

MEMORANDUM

TO: NMHC Members

FROM: Eileen Lee
Vice President of Environment

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DATE: June 16, 1998

RE: New Requirements for Hazard Education before Renovation of Target Housing

Please understand that the information discussed in this Memorandum is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.

Because this Memorandum discusses potential legal strategies, please do not distribute it outside of your organization.

I. SUMMARY

On June 1, pursuant to Title IV of the Toxic Substances Control Act (TSCA), the U.S. Environmental Protection Agency (EPA) published a final rule (40 CFR 745) requiring certain persons who perform renovations of target housing¹ for compensation² to provide a lead hazard

¹ Target housing means any housing constructed before 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

² Renovator means any person who performs for compensation a renovation. According to EPA, maintenance staff retained by the owners of buildings are considered renovators for

information pamphlet to owners and residents of that housing before commencing the renovation. This is the same pamphlet, *Protecting Your Family From Lead in Your Home*, that owners and managers of target housing are required to distribute under Section 1018 of Title X of the 1992 Housing and Community Development Act.³ In addition, this rule, **which takes effect June 1, 1999**, requires notification of the nature of the renovation activities in certain circumstances involving multi-family housing.⁴ The rule ensures that owners and residents of target housing are provided information concerning potential hazards of lead-based paint exposure before certain renovations are begun on that housing. Federal agency research has identified these types of renovation activities as primary sources for the dispersal of lead-based paint (LBP) contaminated dust.

II. COVERED RENOVATION ACTIVITIES

This rule applies to all renovations⁵ of target housing performed for compensation, except the following:

- (1) Minor repair and maintenance activities (including minor electrical work and plumbing) that **disrupt two square feet or less** of painted surface per component.
- (2) Emergency renovation operations, which means renovation activities, such as operations necessitated by non-routine failures of equipment, that were not planned but result from a sudden, unexpected event that, if not immediately attended to,

compensation and, therefore, are covered by the rule; however, certain routine maintenance and operations activities typically carried out by maintenance staff are excluded from the requirements of this rule.

³ Copies of the pamphlet (Document Number 055-000-00507-9) are available from the Government Printing Office at (202) 512-1800. Persons who wish to make their own reproductions of the pamphlet may obtain camera ready copy from the National Lead Information Center at (800) 424-5323. The material must be copied in full and not revised in any way, except to add any state and local sources of information. Also, persons wishing to reprint the pamphlet may attach their company name, logo, and contact information in the space provided.

States and tribal organizations may develop alternative pamphlets for this purpose but those pamphlets must be specifically approved by EPA for use under this rule.

⁴ Multi-family housing means a housing property consisting of more than four dwelling units.

⁵ Renovation 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 EPA rules (40 CFR 745.223). The term “renovation” includes, but is not limited to: the removal or modification of painted surfaces or painted components (e.g., modification of painted doors, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust); the removal of large structures (e.g., walls, ceiling, large surface replastering, major re-plumbing); and window replacement.

presents a safety or public health hazard, or threatens equipment and/or property with significant damage.

- (3) Renovations in target housing in which a written determination has been made by a state certified inspector that the components affected by the renovation are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight, where the renovator has obtained a copy of the determination.

III. INFORMATION DISTRIBUTION REQUIREMENTS

Renovations in dwelling units. Not earlier than 60 days before beginning renovation activities in any residential dwelling unit of target housing, the renovator⁶ is required to:

- (1) provide the owner of the unit with the pamphlet and be able to document that by obtaining either:
 - (i) a written acknowledgment⁷ from the owner that the owner has received the pamphlet before the start of the renovation; **or**
 - (ii) a certificate of mailing of the pamphlet to the owner at least seven days before the start of the renovation; **and, in addition,**
- (2) if the owner does not occupy the dwelling unit, provide an adult resident of the unit with the pamphlet and be able to document that by obtaining either:
 - (i) a written acknowledgment⁸ from the adult resident that the resident has received the pamphlet before the start of the renovation; **or**
 - (ii) certification⁹ in writing that a pamphlet has been delivered to the dwelling and that the renovator has been unsuccessful in obtaining a written acknowledgment from an adult resident; **or**
 - (iii) a certificate of mailing of the pamphlet to the adult resident at least seven days

⁶ See fn 2 above.

⁷ Sample language for this acknowledgment is provided in Attachment A. The acknowledgment must: (1) include a statement recording the owner or resident's name and acknowledging receipt of the pamphlet before the start of the renovation, the address of the unit undergoing renovation, the signature of the owner or resident as applicable, and the date of signature; (2) be either a separate sheet or part of any written contract or service agreement for the renovation; and (3) be written in the same language as the text for the contract or agreement for the renovation or, in the case of non-owner occupied target housing, in the same language as the lease or rental agreement or the pamphlet.

⁸ See fn 7 above.

⁹ Sample language for this certification is provided in Attachment B. This certification must include the address of the unit undergoing renovation, the date and method of delivery of the pamphlet, names of the persons delivering the pamphlet, reason for lack of acknowledgment (e.g., resident refuses to sign, no adult resident available), the signature of the renovator, and the date of signature.

before the start of the renovation.

Renovations in common areas. Not earlier than 60 days before beginning renovation activities in common areas¹⁰ of multi-family housing,¹¹ the renovator is required to:

- (1) provide the owner with the pamphlet and be able to document that by obtaining either:
 - (i) a written acknowledgment¹² from the owner that the owner has received the pamphlet before the start of the renovation; **or**
 - (ii) a certificate of mailing of the pamphlet to the owner at least seven days before the start of the renovation; **and**
- (2) ensure written notification¹³ of each unit of the multi-family housing and make the pamphlet available upon request before the start of renovation; **and**
- (3) prepare, sign, and date a statement describing the steps performed to notify all residents of the intended renovation activities and how the pamphlet was made available to residents who requested it.

Additionally, if the scope, locations, or expected starting and ending dates of the planned renovation activities change after the initial notification, the renovator is required to provide further written notification to the owners and residents providing revised information on the ongoing or planned activities. This subsequent notification must be provided **before** the renovator initiates work beyond that which was described in the original notice.

IV. RECORDKEEPING REQUIREMENTS

Renovators are required to retain and, if requested, make available to EPA all records¹⁴

¹⁰ Common areas in residential housing mean a portion of a building generally accessible to all residents and users, including, but not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences.

¹¹ See fn 4 above for definition.

¹² See fn 7 above.

¹³ The notification is to be accomplished by distributing written notice to each affected unit. The notice shall describe the general nature and locations of the planned renovation activities; the expected starting and ending dates; and a statement of how each resident can obtain the pamphlet, at no charge, from the renovator.

¹⁴ See 40 CFR 745.86 for a complete list of all records that must be retained, including, where applicable: (1) reports certifying that a determination had been made by a state certified inspector that LBP is not present in the area affected by the renovation; (2) signed and dated acknowledgments of receipt of the pamphlet; (3) certifications of attempted delivery; (4) certificates of mailing; and (5) records of notification activities performed regarding common

necessary to demonstrate compliance with this rule for a period of at least three years following completion of the renovation activities in target housing.

V. ENFORCEMENT

Members are cautioned that compliance with this rule is likely to be “tested” in the same sense that compliance with the Fair Housing Act is often “tested.” Once a violation has been established with credible evidence, EPA will determine which of the following enforcement actions should be taken: notice of noncompliance, civil penalties, criminal action, or some combination of all three.

Earlier this year, HUD and EPA entered into a memorandum of understanding that will serve as the basis for a nationwide enforcement initiative to ensure compliance with the federal “right to know” requirement about LBP. Documents obtained by our staff show that the EPA enforcement staff will ask to examine leasing and sales records, market analysis, and financial information to ensure that the disclosure requirements are being met. It is expected that this same approach will be taken with respect to renovation activities.

Section 409 of TSCA makes it unlawful to fail or refuse to comply with any provision of a rule promulgated under Title IV of TSCA. In addition, Section 15 of TSCA makes it unlawful for any regulated entity to fail or refuse to permit entry or inspection (of business records in this instance) by EPA or its authorized delegates as required by Section 11 of TSCA. Under the penalty provision of Section 16 of TSCA, any person who violates Sections 15 or 409 may be subject to a civil penalty of up to \$25,000 per day for each such violation. Knowing or willful violations of any provision of this final rule could lead to the imposition of criminal fines of up to \$25,000 per day and imprisonment for up to one year for each such violation.

While EPA intends to use the inspection and enforcement tools available to ensure compliance with this final rule, it is also EPA's intent that outreach and compliance assistance be major components of the Section 406(b) program so that renovators are aware of the new requirements and their subsequent obligations. EPA is currently developing an “Enforcement Response Policy” for this final rule.

VI. SAFE WORK PRACTICES

Property owners and managers should also be aware that workers involved in activities that disturb LBP, or whose activities are likely to generate lead-containing dust, must also comply with Occupational Safety and Health Administration's (OSHA) Lead in Construction Standard (29 CFR 1926.62). The NMHC/NAA Joint Legislative Staff has worked with OSHA to develop an interactive expert computer program to help workers understand the lead rule. The Lead in Construction Expert Advisor is expected to be available through the Internet at “www.osha.gov/oshasoft” in late June.

area renovations.

An excellent video training tape for maintenance personnel which addresses various LBP maintenance and repair situations likely to be encountered in the multi-family setting may be obtained from LeadSmart Homes™ at “www.leadsmarthomes.com” or by calling (888) 532-3762.

VII. DISCUSSION

Four major industry sections are affected by this new rule: SIC Code 15 (General Contractors and Operative Builders); SIC Code 17 (Special Trade Contractors); SIC Code 651 (Real Estate Operators and Lessors); and SIC Code 653 (Real Estate Agents and Managers). EPA estimates that 92,000 business establishments falling into Standard Industrial Classification (SIC) Codes 651 and 653 are affected by this rule and 6.3 million renovation events in rental target housing will be subject to this rule annually.

In publishing this final rule, EPA adopted several of the changes advocated by NMHC/NAA regarding distinguishing between routine maintenance activities and more substantial renovations in occupied units. The two square feet *de minimis* level was adopted by EPA to address that point. In the case of emergency renovation jobs, EPA also included our suggestion for an exemption for such tasks from the advance notification requirements.

Although this is a final rule, the Joint Legislative Staff will be submitting questions and comments to EPA and the U.S. Small Business Administration concerning certain economic assumptions made by the regulatory agencies and questions raised by various provisions of the rule.

Attachment A

SAMPLE ACKNOWLEDGMENT LANGUAGE

The following is a sample of language that could be used for such acknowledgments:

I have received a copy of the pamphlet, *Protect Your Family From Lead In Your Home*, informing me of the potential risk of lead hazard exposure from renovation activity to be performed in my dwelling unit. I received this pamphlet before the work began.

Printed Name and Signature

Date

Unit Address

Attachment B

SAMPLE CERTIFICATIONS OF ATTEMPTED DELIVERY LANGUAGE

The following is a sample of language that could be used under those circumstances:

Unavailable for signature

I certify that I have made a good faith effort to deliver the pamphlet, *Protect Your Family From Lead In Your Home*, to the unit listed below, and that the occupant was unavailable to sign the acknowledgment. I further certify that I have left a copy of the pamphlet at the unit by sliding it under the door.

Printed Name and Signature

Date

Unit Address

Attempted delivery dates and times:

Refusal to sign

I certify that I have made a good faith effort to deliver the pamphlet, *Protect Your Family From Lead In Your Home*, to the unit listed below at the dates and times indicated, and that the occupant refused to sign the acknowledgment. I further certify that I have left a copy of the pamphlet at the unit with the occupant.

Printed Name and Signature

Date

Unit Address