

ENFORCEMENT OF THE RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT

The Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) have begun a stringent effort to enforce the Residential Lead-Based Paint Hazard Reduction Act. In 1992, Congress enacted the Act, which regulates disclosure of lead-based paint in sales and lease transactions involving residential properties built before 1978. Congress charged HUD and EPA with developing regulations to enforce the 1992 law.

BACKGROUND

On December 6, 1996, the Regulations developed by U.S. EPA and HUD requiring disclosure of lead-based paint and lead-based paint hazards in connection with residential housing sale and lease transactions went into effect. When those Regulations were first released in final form, EPA and HUD announced that during the first year in which they were in effect enforcement would be primarily limited to "compliance assistance." That is, EPA and HUD indicated they would generally respond to violations of the Regulations by providing the violator with information and assistance regarding how to achieve compliance, and would seek to apply penalties only in cases of egregious or intentionally non-compliant activities. The compliance assistance activities of EPA and HUD during this period were generated primarily by complaints of violations and unannounced "random" compliance monitoring inspections and audits. Except in cases of egregious or intentional violations, persons found to have violated the Regulations were sent an "Advisory Letter" explaining the nature of the violation and the correct action required by the Regulations.

ENFORCEMENT POLICIES

After one year of compliance assistance, the agencies began enforcing the disclosure regulation in 1998. Enforcement actions have occurred and substantial fines have been imposed. In cases where a seller or lessor utilizes the services of an agent, the agent has the responsibility to inform the seller/lessor of their obligations under the Act and to ensure compliance. Failure to comply can result in fines of up to \$63,500 per transaction.

EPA and HUD are carrying out the enforcement independently and jointly, and with the assistance of the Department of Justice. The policies between the two Departments differ slightly, however they use the same methods at the penalty stage for violators.

HUD will generally just show up at a rental office and ask to see lease records. EPA may do a surprise check, or may send a letter alerting the owners/managers that they are coming. Both agencies encourage owners/managers to conduct self-audits and self-disclosures. However, bringing yourself into compliance doesn't erase the violation. EPA and HUD have stated that they may penalize those who have come into compliance, if they originally violated the law. However, if an owner/manager self-discloses to EPA or HUD prior to being inspected by the agencies, penalties for non-compliance are generally greatly reduced, and in some cases eliminated.

HUD plans to focus on compliance with the requirements as they apply to property rentals, rather than sales, and to focus its efforts on rental properties in large urban areas where there are identified elevated lead blood level (EBL) problems. At the current time, HUD has targeted 20 cities -- including Los Angeles, Boston, Chicago, and New York. They decide to do an inspection based upon: a call to the lead hotline, referral from a health department of a EBL child, troubled housing determined from housing and code violations, and random samples. If any anomalies or violations are discovered during the inspection, HUD or EPA may refer the results to the Department of Justice. If egregious violations are suspected, the owner/manager may receive a follow-up letter from the agencies, requesting further information. If there

are only minor technical violations, the owner/manager may receive a letter from the agency explaining the violations, and what the owner/manager must do to come into compliance. Often, the agency will plan to follow up in a year, to see that the violation is corrected. After an inspection, EPA has also followed-up with owners who were not found to have any violations. Those property owners receive a letter stating that they were found to be in compliance, but that they could be inspected again at any time. We are not aware of any similar letter which HUD has sent.

At the most basic level, EPA may issue a Notice of Noncompliance in lieu of seeking civil or criminal penalties when it believes justice would be adequately served by doing so. The EPA enforcement policy indicates that such a Notice is the appropriate and recommended response for first-time violators, except (as described below) in the case of egregious violations. Just as the name suggests, a Notice of Noncompliance is a written description of the facts and circumstances of the violation. The Notice also specifies actions the violator must take to correct the violation and comply with the Regulations. A "compliance assistance package" is also included with the Notice of Noncompliance to ensure future compliance with the Regulations. HUD has no such Notice process. However, HUD officials insist they are not seeking to penalize violators for what they consider "technical violations", such as initialing the form in the improper place. Instead, HUD is focusing on "egregious" violations of the law.

VIOLATIONS AND PENALTIES

EPA and HUD both intend to seek civil penalties through a civil administrative action in circumstances where the violation is more serious. Egregious violations include, in general, failure to satisfy the requirements of the Regulations where the housing being sold or leased contains lead-based paint or lead-based paint hazards and is occupied or to be occupied by a pregnant woman or child under the age of 6 years. A Civil Administrative Action is initiated by preparation of an administrative complaint, which includes the penalty to be imposed. Before the penalty becomes final the violator is entitled to an administrative hearing on the matter.

There is a total of 11 possible violations per lease transaction, and 13 possible violations per sales transaction. A chart listing the possible violations is attached for your information. The base amount of the penalty assessed for a violation is based on the nature, circumstances and extent of harm which may result, and may range from \$110 to \$11,000. Multiple penalties may be imposed where there are several violations in a single transaction. The base penalty amount is adjusted (upward or downward), based on factors such as the violators ability to pay, the history of prior violations, the extent of the violators culpability (that is, the extent to which the violator had knowledge of the requirements of the Regulations and/or had control over the conditions), whether the violator voluntarily reported the violation, and other factors as justice may appear to require. Violations involving pregnant women or young children are viewed more harshly than those not involving children, and, in general, will be subject to more severe penalties.

A violator may also be requested to voluntarily perform a "Supplemental Environmental Project" to improve some feature of the environment. Neither EPA nor HUD has the authority to compel a violator to perform such a project, and the violator may decline to do so. However, the cost incurred by the violator to perform the project reduces the amount of the civil penalty to be paid. Such a project might include, for example, remediating the lead-based paint hazard that exists within a residence. EPA and HUD cannot require anyone to conduct abatement as part of the penalty phase, however a violator may chose to abate to reduce penalties. In addition, abatement can be included as part of the penalty, if required by state or local law.

Violations of the regulations may also result in criminal penalties if the violation is committed "knowingly and willfully." The Enforcement Response Policy does not describe further the specifics of the circumstances that might cause EPA or HUD to refer a violation to the Department of Justice for criminal prosecution. Penalties in a criminal case include fines of up to \$11,000 per violation and/or imprisonment for up to one year. EPA and HUD have also worked closely with the Department of Justice for DOJ to

seek Federal court-issued injunctions directing the violator to comply with the regulations or to abate from a residence any lead-based paint or lead-based paint hazards present. In appropriate circumstances EPA and HUD may also seek more than one of the sanctions described above. The EPA Interim Enforcement Response Policy can be found on EPA's website at <http://es.epa.gov/deca/ore/tped/lead.pdf>.

ENFORCEMENT ACTIONS

To date, HUD and EPA have announced four judicial/administrative settlements in the Washington, DC area. These are the first filed actions under the Residential Lead-Based Paint Hazard Reduction Act. Consent decrees were filed in each of the four cases. The property owners and managers agreed to pay a combined \$87,000 in penalties, and committed support to community projects in the amount of \$172,000. The four companies also agreed to a total of over \$1 million worth of abatement. HUD and DOJ also filed a complaint against an additional company, who did not agree to a consent decree.

EPA reports that they have filed less than 20 complaints nationally, and have filed approximately 300 Notices of Non Compliance since January of 1998. The most common violation, according to EPA, is failure to disclose knowledge of a lead-based paint test.

HUD reports that they have initiated 45 administrative cases against owners and/or management agents across the country. To date, they have filed five administrative settlements. These settlements include varying levels of penalty fines (ranging from \$1,000 to \$4,000), an agreement to comply with the Act going forward, and varying levels of abatement/lead removal. These actions were each enacted in consort with local Health Departments, and state law requirements. They have issued administrative complaints in four cases in Columbus, OH and Baltimore, MD. In each of these cases, local health departments had previously issued lead-based paint abatement orders for the properties. HUD is seeking a total of \$67,650 from these complainants. HUD has issued 23 pre-penalty letters, informing these owners/managers that HUD is considering seeking a civil money penalty for violations of the Act. There are currently thirteen ongoing investigations in Washington, DC.

HUD and EPA have both found that many of the violations resulted when an owner/manager did not comply with the law during a "triggering event". The agencies define a "triggering event" as any change in the lease terms. In other words, if a tenant has been in the property since before this law went into effect, and that tenant didn't sign the disclosure form at the time of lease signing (because the law wasn't in effect), the tenant would have been required to sign the form as soon as the first "triggering event" after enactment of the law. These events include an increase in rent (even if it is a part of law, such as under rent control), change of unit, change of lease terms, etc. Anything that effects the lease in any way is a "triggering event" for compliance with the law.

For further information contact Megan Booth at 202-383-1222 or mbooth@Realtors.org.

The information provided above is for your assistance, however it does not constitute legal advice. If you are party to an inspection or self-audit to EPA or HUD, IREM encourages you to contact an attorney for assistance with complying with the agencies.

**TOTAL POSSIBLE VIOLATIONS (PER TRANSACTION)
UNDER LEAD BASED PAINT HAZARD DISCLOSURE**

SALES TRANSACTION

- Failure to provide information/pamphlet
- Failure to disclose presence of lead-based paint or lead-based paint hazards
- Failure to disclose to each agent the presence of any lead-based paint, or lead-based paint hazards, and the existence of any available records or reports
- Failure to provide any records or reports
- Failure to include, as an attachment to the contract, the Lead Warning Statement
- Failure to include, as an attachment to the contract, a statement by the seller disclosing the presence of known lead-based paint, or lead-based paint hazards
- Failure to permit the purchaser a 10-day period to conduct a reassessment or inspection for lead-based paint
- Failure to include in the contract as an attachment, a statement by the purchaser or an opportunity to conduct a risk assessment or inspection or to waive an opportunity to do so
- Failure to include in the contract a list of any records or report available to the seller that pertain to lead hazard information or the failure to indicate that no such list exists
- Failure to include in the contract a statement by the purchaser affirming receipt of the information and the lead hazard pamphlet
- Failure to include in the contract as an attachment, a statement by one or more of the agents involved in the transaction that the agent has informed the seller of the seller's obligations, and that the agent is aware of his duty to ensure compliance
- Failure to include in the contract, signatures of the sellers, agents and purchasers certifying to the accuracy of their statements, as well as dates
- Failure to retain a copy of the completed disclosure records for no less than three years from the completion date of the sale.

LEASE TRANSACTION

- Failure to provide information/pamphlet
- Failure to disclose presence of lead-based paint or lead-based paint hazards
- Failure to disclose to each agent the presence of any lead-based paint, or lead-based paint hazards, and the existence of any available records or reports
- Failure to provide any records or reports
- Failure to include, as an attachment to (or within) the contract, the Lead Warning Statement
- Failure to include, as an attachment to the contract, a statement by the lessor disclosing the presence of known lead-based paint, or lead-based paint hazards
- Failure to include as an attachment, or within the contract, a list of any records or reports available to the lessor that pertain to lead hazard information, or the failure to indicate that no such list exists
- Failure to include in the contract for lease a statement by the lessee affirming receipt of the information and the lead hazard pamphlet
- Failure to include in the contract as an attachment, a statement by one of more of the agents involved in the transaction, that the agent has informed the lessor or the lessor's obligations and that the agent is aware of his duty to ensure compliance
- Failure to include in the contract for lease, signatures of the lessor, agent, and lessee certifying to the accuracy of their statements, as well as dates
- Failure to retain a copy of the completed disclosure records for no less than three years from the completion date of the lease