INTERPRETIVE GUIDANCE FOR

THE REAL ESTATE COMMUNITY ON THE

REQUIREMENTS FOR DISCLOSURE OF INFORMATION

CONCERNING LEAD-BASED PAINT IN HOUSING

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INTRODUCTION

On March 6, 1996, the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) published a final rule, "Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing," (61 FR 9064-9088). This final rule requires persons selling or leasing most residential housing built before 1978 to provide purchasers and renters with a federally approved lead hazard information pamphlet and to disclose known lead-based paint and/or lead-based paint hazards. The specific requirements of the final rule are discussed in detail in the March 1996 notice. Other documents used in the development of this rule are included in a public docket available for inspection at EPA.

The requirements of the final rule are applicable as follows: (1) For owners of more than four residential dwellings, the requirements are applicable beginning on September 6, 1996, and (2) For owners of one to four residential dwellings, the requirements are applicable beginning on December 6, 1996.

Subsequent to the publication of the final rule, EPA and HUD have received questions from the real estate community about implementation of the rule. EPA and HUD have developed this "Interpretive Guidance" document to supplement the information presented in the final rule. This guidance will be expanded and updated as necessary.

To assist the general public, EPA and HUD made the document, "EPA and HUD Real Estate Notification and Disclosure Rule: Questions and Answers" available when they published the final rule. This document, EPA-747-F-96-001, March, 1996, and others may be obtained from the National Lead Information Clearinghouse (NLIC) at (800) 424-LEAD, or TDD(800) 526-5456 for the hearing impaired. Requests may also be sent by fax to (202) 659-1192 or by Internet E-mail to ehc@cais.com.

EFFECTIVE DATE OF RULE

General

1. Q: What part of a sale or rental transaction must occur on or after the effective date for the rule to apply?

A: The rule generally applies if the buyer or renter becomes obligated under a contract to purchase or lease target housing on or after the effective date of the rule

(September 6, 1996 or December 6, 1996, depending on the number of dwelling units owned).

2. Q: What is the effective date for sale or rental transactions involving cooperatives ("co-ops") and condominiums ("condos")?

A: EPA and HUD recognize that both the individual unit "owner" and the corporation or homeowner association may have an ownership interest in co-ops and condos (see answer to question # 10). However, EPA and HUD believe that when a co-op or condo unit is sold or rented, the focus of the transaction is the single unit. Therefore, as a matter of policy, EPA and HUD have determined that the effective date will be based on the number of dwellings "owned" (meaning in some cases, the number of co-op shares or condo units owned) by the individual seller or lessor as opposed to the number of units that comprise the co-op or condo. Where co-ops or condos are being directly sold or leased by the corporation (as in a renovated building being newly offered), however, the applicable date would depend on the number of units owned by the corporation.

Sale Transactions

3. Q: Is the rule effective for sales agreements entered into before the effective date, where closing occurs after the effective date?

A: The rule will not apply to target housing transactions where the sales agreement is signed and all contingencies have been removed before the effective date, even if closing occurs after the effective date.

Rental Agreements

4. Q: What is the effective date of the rule for the following situation? A real estate or property management firm represents 40 property owners who own four units each. Each of the 40 property owners' effective date would clearly be December 6, 1996 (four or less units) if they were managing their own properties. However, because the real estate or property management firm is managing 160 rental units (40x4) on behalf of the owners, would they be subject to the September 6, 1996 effective date ?

A: The effective dates in the rule refer specifically to the number of residential dwellings owned. Although the property manager is managing more than four properties, each individual owner only owns four properties. Therefore, the effective date for property managers of properties with four units each per owner would be December 6, 1996.

5. Q: In some cases, as in the New York City Rent Stabilization Law, owners must offer renewal leases to rent-stabilized tenants 120 to 150 days before their current leases expire. This 120-150 day period may occur prior to the September 6 effective date, but the renewal lease could start after the September 6 effective date. Must an owner include the disclosure forms with the 120-150 day offer of renewal, even though this occurs before the effective date?

A: The rule applies to obligations made on or after the effective date. Thus, the date upon which a renewal lease is offered is not particularly relevant under the rule. It is the date that the offer is accepted, if such acceptance constitutes an obligation to rent, that determines whether or not the rules apply. For written leases, this would mean that regardless of when the renewal leases are offered to the tenant, the rule would apply to all renewal leases signed by the tenant (and any contingencies have been removed) on or after the effective date. The rule does not apply to cases where the renewal leases have been signed by tenants (and contingencies removed) prior to the effective date, even if the lease does not begin until after the effective date.

APPLICABILITY

Housing - Pre-1978

6. Q: Target housing is housing built before 1978. Does this include or exclude housing that was started in 1977, but not completed until 1978?

A: EPA and HUD consider "housing constructed before 1978" to mean housing for which a construction permit was obtained (or if no permit was obtained, housing in which construction was started) before January 1, 1978.

0-Bedroom Dwellings

7. Q: Would "0-bedroom dwellings" include college fraternity and sorority houses, dormitory suites, married student housing, and university-owned apartments?

A: The rule excludes "0-bedroom dwellings." The definition of "0-bedroom dwelling" includes "rentals of individual rooms in residential dwellings," and EPA and HUD believe that rentals of rooms in fraternity and sorority houses generally fit that model and would be exempt. The definition of "0-bedroom dwelling" also specifically includes dormitory housing, which would encompass typical dormitory suites. However, married student housing and university-owned apartments typically are not "0-bedroom dwellings" and would be covered by the rule if they meet the other criteria for target housing set out in the rule.

Disabilities

8. Q: What is the definition of housing for persons with disabilities?

A: Housing for persons with disabilities means communities or similar types of housing specifically designed for one or more persons with a physical or mental impairment which substantially limits one or more major life activities at the time of initial occupancy (HUD, Fair Housing Accessibility Guidelines, 56 FR 9472, 3/6/91). However, the exclusion for persons with disabilities from the definition of "target housing" does not cover housing in which any child who is less than 6 years of age resides or is expected to reside.

Daycare

9. Q: Are daycare centers included in the scope of the final rule?

A: Section 1018 of Title X focusses specifically on residential housing. As such, the rule does not apply to commercial facilities such as daycare centers and nurseries, except where such facilities are part of a residential dwelling.

DISCLOSURE

Co-ops and Condos

10.Q: Who is responsible for disclosure in the case of co-ops or condos? What about common areas?

A: EPA and HUD recognize that co-ops and condos can be structured in a variety of ways. For example, in the case of co-ops, a corporation may be established and this corporation would own all the units and common areas comprising the co-op; individual unit "owners" would own shares in the corporation and might also own occupancy rights or lease a unit from the corporation. In the case of condos, individual condo unit owners may own their unit; all condo unit owners may jointly own the common areas and a homeowners association may be established to represent the interests of all the unit owners.

Under this rule, a person selling or leasing a co-op or condo unit (whether the unit owner owns the unit in its entirety or owns shares in a corporation) would be responsible for complying with disclosure requirements both with respect to the unit itself and to any associated interest in common areas that is transferred. In the case of a corporation or homeowner association owning an interest in all the units or common areas, the corporation or association would be responsible for disclosing information regarding those areas when their interest in them is sold or leased. Additionally, in the case of a corporation or homeowner association which does not have an ownership interest in the co-op or condo but represents the joint interests of

all the unit owners, the corporation or association, acting as legal representative of the owners (see also question #11), would be responsible for disclosing information regarding the areas subject to the transaction. In such a case, an individual seller or lessor is responsible for timely notifying the corporation or association before a buyer or lessee becomes obligated, so that the corporation or association has an opportunity to comply with disclosure requirements.

Where the corporation or association is not a seller or lessor and is not a legal representative of the owners, the corporation or association has no disclosure responsibilities. However, in this case, the individual seller or lessor must obtain any information held by the corporation or association and include it in the disclosure to ensure compliance with this rule. Parties with the disclosure responsibilities must also sign the disclosure form certifying accuracy.

Authorized Representatives and Agents

11.Q: May a seller or lessor authorize a representative or agent to discharge the seller's or lessor's responsibilities under the rule, including signing the certification of accuracy required in the contract?

A: Yes. The seller or lessor may authorize a representative or agent to fulfill the seller or lessor's requirements under this rule; however, the seller or lessor is ultimately responsible for full compliance with the requirements of this rule. The representative must disclose the presence of lead-based paint or lead-based paint hazards if known by either the representative or the seller or lessor and disclose and provide records available to the representative and the seller or lessor. The designated representative or agent may sign on behalf of the seller or lessor. If the representative or agent acting on behalf of the seller or lessor is also functioning as an Agent, as defined under 24 CFR 35.86 and 40 CFR 745.103, they are also required to carry out those duties and to sign the certification in that capacity.

12.Q: Given that the selling agent in real estate transactions may be prohibited by State or local law from direct communication with the seller, how can they inform the seller of his or her responsibilities under this rule?

A: Where State or local laws prohibit direct contact, EPA and HUD have determined that the selling agent may inform the listing agent of the seller's responsibilities under this rule and may sign the disclosure form to that effect. Regardless of the actions or involvement of the selling agent, however, the listing agent is still responsible for informing the seller of his or her duties under this rule.

Type of Documents

Summary vs. Reports

13.Q: The rule states that lessors must give each lessee copies of all records or reports relating to lead-based paint hazards in the target housing. But in some cases it may be impractical to give each lessee his or her own report -- the document's length may make copying costs prohibitively high. In such situations, what steps may a lessor take to make the document available to a lessee without actually giving the lessee his or her own copy? For example, may the lessor give the lessee a summary of the document and give the lessee an opportunity to read a copy of the full document in the lessor's office?

A: The rule requires lessors to provide lessees with available records or reports pertaining to lead-based paint and/or lead-based paint hazards. However, EPA and HUD recognize that in some cases, the actual transfer of multiple voluminous technical documents may be burdensome for both lessors and lessees.

For lengthy court documents and construction documents, EPA and HUD have determined that these documents may be excerpted, provided that all information regarding lead-based paint and lead-based paint hazards is included along with sufficient background information, so that the context of the excerpt is clear.

For paint inspection and risk assessment reports, EPA and HUD have determined that lessors may provide lessees with a summary of all paint inspection and risk assessment reports, provided that the summary is prepared by a certified paint inspector or risk assessor. Where information about specific units is inconsistent with the conclusions as a whole, this information should be included along with the summary of general conclusions.

In situations where documents are excerpted or summarized, they must be accompanied by a list of all complete records and reports available to the lessee. If the lessor chooses to provide excerpts or summaries and document lists in lieu of complete copies, the lessor must provide the lessee with the opportunity to review the complete documents in a central location on the premises, if feasible, and the opportunity to receive copies of any documents not provided, upon request, and at no cost to the lessee.

In the case of sales transactions, the seller must provide complete documents to the buyer. In order to assure that future buyers have access to complete records and reports, EPA and HUD believe that complete document transfer, rather than excerpts or summaries, is necessary.

14.Q: What methods of distribution are available to a seller or lessor when providing copies of relevant materials to a purchaser or lessee? May records and reports be provided via the Internet?

A: While EPA and HUD recognize that electronic transfer may be acceptable to some purchasers and lessees, the Agencies are concerned that relying exclusively on electronic distribution may deny some purchasers or lessees access to the information, due to the lack of access to the necessary technology. Therefore, EPA and HUD would deem electronic transfer of documents acceptable only if the purchaser or lessee agrees in writing to accept the documents in that format.

Unit vs. Whole Building

15.Q: In cases where there have been building-wide evaluation or reduction activities, must the contents of the reports be disclosed to every prospective purchaser or lessee of individual units that may not have been specifically addressed?

A: EPA and HUD believe that information and reports on other units in the target housing are directly relevant to prospective purchasers and lessees, if the information results from evaluation or reduction efforts in the target housing as a whole. In large multifamily properties, evaluations do not necessarily examine every dwelling unit in the housing. Rather, inspectors or risk assessors examine a representative sample of the dwelling units and apply the findings to the housing as a whole. While such evaluations might not include data on a specific unit, the fact that the evaluation was designed to provide information on the housing as a whole makes the report's findings relevant. If there is unit-specific information that was not part of a building-wide evaluation, such information must be disclosed only during sales or rentals of the specific units that were evaluated.

Timing of Disclosure for Lessors

16.Q: If a renter has a month-to-month lease arrangement, what is the responsibility of the owner (lessor) with respect to providing copies of the booklet and disclosure forms?

A: The rule excludes from its requirements short-term leases of 100 days or less, where no lease renewal or extension can occur. If both parties wish to extend a previously exempted short-term lease beyond the 100-day limit, all provisions of this rule must be satisfied in full before any such "extension" occurs.

In an "open-ended" month-to-month lease arrangement (i.e., an arrangement with no specified termination date), whether written or unwritten, the rule applies at the

time of the initial lease agreement, since the parties have not limited the lease term to 100 days or less.

In some cases, leasing arrangements switch to "open-ended" month-to-month arrangements after an initial period of occupancy and may continue indefinitely. Under such circumstances, EPA and HUD interpret renewal to occur at the point when the lessee becomes obligated to this change in the rental period. Another significant change in the lease agreement constituting lease renewal would be a rental rate adjustment. Following any such alteration of terms, either an initial disclosure would be required if no disclosure had been made, or disclosure would be required of any new information obtained subsequent to an initial disclosure.

17.Q: Can an owner send the disclosure forms to all existing tenants at one time, without waiting for the tenants to renew their leases or must the owner wait for each tenant's renewal to come up?

A: Disclosure may be made any time before the lessee becomes obligated under a new lease (see response to question #18). However, if disclosure is made in advance of lease renewal and the owner subsequently obtains new information relevant to disclosure, this new information must be disclosed before the lessee becomes obligated under a new lease.

Signatures on Disclosure Forms

18.Q: Is an original signature required on the disclosure form?

A: No. The signature does not have to be original for purposes of the Federal rule. It may be reproduced, for example, by photocopy, facsimile, autopen or rubber stamp. EPA and HUD note that use of a reproduced signature does not relieve the signatory from its responsibility for compliance with this rule. Sellers and lessors are advised to ascertain whether original signatures are required under State law governing the execution of documents associated with sales or rental transactions.

LEAD-BASED PAINT FREE

19.Q: Can inspectors certified in one State perform inspections for the lead-based paint free exemption in another State?

A: Currently yes. An inspector certified to perform inspections in a State with its own certification and training requirements may perform inspections for the lead-based paint free exemption in that State and in other States. Inspectors are advised, however, that separate State laws may also apply to their activities. Within two years, a Federal program or authorized State program will be in place to certify inspectors. After such Federal or authorized State program takes effect, all

inspections for purposes of the lead-based free exemption must be performed by an inspector certified in the Federal or Federally-authorized program applicable in the State where the inspection will take place.

20.Q: What sampling is required to support a determination of lead-based paint free? What sampling criteria should be used when conducting a "surface-by-surface investigation" in multi-family housing? Does Chapter 7 of the HUD Guidelines provide adequate criteria regarding how many and what type of samples need to be taken, or are the criteria to be used established by the State where the individual is certified?

A: The rule defines inspection as a (1) a surface-by-surface investigation to determine the presence of lead-based paint, and (2) the provision of a report explaining the investigation. Before EPA implements the Federal training and certification program and the State authorization program under TSCA, certified inspectors should use the sampling methodology provided by their certifying State for determining what number of units must be inspected to have a representative sample. If the State in which the inspector is certified does not provide a sampling protocol, the inspector should either sample every unit in multi-family housing or use the sampling guidelines provided in Chapter 7 of the HUD's "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing," (HUD Guidelines), June, 1995 or subsequent updates.

21.Q: Do the States have the authority to alter the definition of lead-based paint in the rule that will be used to apply the lead-based paint free exemption?

A: No. The rule, at 24 CFR 35.86 and 40 CFR 745.103, states that a lead-based paint free finding must demonstrate that the building is free of "paint or other surface coatings that contain lead equal to or in excess of 1.0 milligrams per square centimeter or 0.5 percent by weight." The State standards are not applicable, whether more or less stringent, since a State cannot amend Federal requirements.

22.Q: Will lead-based paint free findings carry over once the EPA section 402/404 rule is implemented or will reinspections be required in States that do not have programs?

A: Prior to Federal or State implementation of section 402/404, reinspections will not be required for target housing that was already inspected and found to be lead-based paint free by a certified inspector. An inspection conducted prior to Federal or State implementation of section 402/404 requirements by a non-certified inspector is acceptable if the past inspection report has been reviewed and approved in writing by a certified inspector.

Once the Federal or authorized State programs take effect, all new inspections for purposes of the lead-based free exemption must be performed by an inspector

certified in the Federal or Federally-authorized State program applicable in the State where the inspection will take place. An inspection conducted prior to Federal or State implementation of section 402/404 requirements by a non-certified inspector will be acceptable, if the past inspection report has been reviewed and approved in writing by an inspector certified in the Federal or Federally-authorized State program applicable in the State where the inspection took place.

PAMPHLET ISSUES

Approval

23.Q: Can private groups seek approval under section 1018 for use of alternatives to the Federal pamphlet?

A: The rule provides flexibility for States to obtain EPA approval for use of alternative State information materials in lieu of the Federal Pamphlet "Protect Your Family From Lead in Your Home." However, this pamphlet approval process does not apply to private groups that seek to develop lead hazard information materials.

EPA and HUD specifically included these State pamphlet provisions to minimize the overlap between the Federal program and State laws and regulations that may already require the distribution of State information materials during sales or leasing transactions. While EPA and HUD cannot approve materials developed by a private group as a national alternative to the Federal pamphlet, private groups may ask States to consider using their pamphlets as a State alternative. States interested in developing an alternative pamphlet should contact their EPA regional offices.

Empty Space

24.Q: The back page of the booklet contains an empty rectangular space at the bottom. Is it permissible for an individual or private party, i.e. real estate firm, to place their name, address, company logo or advertising material in this space?

A: In the Notice of Availability for the final pamphlet (60 FR 39168, August 1, 1995), EPA indicated that to encourage private reproduction of the pamphlet, space was added on the pamphlet's back cover for names and contact information of organizations that reprint and distribute the pamphlet.

Reproduction

25.Q: Do pages 12 (State Health and Environmental Agencies) and 13 (EPA Regional Offices and CPSC Regional Offices) of the Federal pamphlet have to be included? When the

pamphlet is developed for use only in one State, the information on pages 12 and 13 may not be necessary.

A: Provided that the State and Federal regional information on the State developing the pamphlet is retained, the printer can reformat the information on page 12 and 13 to omit information on other State and regional offices.

26.Q: If a private-sector party or association wishes to reproduce the pamphlet at its own expense, do the graphic illustrations have to be included?

A: The pamphlet reproduced by a private organization must include all graphics provided in the original.

27.Q: Can the pamphlet be provided in an 8-1/2 x 14 inch format as an attachment to the sale or rental contract?

A: EPA has developed and made available an alternative format of the pamphlet on 8-1/2 x 14 inch legal paper to accommodate sellers or lessors who wish to provide the pamphlet as part of the contract. The attachment includes EPA's and HUD's sample disclosure and acknowledgement forms. Provided that the seller or lessor adds the appropriate regional and state contacts in the space provided, the legal size format may be used as an alternative to the 5-1/2 x 8-1/2 inch version of the pamphlet. The public may also revise the included sample disclosure and acknowledgement forms provided that the forms contain all the elements set out in the content requirements in 24 CFR 35.92 and 40 CFR 745.113. These materials may be obtained from the NLIC (see Information section of this document).

STATE PROGRAMS

28.Q: Can States obtain authorization to administer and enforce their disclosure programs in lieu of the Federal program?

A: No. EPA and HUD have determined that Title X does not provide authority to delegate the administration and enforcement of the section 1018 disclosure requirements to State programs. However, EPA and HUD believe that Title X provides flexibility to EPA to approve State alternatives to the Federal pamphlet. Additionally, the rule does not require the use of a Federal disclosure form as an attachment to sales and leasing contracts. States, sellers, landlords, and agents have flexibility to draft disclosure and acknowledgement attachments to fit their needs, provided that the attachments address the content requirements laid out in 24 CFR 35.92 and 40 CFR 745.113.