Lead Paint Disclosure Requirements for Residential Real Estate

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By Alvin C. Harrell

1992 (the Act) was enacted. The Act was premised on a Congressional finding that:

1. Low level lead poisoning is widespread among American children, affecting as many as 3,000,000 children under age six, with minority and low-income communities disproportionately affected;
2. At low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems;
3. Pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint;
4. The ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children;
5. The health and development of children living in as many as 3,800,000 American homes is endangered by chipping or peeling lead paint, or excessive amounts of lead contaminated dust in their homes;
6. The danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent lead deterioration and limit children’s exposure to lead dust and chips;
7. Despite the enactment of laws in the early 1970s requiring the federal government to eliminate as far as practicable lead-based paint hazards in federally owned, assisted, and insured housing, the federal response to this national crisis remains severely limited; and
8. The federal government must take a leadership role in building the infrastructure— including an informed public, state and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance—necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved as expeditiously as possible.

In response Congress articulated seven goals for its new legislation:

1. To develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible;
2. To reorient the national approach to the presence of lead-based paint in housing to implement, on a priority basis, a broad program to evaluate and reduce lead-based paint hazards in the nation’s housing stock;
3. To encourage effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction and by ending the current confusion over reasonable standards of care;
4. To ensure that the existence of lead-based paint hazards is taken into account in the development of government housing policies and in the sale, rental, and renovation of homes and apartments;
5. To mobilize national resources expeditiously, through partnership among all levels of government and the private sector, to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards;
6. To reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the federal government; and
7. To educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards.

The subject of all of this attention is lead. As the history was described by another author:

Lead is a heavy, gray, metallic which has been used for pipes, eating utensils and a wide variety of things since pre-historic times. During the last century lead has been used for adding color to paint, as an anti-knock additive for gasoline, in plumbing fixtures and pipes, in battery plates, in ceramic glazes. As more was learned about the dangers of lead poisoning, steps were taken to remove it from these products. Lead based paint, which can contain up to 50% lead, was banned in Japan and most European countries in the 1950s. Lead in gasoline was banned in the 1960s as an air-pollution control measure. Although replacements for lead-based paint, such as lead-free latex paint, were widely available in the 1960s, the United States Consumer Safety Products Commission did not get around to banning the residential use of lead-based paint until 1978. About three quarters of the housing stock built before 1978 contains lead-based paint. People can get lead into their bodies in various ways. In and about rental units, this can happen by people putting their hands or other objects covered with lead dust or soil into their mouths; they can eat paint chips that contain lead or breathe in lead dust, especially during remodeling or renovations that disturbed surfaces. After 1978, the average concentration of lead in the blood decreased as did the number of children with lead poisoning. Studies have indicated that lead exposure from deteriorated residential lead-based paint, contaminated soil, and lead in dust are among the major existing sources of lead exposure among the children in the United States.

In its Supplementary Information to the Final Rule implementing the new disclosure requirements, the Department of Housing and Urban Development (HUD) and the Environmental Protection Agency (EPA) found that:

Lead affects virtually every system of the body. While it is harmful to individuals of all ages, lead exposure can be especially dangerous to children, fetuses, and women of childbearing age. As recent studies have identified previously unrecognized effects, there has been increasing concern about blood-lead levels once thought to be safe. Since 1978, CDC has lowered the blood-lead level of concern from 60µg/dL (micrograms per deciliter) to 10µg/dL (Ref 2).

Lead poisoning has been called "the silent disease" because its effects may occur gradually and imperceptibly, often showing no obvious symptoms. Blood-lead levels as low as 10µg/dL have been associated with learning disabilities, growth impairment, permanent hearing and visual impairment, and other damage to the brain and nervous system. In large doses, lead exposure can cause brain damage, convulsions, and even death. Lead exposure before or during pregnancy can also alter fetal development and cause miscarriages.

In 1991, the Secretary of HHS characterized lead poisoning as the "most number one environmental threat to the health of children in the United States."
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United States" (Ref. 1). Although the percentage of children with elevated blood-lead levels has declined over the past 20 years, millions of U.S. children still have blood-lead levels high enough to threaten their health (Ref. 1). The Third National Health and Nutrition Examination Survey (NHANES III) indicates that over the past two decades, the average child's blood-lead level has decreased from 12.8 µg/dL to 2.8 µg/dL (Ref. 8). NHANES III also indicates, however, that in 1991 approximately 70 million U.S. children under the age of 6 still had blood-lead levels that exceeded the CDC 10 µg/dL level of concern (Ref. 8).

The EPA and HUD further cited the history of lead-based paint regarding the U.S. housing stock, concluding that:

Efforts to reduce exposure to lead from sources of blood-borne and airborne lead have played a large role in the past reductions of blood-lead levels in the United States. Despite these successes, a significant human health threat remains from improperly managed lead-based paint. From the turn of the century through the 1940s, paint manufacturers used lead as a primary ingredient in many oil-based interior and exterior house paints. Usage gradually decreased through the 1950s and 1960s, as largely lead-free latex paints became more popular. Although the CPSC banned lead-based paints from food contact use in 1975 (current), paints may not have greater than 0.06 percent lead by weight (Ref. 3), EPA and HUD estimate that 83 percent of the privately owned housing units built in the United States before 1980 contain some lead-based paint. These estimates, approximately 84 million homes may contain lead-based paint that may pose a hazard to the occupants if not managed properly (Ref. 4).

1 Lead from exterior house paint can flake off or leach into the soil around the outside of a home, contaminating children's playing areas. Dust caused during normal lead-based paint wear (especially around windows and doors) can create a hard-to-see film over surfaces in a house. In some cases, cleaning and renovation activities can increase the threat of lead-based paint exposure by dispersing fine dust lead particles to the air and over accessible household surfaces. If managed improperly, both adults and children can receive hazardous exposures by inhaling the fine dust or by ingesting paint dust during hand-to-mouth activities. Children under age 6 are especially susceptible to lead poisoning (Ref. 2). These conclusions are excerpted at length in order to emphasize the seriousness with which the federal government views these issues. Moreover, when federal agencies promote a detailed regulatory solution to a perceived problem, private litigation using regulatory proceedings becomes a basis for civil liability that may follow. The resulting issues concern public officials and agencies should be of concern to owners as well as real estate lenders, agents, and lessors.

II. Disclosure Requirements Under the Regulation

A. Introduction

Subpart H to 2 CFR Pt. 35 is HUD's implementing regulation. The regulation imposes six discrete requirements:

1. Sellers and lessors of most residential housing built before 1978 must disclose the presence of known lead-based paint and/or lead-based paint hazards in the housing; and
2. Sellers and lessors must provide purchasers and lessees with any available records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards; and
3. Sellers and lessors must provide purchasers and lessees with a federally approved lead hazard information pamphlet; and
4. Sellers and lessors must provide purchasers with a ten-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards before the purchaser is obligated under any purchase contract; and
5. Sales and leasing contracts must include certain disclosure and acknowledgment language; and
6. Real estate agents must ensure compliance with these requirements.

B. Scope and Effective Date

The regulation applies to all transactions to sell or lease "target housing," except: foreclosed sales and sales and leases of target housing that have been found to be lead-based paint free; short term leases of 100 days or less;16 and renewals of existing leases where the lessee has previously disclosed the required information (and no new information is known).17

For owners of more than four residential dwellings, the requirements became effective September 16, 1996. For owners of one to four dwellings, the effective date was December 6, 1996.18 Among the definitions, it is noteworthy that "lead-based paint hazard" is defined as: 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 as established by the appropriate Federal agency.19

C. Disclosure Requirements for Sellers and Lessors

The disclosure requirements at 2 CFR section 35.88 must be met before the purchaser or lessee becomes obligated under the purchase contract or lease.14 If any of the disclosure requirements are accomplished after the purchaser or lessee has made an offer to purchase or lease the housing, the seller or lessor must complete the required disclosures before accepting the offer and must allow the purchaser or lessee an opportunity to review the information and alter the offer before the树木 are accepted.

The seller or lessor has four affirmative disclosure obligations, as follows:

1. The seller or lessor must provide the purchaser or lessee with an EPA approved lead hazard information pamphlet. Such pamphlets include the EPA document entitled Protect Your Family From Lead in Your Home (EPA-540-K-96-001) or an equivalent pamphlet that has been approved for use in that state by EPA.20

2. The seller or lessor must disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. The seller or lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.21

3. The seller or lessor must disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased, and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards. The seller or lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

4. The seller or lessor must provide the purchaser or lessee with any records available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased. This requirement includes records and reports regarding other residential dwellings in multifamily target housing, including the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards in the target housing as a whole.

D. Opportunity to Conduct an Evaluation

In a purchase of target housing, before the purchaser becomes obligated to purchase the housing, the seller must permit the purchaser a ten-day period to conduct a risk assessment or inspection to determine the presence of lead-based paint and/or lead-based paint hazards.22 The parties may mutually agree, in writing, to a different evaluation period, and a purchaser may waive the opportunity to conduct the evaluation.

14. 24 CFR 35.88(d). 3026.93.1 (iii), 5206.38.4 (f), 24 CFR 35.88(b), 5208.38.7 (d). 3026.93.1 (iii)

15. See (20) 5208.38.7 (d). 3026.93.1 (iii); 5208.38.7 (e). 3026.93.1 (iii). 24 CFR 35.86. 5208.38.7 (f), (g).


17. 24 CFR 35.86 (c). See 3026.93.1 (iii).


20. The 

E. Certification and Acknowledgment for Sales Transactions

Every contract to sell target housing must include an attachment with the following elements, in the same language as the contract (e.g., English, Spanish, etc.):

(1) A Lead Warning Statement consisting of the following language:

Every purchaser of any interest in a residential dwelling that was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller’s possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

(2) A statement by the seller disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing, being sold or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The seller shall also provide any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

(3) A list of any records or reports available to the seller pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the purchaser. If no such records or reports are available, the seller shall so indicate.

(4) A statement by the purchaser affirming receipt of the information set out in paragraphs (a)(2) and (a)(3) of this section and the lead hazard information pamphlet required under section 15 U.S.C. (section) 2696.

(5) A Lead Warning Statement with the following language:

Housing built prior to 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially hazardous to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of the lead-based paint and/or lead-based paint hazards in the dwelling. Lessors shall also provide a federally approved pamphlet on lead poisoning prevention.

(6) When any agent is involved in the transaction to sell target housing on behalf of the seller, a statement that:

(i) The agent has informed the seller of the seller’s obligations under 42 U.S.C. (section) 4852d; and

(ii) The agent is aware of his/her duty to comply with the requirements of this subpart.

(7) The signatures of the sellers, agents, and purchasers, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

F. Certification and Acknowledgment for Leasing Transactions

Every contract to lease target housing must include, in an attachment or within the contract, the following elements, in the language of the contract (e.g., English, Spanish, etc.):

(1) A Lead Warning Statement with the following language:

Housing built prior to 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially hazardous to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of the lead-based paint and/or lead-based paint hazards in the dwelling. Lessors shall also provide a federally approved pamphlet on lead poisoning prevention.

(2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing, being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

(3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the tenant. If no such records or reports are available, the lessor shall so indicate.

(4) A statement by the tenant affirming receipt of the information set out in paragraphs (a)(2) and (a)(3) of this section and the lead hazard information pamphlet required under section 15 U.S.C. (section) 2696.

G. Record Retention Requirements

The seller and any agent must retain copies of the executed disclosure requirements for at least three years after completion of the sale. The lessor and any agent must retain copies of the executed disclosure requirements for at least three years after commencement of the leasing period. Record keeping limitation periods do not apply in cases when the limitations in civil law suits brought under the Act, or otherwise limit the civil liability of sellers, lessors or agents.

IV. Enforcement and Civil Liability

Any person who knowingly fails to comply with any provision of the act or regulations will be subject to civil money penalties under 42 U.S.C. section 3545 and 24 CFR Part 30. The Secretary of HUD is further authorized to seek injunctions in federal court to enjoin violations or to restrain violators from further acts. This authority is in addition to the authority that the Secretary already possesses in connection with violations of this Act.
tive relief in federal court. Persons who knowingly violate the Act or regulation are also jointly and severally liable to the purchaser or lessee for an amount three times the amount of actual damages sustained. In addition the court may award court costs, attorney fees, and expert witness fees to the prevailing plaintiff.

The following actions are specifically deemed to be a violation of 42 U.S.C. section 4852d (b)(5) and TSCA Section 409 (15 U.S.C. section 2689): Failure to comply with the disclosure requirements for sellers and lessors at 24 CFR section 35.88; failure to allow an opportunity to conduct and evaluation under 24 CFR section 35.90; failure to comply with the certification and acknowledgment disclosure requirements at 24 CFR section 35.92; failure to comply with the agent responsibilities at 24 CFR section 35.94. Violators are also subject to civil and criminal sanctions under TSCA section 16.44 up to $10,000 for each violation. The Act and regulation do not relieve any party for responsibility to comply with other laws, regulations, codes, or ordinances.

V. Conclusion

While the Act and regulations hopefully will prove to contain fewer traps and subtleties than the FDCPA, for some of the less sophisticated transactions covered (e.g., the sale by owner without an agent, or a lease by a "mom and pop" landlord) the requirements may prove to be as challenging as the FDCPA is for lawyers. If the Act and regulations do not ultimately spur new litigation, it will not be for lack of trying; Congress and HUD have built obvious incentives for litigation into the Act and regulation. Since the targets (owners and sellers of real estate) necessarily have some assets to pursue, it seems likely that federal agencies and the plaintiffs' bar will do their part to assure vigorous enforcement in the years ahead. Lenders may also come in for their share of the cost, due to potential liability in the sale of foreclosed real estate.

49. 24 CFR § 35.90(e).
50. Id. § 35.90(e). This creates an incentive for private litigation.
51. 24 CFR § 35.90(e). This provides more incentives for increased litigation. Will this become another Federal Debt Collection Practice Act (FDCPA)?
52. 24 CFR § 35.90(e).
55. 24 CFR § 35.90(d).
56. Id. § 35.98.
57. See House Report, supra note 7, supra notes 50 and 51. For a possible preview, see the description of the asbestos litigation, supra this issue at 372, note M. 2.

**STATUS REPORT: THE CONFERENCE ON CONSUMER FINANCE LAW**

The Conference on Consumer Finance Law is a non-profit institute organized in 1926 by leading members of the American Bar Association (ABA) and the financial services industry, to provide educational services, publications, and research relating to consumer, commercial, and financial services law.

The Conference is now in its 71st year, and the 50th year of publication of its journal, the *Consumer Finance Law Quarterly Report*. In addition to publishing this journal, the Conference conducts meetings and programs in conjunction with the ABA Annual Meeting and the Spring meeting of the ABA Section of Business Law. The Conference also publishes books and sponsors national institutes and regional continuing education programs.

The Conference is participating in the current effort to revise Uniform Commercial Code Article 9, which covers lending transactions secured by personal property. This law revision effort has been underway for approximately five years and is expected to be completed in 1998. The Conference also participates in other law reform efforts, and is expected to independently study and analyze current proposals for bankruptcy reform. If you are interested in any of these projects and would like to contribute to the work of the Conference in any of these areas of law, please contact the Editor of the *Quarterly Report*.

The Conference is a national organization with members in every state and a Governing Committee representing every region of the country. There are also overseas members in a number of different countries. Most members are lawyers, academics, judges, regulators, consumer advocates, or financial services executives. All viewpoints are welcome and expression of divergent views is encouraged. The Conference encourages submission of unsolicited manuscripts for publication in the *Quarterly Report*, and invites those who disagree with published articles to respond in writing for publication.

The Conference is supervised by a Governing Committee that establishes Conference policies and directs the activities of the Conference. It numbers approximately 45 persons. Membership on the Governing Committee is by invitation only and requires election by the members of the Governing Committee. The Conference is funded primarily by membership dues and subscriptions to the *Quarterly Report*, plus small private donations. The editorial offices of the Conference are located at Oklahoma City University School of Law.

Further information about the Conference is available from the Editor of the *Quarterly Report*. 

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