

**INTERPRETIVE GUIDANCE FOR THE REAL ESTATE
COMMUNITY ON THE REQUIREMENTS FOR
DISCLOSURE OF INFORMATION CONCERNING
LEAD-BASED PAINT IN HOUSING**

PART III

August 2, 2000

Prepared by the

Office of Lead Hazard Control
U.S. Department of Housing and Urban Development
Washington, D.C. 20410

and

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Lead-Based Paint Free Determination Protocol

54.Q: What procedure is appropriate to determine that housing is lead-based paint free under the disclosure rule?

- A. HUD and EPA believe that for housing to be lead-based paint free under the disclosure rule any of the following lead-based paint inspection protocols should be used: 1) Chapter 4 of the 1990 “Lead-Based Paint Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing.”; 2) Chapter 7 of the 1995 Guidelines; 3) Chapter 7 (1997 revision); or 4) Other equivalent inspection protocol.**

Timeshares

55.Q: When do sales of vacation timesharing rights fall within the scope of the exemption for short-term leases of 100 days or less?

- A: The subject of timeshares was originally addressed in response number 36 of the “Interpretive Guidance” document dated December 5, 1996. In that response, HUD and EPA stated that owners of timeshares who sell or lease their timeshares are subject to the rule, except that leases of timeshares for 100 days or less per visit are excluded under the short term lease exemption at 40 C.F.R. 745.101(c) and 24 C.F.R. 35.82(c).**

Since issuing the December 1996 guidance, HUD and EPA have further evaluated the short term lease exemption and have concluded that the sale of certain forms of timeshare interests also qualify for the short term lease exclusion. Specifically, if an owner of a timeshare interest of less than 100 days per visit does not obtain or retain a deeded interest to a specific dwelling unit, then the sale of such an interest also falls within the exclusion for short term leases. Such timeshare interests can take several forms. One form is a “non-fee” or a “right to use” interest, which is structured like a club membership in which the owner possesses the right to use a specified type of vacation unit in a timeshare building, e.g., a 1-bedroom unit, for a specified number of weeks per year for a specified number of years. A second more common form is a “fee timeshare” in which the owner owns a deeded interest in a specific unit but waives his/her right to use that specific unit under the recorded covenants and restrictions for the project, and instead receives a right to use one of several units of the type in which an interest was purchased. In either case, because the owner does not possess or retain a deeded interest to a specific dwelling unit, the Agencies believe it is more appropriate to consider transfers of such interests akin to seasonal vacation rentals and hotel/motel transactions which are excluded under the short term lease exemption. That exemption does not apply, however, if the timeshare owner possesses a deeded interest to a specific unit and does not waive his/her right to use that specific unit under a recorded covenant or restriction.

Distinction Between the Terms “Lessor” and “Agent”

56.Q: Does a real estate Agent who executes a lease with a tenant (“lessee”), including signing the agreement on behalf of the owner of the rental unit, become both the “lessor” and the “agent” in that transaction, as those terms are used under the section 1018 regulations?

A: No. Although both the lessor and agent are subject to the requirements of the rule, a real estate agent executing a lease as described above is clearly acting in the capacity of an “agent” under section 1018 if he or she has entered into a contract with a lessor or lessor representative for the purpose of leasing a rental unit; however, that agent does not also become a “lessor” under section 1018 merely by virtue of his or her actions on behalf of the lessor pursuant to that contract.

Seller Refusal to Permit Inspection

57. Q: May a seller decline to accept an offer from a prospective purchaser that otherwise contains terms and conditions acceptable to the seller but requests a lead inspection or risk assessment?

A: Section 1018 and the implementing regulations published in the Federal Register on March 6, 1996 at page 9064, are clear that the seller is required to provide a potential purchaser with an opportunity to conduct a lead inspection or risk assessment before the purchaser becomes obligated under a contract to purchase target housing. A party selling target housing, therefore, may not offer or advertise property as being available only if purchasers will not take advantage of the opportunity to conduct an inspection or risk assessment.

A purchaser is not required to conduct an inspection or risk assessment and may waive this opportunity in the course of negotiations with the seller. The purchaser is entitled to a 10-day period to arrange for and complete the inspection or risk assessment, but the parties may mutually agree to a different period of time. If the purchaser chooses to have an inspection or risk assessment, the seller is not required to pay for the cost of the inspection or risk assessment. Typically, the purchaser will pay, but this point is negotiable.

58. Q: May sellers decline to agree to make a contract contingent on the results of the lead inspection or allow purchasers to cancel or otherwise modify a contract based on the results of a test?

The regulation provides broad flexibility for buyers and sellers to develop mechanisms for providing the opportunity for inspection or risk assessment prior to contract

obligation. The preamble to the regulations includes sample contract contingency language which offers an example of how this requirement may be implemented. See 61 FR 9076-77. The sample language provides that the sale would be contingent on an inspection or risk assessment and, where the parties could not agree on any appropriate remedial action, they would be released from the contract. The regulations do not, however, prescribe the use of any language, because HUD and EPA decided to allow market forces to develop.

The seller may satisfy the statute through two principal methods:

1. The seller can provide the purchaser an opportunity for an inspection or risk assessment before the contract is signed by both parties. Under this approach, following completion of the inspection or risk assessment, the terms relating to remediation of lead hazards, if any, could be included in the contract or possibly reflected in the price, or simply left to the potential buyer to resolve.
2. The sales contract may include provisions for the buyer to conduct an inspection or risk assessment. As suggested in the sample language offered in the preamble, providing the purchaser a right under a contingency clause would mean that the parties may mutually agree on whether and how to address the problem, if one is found. Nothing in the statute or rule requires a buyer or seller to correct a hazard or otherwise address lead-based paint, so it is essential under the contingency model for the buyer and seller to determine how they would handle a finding of lead-based paint and/or lead-based paint hazards before both parties are obligated. For example, if a buyer wishes to be released from the contract should lead-based paint hazards be identified, then such a clause must be part of the contingency language. Similarly, if a seller wishes to require a buyer to honor the other terms of the contract regardless of the outcome of a lead-based paint inspection or risk assessment, such a clause must be included in the contract language. Either outcome is acceptable to HUD and EPA because the rule only covers the opportunity to obtain an inspection or risk assessment. In short, the agencies suggest that the details of a lead contingency be worked out by both parties before the documents are signed in order to provide clarity.

There may also be methods other than the two described above that comply with the regulations, although HUD and EPA believe these are likely to be the two principal means.

HUD and EPA will not at this time prescribe the use of particular language or requirements for all contracts, unless it appears that prevailing practices are failing to meet the intent of the statute and the regulation, or unless affected parties request the

promulgation of standard language. Adoption of such language would require new rulemaking and there would be adequate opportunity for public comment from concerned parties.

Lead in Pavement Paint

59. Q: Does the rule extend to lead in pavement paint, such as striping on parking lots or roadways on the property?

A: No. It is unlikely that the lead contained in pavement paint applied for pedestrian or vehicle traffic control, such as on parking lots, roadways or driveways, will degrade into dust or leach into soil in significant amounts under normal conditions of use, repair and removal. Measuring lead in pavement paint is not part of a risk assessment or inspection.

Rent Increases Permitted Under Rent Control Ordinances

60. Q: Will increases in rent permitted by local rent control ordinances trigger the Lead Disclosure Statement?

A. Any significant change to an existing lease is considered to be a renewal of the lease for purposes of the rule. An adjustment in the amount of the rent payment is considered a significant change, and therefore would be considered a renewal.

For lease transactions, lead disclosures are required under the rule for (1) all new leases entered into after the applicable effective date of the rule; and (2) all renewals of existing leases after the applicable effective date of the rule unless (a) disclosures have been previously made, and (b) no new information pertaining to lead-based paint or lead-based paint hazards has become available since the previous disclosure. An increase in rent permitted by a local rent control ordinance, therefore, would trigger the lead disclosure requirement unless the requirement was previously satisfied and no new lead information has become available, as described above. See the Preamble to the Lead Disclosure Rule at 61 FR 9068 (March 6, 1996) and also previous answers to questions 16 and 37 in HUD/EPA's Interpretive Guidance dated August 20, 1996 and December 5, 1996.

Lead Disclosure Timing under California Real Estate Sale Practices

61. [NOTE: EPA and HUD were asked by the California Association of Realtors (“CAR”) and

the National Association of Realtors (“NAR”) to provide guidance on whether the lead disclosure procedures in the standard CAR real estate sale contract satisfied the requirements of the section 1018 rule. The Agencies’ response is contained in the following 2 letters.]

Lee Verstandig, Senior Vice President
National Association of Realtors
700 11th Street NW
Washington, D.C. 20001

January 14, 1999

Dear Mr. Verstandig,

This letter follows up on our December 14, 1998 meeting with you, Ralph Holman, and Joe Maheady, and addresses the question presented by your organization on behalf of the California Association of Realtors (“CAR”) regarding the timing of lead disclosures required under section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 and its implementing regulations at 24 C.F.R. Part 35 and 40 C.F.R. Part 745. Specifically, the issue is whether California’s existing practice, as expressed in CAR’s standard real estate contract form, is consistent with the requirements of section 1018. The current California practice allows for legally mandated disclosures and information transmittals, including one regarding lead-based paint, to occur five days after the seller’s “acceptance” of a prospective buyer’s offer to purchase real estate. Under the standard contract, purchasers, after receiving such disclosures, may disapprove of items unacceptable to them, request that the seller correct such items, and cancel the Agreement if the seller refuses or is unable to make repairs to or correct those items that are “reasonably disapproved.” (CAR contract, paragraph 16A(3))

The Environmental Protection Agency (“EPA”) and the Department of Housing and Urban Development (“HUD”) believe that the procedures outlined above do not satisfy the literal requirements of the section 1018 regulations. The regulations at 40 C.F.R. §745.113 and 24 C.F.R. §35.92 specifically require that all disclosure, certification, and acknowledgment requirements be included in an attachment to each contract to sell target housing. Moreover, the regulations plainly state that “[i]f any of the disclosure activities . . . occurs after the purchaser . . . has provided an offer to purchase . . . , the seller . . . shall complete the required disclosure activities prior to accepting the purchaser’s . . . offer and allow the purchaser . . . an opportunity to review the information and possibly amend the offer.” 40 C.F.R. § 745.107(b) and 35 C.F.R. § 35.88(b). This language clearly envisions a process under which the required disclosures must occur before a purchaser’s written offer is accepted by a seller. Regardless of whether the “acceptance” under the California standard contract form is interpreted to be an acceptance of a contract under Section 1018 in view of the subsequent disclosures and the right of the purchaser to amend his or her offer, we do note that the literal language in the standard contract seems to contradict the language of the Section 1018 regulations. Under this reading, therefore, the five-day delay for seller’s disclosure after seller’s “acceptance,” which the California practice allows, appears to be inappropriate.

At the December 14 meeting, you indicated that CAR might be willing to clarify that buyers retain rights to unconditionally, and without risk of loss of deposits or other adverse effects, amend or terminate an offer based on the information contained in the lead disclosures. HUD and EPA believe that such a clarification could resolve any issues regarding compliance with the aforementioned Section 1018 requirements, and that an appropriate amendment to the CAR standard contract language and the language of any related offering documents would ensure resolution. The current CAR standard language, which predicates buyers' rights to "cancel this agreement" on the existence of items that are "reasonably disapproved" appears to fall short of the Section 1018 requirements.

HUD and EPA are also concerned whether the existing California practice protects the 10 day inspection right provided to buyers under Section 1018. Under paragraph 16A(2)(a) of the standard contract, the buyer has 10 days after seller's "acceptance" of the purchase offer to conduct a lead inspection, unless the parties mutually agree to a different time period. In a typical transaction, therefore, a purchaser could be informed of the presence of lead 5 days after the seller "accepts" the purchase offer, and then would have only 5 days to arrange for a lead inspection, obtain the inspection report, and submit to the seller any objections based on the contents of the inspection report. HUD and EPA are concerned that, as a practical matter, those time constraints could limit most purchasers' abilities to assert their rights to inspect for lead.

The final concern relates to the applicability of the CAR contract to "lead-based paint hazards." Section 1018 requirements apply to both "lead-based paint" and "lead-based paint hazards." The standard CAR contract should make this clear.

We hope the above adequately explains our concerns over the present California real estate practices relating to the Section 1018 lead paint disclosure requirements, and look forward to working further with you to find ways to address these matters in a manner satisfactory to all concerned. Please contact Dayton Eckerson at EPA (202.260.2591) or John Shumway at HUD (202.708.3137 x5190) if you have any specific questions.

Sincerely,

David E. Jacobs, Director
Office of Lead Hazard Control
Department of Housing and
Urban Development

John W. Melone, Director
National Program Chemicals Division
Office of Pollution Prevention
and Toxics
U.S. Environmental Protection Agency

Lee Verstandig, Senior Vice President
National Association of Realtors
700 11th Street NW
Washington, D.C. 20001

March 14, 1999

Dear Mr. Verstandig,

This letter confirms our understanding of the amendments proposed to the California “Residential Purchase Agreement (and Receipt for Deposit)” form (“the standard agreement”) by the California Association of Realtors (“CAR”) regarding the timing of lead disclosures and lead inspections under the provisions of section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 and its implementing regulations at 24 C.F.R. Part 35 and 40 C.F.R. Part 745. These amendments are proposed to address the concerns raised by the Environmental Protection Agency (“EPA”) and the Department of Housing and Urban Development (“HUD”) in our January 14, 1999 letter to you.

The proposed amendments, as reflected in CAR’s January 19, 1999 letter to you and subsequent discussions with your staff and that of CAR, are summarized below:

1. Timing of lead disclosures -- To address the concern over when the lead disclosures are to be given, CAR has agreed to move the lead disclosure requirements from paragraph 7. of the standard agreement to paragraph 6. of the standard agreement. This amendment provides buyers with an unconditional right to unilaterally cancel the agreement for 3 days after the lead disclosures are delivered, or 5 days after the disclosures are mailed. The heading for paragraph 6. will also be amended by adding the words “Cancellation Rights.” The effect of this amendment will also be reflected in the text of the disclosure form addendum itself.
2. Timing of lead inspection -- To address the concern over the sufficiency of time to conduct lead inspections, CAR has agreed to amend the standard agreement to provide buyers 10 days, measured from buyers receipt of the Lead Disclosures, to complete all lead inspections.

EPA and HUD believe that these proposed changes, the exact wording of which are reflected in the attachments to this letter, satisfactorily address the concerns raised in our January 14, 1999 letter, and wish to thank the National Association of Realtors and CAR for your efforts in achieving a workable resolution to these matters.

Should you have further concerns related to these issues, please contact Dayton Eckerson at EPA (202.260.2591) or John Shumway at HUD (202.708.3137 x5190).

Sincerely,

David E. Jacobs, Director
Office of Lead Hazard Control
U.S. Department of Housing and
Urban Development

John W. Melone, Director
National Program Chemicals Division
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and Toxics
U. S. Environmental Protection Agency

[Please note that Ronald J. Morony (202.260.0282) has replaced Dayton Eckerson as the EPA contact.]