lead Hazard Standard}

\subsection*{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.\(^ {176}\)

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\(^{165}\) 15 U.S.C. § 2614(3)-(4). \textit{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. \textit{See also} 40 C.F.R. § 745.87(d)(PRE/RRP Rule); § 745.235(e)(LBP Activities Rule).
\(^{168}\) 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.
\(^{171}\) A judicial settlement may include administrative penalties in exchange for the government’s covenant not-to-sue the defendant for its administrative liability. \textit{See also} Part V.I.E.3 of this book, \textit{Federal Lead-Based Paint Enforcement Programs – How Federal Enforcement Programs Work – Case Resolution}.
\(^{172}\) 15 U.S.C. § 2615(b). \textit{See also} 40 C.F.R. § 745.87(d)(PRE/RRP Rule); § 745.235(e)(LBP Activities Rule).
“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 (≥40 µg/ft\(^2\)) on floors; or
- 250 micrograms per square foot (≥250 µg/ft\(^2\)) on interior window sills. \(^{186}\)

A “soil-lead hazard” is bare soil with lead that equals or exceeds:
- 400 parts per million (≥400 ppm) in a play area; or
- 1200 parts per million (≥1200 ppm) in the rest of the yard on average. \(^{187}\)

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\(^{180}\) 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.
\(^{184}\) 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 µg/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.\textsuperscript{188})

\section*{C. Lead-Based Paint Activities Rule}

\subsection*{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.\textsuperscript{189}

With respect to target housing and COFs, the term "lead-based paint activities" means inspection, risk assessment, and abatement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{193}

"Abatement" does \textit{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.\textsuperscript{194}

\footnotetext{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). \textit{See also} www.epa.gov/lead/pubs/training.htm.}

\footnotetext{189}{15 U.S.C. § 2682(a)-(b).}

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

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

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

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

\footnotetext{194}{15 U.S.C. § 2681(1); 40 C.F.R. § 745.223. \textit{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. The federal program, which operates in eleven states, became fully effective in 2000. The Agency has issued an interpretive guidance, and extensive training material. As of August 2008, 44 States/Tribal jurisdictions administer EPA-authorized LBP Activities programs. (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. 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. Federal entities are explicitly subject to the rule.

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

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

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

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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

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<tr>
<td>All regulated work must be performed by certified individuals/firms.</td>
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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 samples;^211^ and
- Lead-based paint determinations.^212, 213^  

4. Training and Certification

The rule provides for:

- Training for inspectors, risk assessors, supervisors, workers, and project designers;^214^;
- Certification for such individuals,^215^ and re-certification every three or five years, as applicable;^216^ 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 training;^218^;
- Training program qualifications;^219^ and application procedures;^220^;
- Recordkeeping requirements.^221^  

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^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).
^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)\textsuperscript{222}; and
• Provisions for the suspension, revocation, and modification of accreditation.\textsuperscript{223}

The RRP Rule amends the LBP Activities Rule’s accreditation provisions to establish two new disciplines: renovator, and dust sampling technician (DST).\textsuperscript{224}
• As of June 23, 2008, a training program “must not provide, offer, or claim to provide” training courses \textit{for EPA certification} as a renovator or DST unless accredited.\textsuperscript{225}
• Training programs \textit{may apply} for accreditation starting April 22, 2009.\textsuperscript{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).\textsuperscript{227}

6. Recordkeeping and Notification

The LBP Activities Rule establishes recordkeeping requirements for firms and individuals,\textsuperscript{228} and training programs.\textsuperscript{229} Also, the rule requires notification to EPA:
• A training provider must notify EPA prior to, and upon completion of, a training course.\textsuperscript{230} (EPA inspectors audit training courses.)
• A certified firm must notify EPA prior to conducting LBP activities.\textsuperscript{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.\textsuperscript{232}

\textsuperscript{221}40 C.F.R. § 745.225(i).
\textsuperscript{222}40 C.F.R. § 745.225(e).
\textsuperscript{223}40 C.F.R. § 745.225(f)-(h).
\textsuperscript{224}See Part III.F, below.
\textsuperscript{225}40 C.F.R. § 745.81(a)(1), § 745.225(a)(3).
\textsuperscript{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.
\textsuperscript{228}See 40 C.F.R. § 745.226(f)(4), \textit{referring to id.} § 745.227(i).
\textsuperscript{229}40 C.F.R. § 745.225(i).
\textsuperscript{231}40 C.F.R. § 745.227(e)(4).
\textsuperscript{232}40 C.F.R. § 745.235(d).
D. State and Indian Tribal Programs

1. Overview

Section 404 of TSCA permits States/Tribes to administer authorized TSCA programs under the PRE Rule, LBP Activities Rule, and RRP Rule. (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 program (but not necessarily identical to it), and must provide for “adequate enforcement.” EPA is empowered to provide federal funds to support authorized programs.

EPA promulgated the State/Tribal Programs Rule in 1996. 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. 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.

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

- Application procedures and requirements for States/Tribes;
- Provisions for EPA’s review, approval, oversight, and withdrawal of authorization;
- Required elements for compliance monitoring and enforcement; and
- Public notice and comment.

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

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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.
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.
243 40 C.F.R. § 745.324(a)-(d). Rather than await EPA approval of an application for authorization, a State may certify with it an 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 firms;247;
• 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

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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. On June 1, 1998, EPA published the Pre-renovation Education Rule (PRE Rule), sometimes called the “406(b) Rule.” The rule became effective June 1, 1999. EPA also has issued four interpretive guidance documents.

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 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.

EPA’s RRP Rule both modifies the PRE Rule, and makes the formerly free-standing PRE Rule a constituent of the new rule. (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.”

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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
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.
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

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.
²⁶⁸ 40 C.F.R. § 745.80.
other requirements of the RRP Rule. Also, the RRP Rule does not supersede more stringent federal, state, or local requirements for renovations. 72

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. 73

EPA estimates that the RRP Rule will apply to approximately 38 million properties 74 and 200,000 entities 75 -- 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). 76

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. 77

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. 78

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). 79
- Renovation Firms -- must obtain certification, by application to EPA (or a State/Tribe). 80

A “firm” may

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75 73 Fed. Reg. 21692, 21753, supra note 160 (189,000 small entities alone).
76 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.
77 See Part VI of this book, Federal Lead-Based Paint Enforcement Programs.
78 See section III.D, above.
79 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.  

- Renovators and DSTs – must obtain certification, by completing accredited training (not by application to EPA or a State/Tribe). 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.

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). These programs must be at least as protective as EPA’s program (but not necessarily identical), and must provide for adequate enforcement. 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 jurisdiction (even if the State/Tribe is in the process of seeking authorization, unless EPA extends this implementation deadline).

**Fig. 8: RRP Rule Regulatory Framework**

- Training Programs
- Renovation Firms
- Renovators and DSTs
- Untrained Workers
- Accreditation by application*
- Certification by application *
- Certification by course completion*
- On-the-Job Training

*From EPA or a State/Tribe.

### 3. Relationship Between the RRP Rule and Other LBP Regulations

The RRP Rule modifies three TSCA LBP regulations:
- The PRE Rule;
- The LBP Activities Rule; and
- The State/Tribal Programs Rule.

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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).
285 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.)
288 See 40 C.F.R. § 745.324(f)(2).
289 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 IILC, above.
290 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, or RCRA Section 7003.

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. 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.

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.

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 1.B of this book, Resource Conservation and Recovery Act – Waste from Residential Lead-Based Paint Renovations and Abatements.


**Fig. 9: Summary of RRP Rule Provisions**

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- Renovations in Common Areas in Multi-Unit Target Housing  
- Renovations in Child-Occupied Facilities  
Written Acknowledgement |
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Standards for Renovation Activities  
- General Requirements  
- Occupant Protection (Warning Signs)  
- Work Area Containment  
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  -- Interior Renovations – Additional Requirements  
  -- Exterior Renovations – Additional Requirements  
- Prohibited Practices  
- Renovation Waste  
- Cleaning the Work Area  
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- Exterior Renovations  
Post-renovation Cleaning Verification  
- Overview  
- Windowsills  
- Bare Floors and Countertops  
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Records to be Retained  
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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.  

The RRP Rule and PRE Rule cover a “virtually identical” universe of activities, except for a change in the exclusion for “minor” activities (explained below). To clarify the broad reach of the new rule, 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 components (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.”

“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.”

“Renovation” excludes “minor repair and maintenance activities” (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,” and

---

293 40 C.F.R. § 745.83.
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,\textsuperscript{301} window replacement, or demolition.\textsuperscript{302}

In calculating whether a project qualifies for this exception:
• Non-emergency jobs in the same room within 30 days are considered the same job\textsuperscript{303}; 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.

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

\textsuperscript{302} 40 C.F.R. § 745.83.

\textsuperscript{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”

<table>
<thead>
<tr>
<th><strong>Renovation, Repair and Painting Rule</strong>&lt;sup&gt;304&lt;/sup&gt;</th>
<th><strong>Pre-renovation Education Rule</strong>&lt;sup&gt;305&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Renovation</em> 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).</td>
<td><em>Renovation</em> 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).</td>
</tr>
</tbody>
</table>

The term renovation includes (but is not limited to):
- the removal, modification or repair of painted surfaces or painted components (e.g., 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 (e.g., walls, ceilings, plumbing, windows);
- weatherization projects (e.g., 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.

The term renovation does not include minor repair and maintenance activities.

<table>
<thead>
<tr>
<th><strong>“Child-Occupied Facility”</strong>&lt;sup&gt;306&lt;/sup&gt;</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Under the RRP Rule (and the LBP Activities Rule)&lt;sup&gt;307&lt;/sup&gt;, 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.&lt;sup&gt;308&lt;/sup&gt;</td>
<td></td>
</tr>
</tbody>
</table>

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

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<sup>304</sup> 40 C.F.R. § 745.83.
<sup>305</sup> 40 C.F.R. (former PRE Rule definition).
<sup>306</sup> EPA’s Supplemental Proposed Rule added COFs to the RRP Rule. 72 Fed. Reg. 31022 (June 5, 2007).
<sup>307</sup> See 40 C.F.R. § 745.227.
<sup>308</sup> 40 C.F.R. §§ 745.83, 745.223.
• In target housing (including that of an unpaid care-giver, such as a relative\textsuperscript{309}); or
• In a public or commercial building, in which case the COF also encompasses:
  o Common areas routinely used by the children (\textit{e.g.}, restrooms, cafeterias) – but not areas that
    children only pass through (\textit{e.g.}, hallways, stairways, garages); and
  o The exterior sides of the building immediately adjacent to the COF or common areas routinely
    used by children.\textsuperscript{310}

\textit{See Fig. 11: Comparison: Definition of “Child-occupied Facility.”}

\textbf{Fig. 11: Comparison - Definition of “Child-occupied Facility”}

**Renovation, Repair, and Painting Rule**\textsuperscript{311}

\textit{Child-occupied facility} 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.

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.

**Lead-Based Paint Activities Rule**\textsuperscript{312}

\textit{Child-occupied facility} 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.

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

\textsuperscript{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. \textit{See e.g.}, 40 C.F.R. § 745.227(b)(2)(ii)(LBP inspections in COF common areas).

\textsuperscript{311} 40 C.F.R. § 745.83.

\textsuperscript{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.\textsuperscript{313}

Therefore, \textit{by its own terms}, the rule does not apply to:
- Abatements, which are excluded from the definition of “renovation”\textsuperscript{314};
- Renovations in “0-bedroom dwellings” and most housing for the elderly or disabled, since these are not “target housing”\textsuperscript{315};
- “Do-it-yourself” renovations performed in one’s own residence, since the work is not performed “for compensation”\textsuperscript{316};
- Completely unpaid (volunteer) renovations\textsuperscript{317}; and
- “Minor repair and maintenance activities,” which are excluded from the term “renovation,”\textsuperscript{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.

\textit{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/cm\textsuperscript{2} or 0.5% by weight”\textsuperscript{319}(herein, “lead-free”), \textit{i.e.}, where:
  - A certified inspector or risk assessor makes a written determination that affected “components” are lead-free, \textit{and} the renovation firm obtains a copy of that determination\textsuperscript{320}; or
  - A certified renovator, properly using “an EPA recognized test kit,” determines that each affected component is lead-free.\textsuperscript{321} (The RRP Rule also requires that the renovator give the customer\textsuperscript{322}}

\textsuperscript{313} 40 C.R.R. § 745.82.
\textsuperscript{314} 40 C.F.R. § 745.83. Abatements are regulated under the LBP Activities Rule. 40 C.F.R. Part 745, Subpart L.
\textsuperscript{315} 15 U.S.C. § 2681(17). Housing for the elderly or disabled lose their exemption and fall \textit{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). \textit{See also} 40 C.F.R. § 745.223 (LBP Activities Rule).
\textsuperscript{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, \textit{supra} note 160.
\textsuperscript{317} In EPA’s view, if \textit{anyone} performing a renovation is paid to do so, then the person \textit{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.
\textsuperscript{318} 40 C.F.R. § 745.83. See section III.F.4-1, above.
\textsuperscript{320} 40 C.F.R. § 745.82(a)(1). 73 Fed. Reg. 21692, 21711, \textit{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. Also, the Disclosure Rule requires disclosure of results to future tenants and buyers.

“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, sills, bulkheads, fences, railings, siding, stairs, columns, and air conditioners.

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.

- 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.

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

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.

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.

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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 EBLL 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.  

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.

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.

EPA has developed a sample statement form.

### Fig. 12: RRP Rule Exemptions (X indicates requirements that do not apply to specific renovations)

<table>
<thead>
<tr>
<th></th>
<th>“Lead-free” Components</th>
<th>Emergency Renovations:</th>
<th>Other</th>
<th>Owner Opt-out</th>
</tr>
</thead>
<tbody>
<tr>
<td>Training (§ 745.90)</td>
<td></td>
<td></td>
<td>X*</td>
<td>X</td>
</tr>
<tr>
<td>Firm Certification (§ 745.89)</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Pre-renovation Education (§</td>
<td>Completely exempt when</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>745.84)</td>
<td>component properly</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Work Practices (§ 745.85)</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>- Warning Signs</td>
<td></td>
<td>X*</td>
<td></td>
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<tr>
<td>- Containment</td>
<td></td>
<td>X*</td>
<td></td>
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</tr>
<tr>
<td>- Waste Handling</td>
<td></td>
<td>X*</td>
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<tr>
<td>- Cleaning</td>
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<tr>
<td>- Cleaning Verification</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recordkeeping (§745.86)</td>
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<td></td>
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<td></td>
</tr>
</tbody>
</table>

* Exempt only to extent necessary to respond to emergency.

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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).
4-3. Effective and Implementation Dates

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).

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, to give States/Tribes time to develop authorized programs. Full compliance with the rule’s obligations (training, certification, work practices, and recordkeeping) is required as of April 22, 2010. See Fig. 13: RRP Rule Implementation Dates.

Implementation Schedule

• Pre-renovation Education for Child-Occupied Facilities
  o Starting June 23, 2008, pre-renovation education requirements apply to renovations in COFs, as well as in target housing.

• Lead Hazard Information Pamphlets
  o Between June 23 and December 22, 2008, renovation firms may distribute either EPA’s new Renovate Right pamphlet, or the Protect Your Family pamphlet.
  o Beginning December 22, 2008, firms performing renovations in EPA-run jurisdictions (States/Tribal areas without authorized programs) must distribute the Renovate Right pamphlet.

• Training Program Accreditation
  o 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.
  o As of April 22, 2009, training programs may apply for accreditation.

• Firm Certification
  o Beginning October 22, 2009, renovation firms may apply for certification.
• As of April 22, 2010, firms must be certified to offer or perform renovations\textsuperscript{346} -- and provisions to suspend, revoke or modify firm certifications take effect.\textsuperscript{347}

• Individual Certification; Worker Training
  o 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 renovators\textsuperscript{348} -- and provisions to suspend, revoke or modify individual certifications become effective.\textsuperscript{349}

• Work Practice Standards and Recordkeeping
  o As of April 22, 2010, all renovations must be performed in accordance with work practice standards, and recordkeeping requirements apply.\textsuperscript{350}

• State/Tribal Authorization
  o As of June 23, 2008, States/Tribes may apply for authorization to administer EPA-approved RRP programs.\textsuperscript{351}

\textsuperscript{347} 40 C.F.R. § 745.81(a)(5), § 745.91(a).
\textsuperscript{349} 40 C.F.R. § 745.81(a)(5), § 745.91(a).
### Fig. 13: RRP Rule Implementation Dates

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

**4-4. Pre-renovation Education**\(^{352}\)

**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 renovation; 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 then); 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:
  o Provide the unit’s owner the appropriate pamphlet, and obtain written acknowledgment of receipt or a certificate of mailing; and
  o 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.

• Renovations in Common Areas in Multi-unit Target Housing
  No more than 60 days before beginning a renovation, the firm must:
  o Provide the owner the appropriate pamphlet, and obtain written acknowledgment of receipt or a certificate of mailing; and
  o 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.
  o Prepare a statement describing the actions taken to inform occupants.

• Renovations in Child-Occupied Facilities
  No more than 60 days before beginning a renovation, the firm must:
  o 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.

Prepare a statement describing the actions taken to inform parents/guardians.

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.

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

4-5. Work Practice Standards

Standards for Renovation Activities

- General Requirements

Renovations must be performed by certified firms using certified renovators. 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.)

- 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 judgment) to contain the dust and debris generated by a renovation;
- 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.

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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**
  
  o **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.  

  o **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.

  o **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.

• **Prohibited Practices**
  
  o 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 (≥1,100°F)
    ▪ Using machines that remove LBP “through high speed operation” (such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting) without “HEPA” exhaust control.

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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).


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.\footnote{40 C.F.R. § 745.83. 73 Fed. Reg. 21692, 21734-21736, supra note 160.}

The rule does not prohibit dry hand-scraping or dry hand-sanding.\footnote{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).}

- **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.\footnote{40 C.F.R. § 745.85(a)(4).}

- **Cleaning the Work Area**
  After the renovation, the firm must clean the work area “until no dust, debris or residue remains.”\footnote{40 C.F.R. § 745.85(a)(5).}

  - **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.\footnote{40 C.F.R. § 745.85(a)(5)(i).}

  - **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.\footnote{40 C.F.R. § 745.85(a)(5)(ii).}

**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.\footnote{40 C.F.R. § 745.85(b)(1)(i), (b)(2).} All renovations must pass this visual inspection.
• Interior Renovations
After a successful visual inspection, a certified renovator must perform the post-renovation cleaning verification.  

• Exterior Renovations
After a successful visual inspection, the warning signs may be removed. Post-renovation cleaning verification is not required for exterior renovations.

Post-renovation Cleaning Verification

• 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.” 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.”

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

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

• Interior Windowsills
  o 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.
  o 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.
  o 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

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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 countertops).
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/nilc.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).\textsuperscript{389}

- **Interior Bare Floors and Countertops\textsuperscript{390}
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.\textsuperscript{391}

The warning signs can be removed when the work area “passes” the post-renovation cleaning verification,\textsuperscript{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**.

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\textsuperscript{389} 40 C.F.R. § 745.85(b)(1)(ii)(A).
\textsuperscript{390} There is no post-renovation cleaning verification for carpets.
\textsuperscript{391} 40 C.F.R. § 745.85(b)(1)(ii)(B).
\textsuperscript{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.  

EPA has developed a recordkeeping checklist and certification statement.  

**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.
- If dust clearance sampling was performed (in lieu of cleaning verification), then a copy of the dust sampling report.

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. Also, a current tenant who renews a lease is entitled to this new information upon lease renewal if it has not already been disclosed.

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**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. 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.”

Notwithstanding EPA’s potential focus on record review inspections, it may conduct on-site inspections, particularly where an ongoing hazard is alleged.

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**4-7. Enforcement and Inspections**

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. The RRP Rule adds a presumption that LBP is present in regulated renovations.
4-8. Recognized Test Kits

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.” (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.

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). 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. Until September 1, 2010, kits only have to meet the negative response criteria.

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). EPA favors the commercial availability of dual criteria (positive-negative) test kits. 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. After September 1, 2010, test kits must meet both criteria.

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

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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”).
424 40 C.F.R. § 745.88(a), (b)(3).
425 40 C.F.R. § 745.88(b)(4).
4-9. Firm Certification and Responsibilities\textsuperscript{427}

\textbf{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.\textsuperscript{428} EPA certification lasts five years,\textsuperscript{429} and allows the firm to perform renovations in any EPA-run jurisdiction (\textit{i.e.}, jurisdiction without an authorized State/Tribal program).\textsuperscript{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.”\textsuperscript{4431}

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 \textit{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).\textsuperscript{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.\textsuperscript{433}

\textbf{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.\textsuperscript{434}

\textbf{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 \textit{finding} of a violation, or \textit{settlement} of an enforcement action, constitutes evidence of such failure to comply.\textsuperscript{435}

\textsuperscript{427} 40 C.F.R. § 745.89
\textsuperscript{428} 40 C.F.R. § 745.89(a)(1).
\textsuperscript{429} 40 C.F.R. § 745.89(a)(2)(i), (b).
\textsuperscript{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.
\textsuperscript{431} 40 C.F.R. § 745.89(a)(2)(i), (a)(2)(ii), (b)(2)(i), (b)(2)(ii).
\textsuperscript{432} 40 C.F.R. § 745.89(c).
\textsuperscript{433} 73 Fed. Reg. 21692, 21725, \textit{supra} note 160.
\textsuperscript{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.¹³⁶

4-10. Individual Certification and Responsibilities¹³⁷

Certification and Recertification¹³⁸

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.¹³⁹ Certification allows the individual to perform renovations, or dust clearance sampling for renovations, in any EPA-run jurisdiction.¹⁴⁰

“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 course:¹⁴¹

• A person may obtain renovator certification if he/she has completed an:
  o Accredited abatement worker course;
  o Accredited abatement supervisor course; or
  o EPA, HUD, or EPA/HUD “model renovator training course.”¹⁴²
• A person may obtain DST certification if he/she has completed an accredited LBP inspector or risk assessor course.¹⁴³

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 abatement;¹⁴⁴ or
• Completion of HUD’s Lead Maintenance course.¹⁴⁵

¹³⁵ 40 C.F.R. § 745.91(a)(2).
¹³⁶ 40 C.F.R. § 745.91(b).
¹³⁷ 40 C.F.R. § 745.90.
¹³⁸ 40 C.F.R. § 745.90.
¹³⁹ 40 C.F.R. § 745.90(a)(1), (4).
¹⁴⁰ 40 C.F.R. § 745.90(a).¹⁴¹
¹⁴² 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.”¹⁴³
¹⁴³ 40 C.F.R. § 745.90(a)(3).
### Fig. 15: RRP Rule “Grandfathering” Provisions

<table>
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<th>Prior Training</th>
<th>+ RRP Refresher</th>
<th>= RRP Certification</th>
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<td>LBP Risk Assessor Training</td>
<td>DST Course</td>
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### Renovator Responsibilities

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

- Perform the visual inspection and post-renovation cleaning verification.** (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).**
- Train uncertified workers on lead-safe work practices for their assigned tasks.
- Be “physically present at the work site” when warning signs are posted, and during work area containment and cleaning.
- “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.”
- Be available on-site or by telephone at all times that renovations are underway.
- When requested by the customer, must use an acceptable test kit to determine whether affected components are lead-free (as explained above).
- Have copies of their course completion certificate (which serves as the renovator’s certification) with them at the work site.
- Prepare records required to verify compliance with the work practices.

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**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).**
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

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457 40 C.F.R. § 745.90(c)(1). See also id. § 745.227(c)(8).
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).
Acronyms and Abbreviations in this Chapter

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

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 C\(^{465}\)); provides a framework for the management of non-hazardous waste, including standards for municipal solid waste landfills (MSWLFs) (Subtitle D\(^{466}\)); and regulates underground storage tanks (Subtitle I\(^{467}\)). 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

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\(^{464}\) 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.
477 RCRA-3-2000-0001TH (2000)(17th Street Trust UAO). The discussion herein refers to the modified UAO and revised statement of work.
2. Requirements

EPA must make three seminal determinations to invoke Section 7003:

• A person 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,” and this term has been liberally construed. 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 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.

• 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.

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. 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.

Typically, the Agency uses Section 7003 in response to natural resource contamination. 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).
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.
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 Options**

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 Trust493; 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.

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


491 42 U.S.C. § 6973(a).


494 Fall River UAO, supra note 478.

495 40C.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. 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, 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 EBLLs 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.

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 20;
- Paint chips containing lead up to 29.31% by weight (whereas federal law defines LBP to mean paint with lead content equal to or in excess of 0.5% by weight);
- 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, and several in the millions µg/ft². (By comparison, the federal standard for dust-lead hazards on window sills is 250 µg/ft².)

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 EBLLs “associated with adverse human health effects” which “present a substantial risk to the health of tenants” especially young children.

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

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\(^{504}\) 17\(^{th}\) Street Trust UAO, *supra* note 477, section V.FF-JJ.

\(^{505}\) 17\(^{th}\) Street Trust UAO, *supra* note 477, section VI.


\(^{507}\) 17\(^{th}\) 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.\(^{514}\)

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\(^{509}\) 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.
Acronyms and Abbreviations in this Chapter

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>EPA</td>
<td>U.S. Environmental Protection Agency</td>
</tr>
<tr>
<td>HUD</td>
<td>U.S. Department of Housing and Urban Development</td>
</tr>
<tr>
<td>LBP</td>
<td>Lead-Based Paint</td>
</tr>
<tr>
<td>LSH Rule</td>
<td>Lead Safe Housing Rule</td>
</tr>
<tr>
<td>Title X</td>
<td>Title X of the Housing and Community Development Act of 1992 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992)</td>
</tr>
</tbody>
</table>

**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 percent\(^{520}\) ) 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

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\(^{516}\) 64 Fed. Reg. 50139 (Sept. 15, 1999).


\(^{519}\) 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.

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. 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, 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);
  - 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);
  - Visual assessment (looking for deteriorated paint; visible surface dust, debris, and residue; or the completion or failure of a hazard reduction measure); and
  - Paint testing prior to disturbing paint to determine the presence of LBP.

- **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);
  - 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);
  - Paint repair, or paint stabilization (repairing physical defects in the substrate that cause paint deterioration, removing loose paint, and repainting); 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.

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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 Rule\(^1\)
**Evaluation and Risk Reduction Requirements**

<table>
<thead>
<tr>
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<th>Risk Reduction Measures</th>
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<td>- 1960-77</td>
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<td>D</td>
<td>Project-based Assistance (^2)</td>
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<tr>
<td>Other Properties</td>
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<td>Tenant-based Rental Assistance (^2)</td>
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<td>X</td>
</tr>
</tbody>
</table>

\(^1\) 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

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

A. Introduction

This chapter provides an overview of federal LBP enforcement programs, focusing primarily on Disclosure Rule enforcement. 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:

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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 Rule\textsuperscript{533}; and
• The Lead Safe Housing Rule.\textsuperscript{534}
• The Toxic Substances Control Act (TSCA) and its LBP regulations:
  • The Pre-renovation Education Rule (PRE Rule)\textsuperscript{535};
  • The Renovation, Repair, and Painting Rule (RRP Rule)\textsuperscript{536}; and
  • The Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule).\textsuperscript{537, 538}
• Section 7003 of the Resource Conservation and Recovery Act (RCRA).\textsuperscript{539}

Of these, only two -- the Lead Safe Housing Rule,\textsuperscript{540} and RCRA Section 7003\textsuperscript{541} -- may be used to compel the performance of risk reduction work.\textsuperscript{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 (\textit{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.\textsuperscript{543} Most provisions of the new RRP Rule are not yet enforceable, and it is unclear how many States/Tribes will administer the program.\textsuperscript{544} The Lead Safe Housing Rule applies to a very small portion (approximately 3 percent) of the nation’s housing stock with LBP.\textsuperscript{545} EPA has used RCRA Section 7003 to address LBP hazards on only two occasions.\textsuperscript{546} See Fig. 17: Enforcement Authority for Federal LBP Laws.

\textsuperscript{533} 24 C.F.R. Part 35, Subpart A (HUD); 40 C.F.R. Part 745, Subpart F (EPA).
\textsuperscript{534} 24 C.F.R. Part 35, Subparts B-R.
\textsuperscript{535} 40 C.F.R. Part 745, Subpart E.
\textsuperscript{536} 73 Fed. Reg. 21692 (Apr. 22, 2008), to be codified at 40 C.F.R. Part 745, Subparts E, L, and Q.
\textsuperscript{537} 40 C.F.R. Part 745, Subpart L.
\textsuperscript{538} The Lead Hazard Standard does not impose enforceable obligations; and the State/Tribal Programs Rule is a program authorization regulation.
\textsuperscript{539} 42 U.S.C. § 6973.
\textsuperscript{540} See Part V of this book, The Lead Safe Housing Rule.
\textsuperscript{541} See Part IV of this book, Resource Conservation and Recovery Act.
\textsuperscript{545} See Part V of this book, Lead Safe Housing Rule.
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. 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. EPA and HUD enforcement actions have obtained LBP abatement, risk assessments, and inspections in hundreds of thousands of dwellings across the nation by employing creative policies and strategies, such as:

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

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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., HU
551 See id.
552 See section VI.F and G, below.
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. Under a 1997 Memorandum of Understanding and accompanying guidance, 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. 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.

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.

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

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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. Each Region has a Regional lead coordinator, and a separate lead enforcement coordinator. 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.

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.

3. U.S. Department of Justice

The U.S. Department of Justice (DOJ) represents federal entities in litigation. 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. DOJ has encouraged AUSAs to prosecute Disclosure Rule cases, resulting in several civil and criminal 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.
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/usaio/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.\(^\text{570}\) 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.\(^\text{571}\)

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.\(^\text{572}\)

3. **Other Agencies**\(^\text{573}\)

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.\(^\text{574}\)

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.\(^\text{575}\)

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\(^{570}\) 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.


\(^{573}\) 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 citizens;\(^{576}\)
• Informal referrals from state and local agencies;\(^{577}\) 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 EBLLs).\(^{578}\)

**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, with or without a prior IRL. Since HUD has no TSCA authority, EPA may

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\(^{576}\) 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 EBLLs 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.


\(^{580}\) 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).

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.

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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).

**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 policy\(^{588}\) 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.\(^ {592}\)

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**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 $16,000\(^ {594}\)). 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.

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\(^{590}\) 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.

Supplemental Environmental Projects (SEPs)
SEPs are environmentally beneficial projects which a respondent agrees to undertake but is not otherwise legally obligated to perform.\textsuperscript{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.\textsuperscript{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.\textsuperscript{597} Usually the respondent must perform the SEP. Under certain circumstances, however, a third party may perform the SEP,\textsuperscript{598} such as where the SEP funds blood-lead testing by a local health department or LBP risk reduction work by a community organization.\textsuperscript{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 centers\textsuperscript{600}; the purchase of a mobile lead-screening van\textsuperscript{601}; and work with a community non-profit organization to replace windows in low-income properties.\textsuperscript{602}

\textsuperscript{595} EPA’s SEP policy home page is located at http://cfpub.epa.gov/compliance/resources/policies/civil/seps/.
\textsuperscript{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/.
\textsuperscript{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/.
\textsuperscript{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/ebab.
3. Case Resolution

**Administrative versus Judicial Enforcement**

EPA, and HUD, may pursue civil enforcement actions either administratively following their respective organization’s rules, 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 penalties 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

<table>
<thead>
<tr>
<th>Venue</th>
<th>Civil Penalties</th>
<th>Risk Reduction Work¹</th>
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<tbody>
<tr>
<td>Administrative (by EPA or HUD)</td>
<td>- EPA may impose under TSCA § 16.</td>
<td>- Available as SEP in EPA settlement.</td>
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<tr>
<td></td>
<td>- Available in settlement.</td>
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</tr>
<tr>
<td>Judicial (by DOJ, on behalf of EPA &amp;/or HUD)</td>
<td>- Available in settlement (to resolve administrative liability).</td>
<td>- Available as CHIP in settlement; or - DOJ may ask court for injunctive relief.</td>
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</tbody>
</table>

¹ Abatement, interim controls, or other risk reduction measures.

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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, conducts the initial adjudication. 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. 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.

- **In re: Ronald H. Hunt** 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** 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** 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

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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).
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 EBLL. (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 EBLL, 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.
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 EBLL 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. 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 EBLL 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.

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