

LEAD PAINT DISCLOSURE REQUIREMENTS THE EPA IS AT THE DOOR!

By: John Dolgetta, Esq.

The Environmental Protection Agency ("EPA") reports that it has been investigating real estate agents for the past seven years and for the most part, has found the agents to be in compliance with the requirements of the Residential Lead-Based Paint Hazard Reduction Act (the "Act"). In some instances, there are agents who have not been in full compliance. The public's attention to lead paint has been heightened by incidents unrelated to the EPA (i.e., imported toys and other products containing lead based paint). Non-compliance by agents of the EPA regulations, although infrequent according to the EPA, can produce harsh consequences and burdensome fines.

Real estate licensees must become aware of the EPA's stance and the severe penalties, both civil and criminal, that can be imposed as a result of non-compliance. After speaking with an Inspector for the EPA's Division of Enforcement and Compliance Assistance, we have been advised that compliance officers and field investigators are sent out to ensure that agents are following the law.

The Residential Lead-Based Paint Hazard Reduction Act

The Act, known as Title X, was signed into law in 1992 and did not become effective until 1996, when the required rules and regulations (the "Rules" or "Regulations") were promulgated by the Department of Housing and Urban Development ("HUD") and the EPA. While most agents recognize that the Act exists and that lead paint disclosure is important, few real estate licensees appear to be strictly complying with the requirements of the Act.

The Act focuses on "target housing" which the EPA defines as "...most private housing, public housing, housing receiving federal assistance and federally owned housing built before 1978." The Act applies in all situations that involve the sale or lease of target housing, which also includes the sale of individual cooperative apartments and condominium units.

The Agent's Responsibilities Under the Act

It is clear that sellers are required to comply with the Act. However, the Act goes even further and provides that "whenever a seller or lessor has entered into a contract with an agent for the purpose of selling or leasing a unit of target housing, the regulations promulgated under this section shall require the agent, on behalf of the seller or lessor, to **ensure compliance** (emphasis added) with the requirements of this section." Section 35.86 of the Regulations defines "Agent" as follows:

"Agent means a party that enters into a contract with a seller or lessor, including any party that enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. This term does not apply to purchasers or any purchaser's representative who receives all compensation from the purchaser." (Buyer brokers who are paid by the buyer are therefore exempted.)

The EPA and HUD explain "that any party entering into a contractual relationship directly with the seller or lessor (or indirectly with a representative of the seller or lessor) for the

purpose of selling or leasing the target housing, is an 'agent' for purposes of this rule." The Regulations further explain that "[a]s a consequence, listing agents, selling agents and buyer agents (if paid by the Seller or through a cooperative brokerage agreement with the listing agent), are 'agents' and are responsible for **ensuring compliance** under the Rule." A buyer's agent, however, who is paid solely by the buyer, is not considered an 'agent' under the Rules. The typical real estate licensees in a transaction are therefore given the responsibility to inform the seller or lessor of their obligations under the Act and ensure that each of them complies with the requirements.

The Seller's Responsibilities Under the Section 1018 Lead Paint Disclosure Rules

Both sellers **and** agents of sellers are required to comply with the various provisions of the Act. Sellers and their agents are required to complete several steps before a purchaser is bound under a contract of sale or a tenant is bound under a lease agreement. Although failure to comply with the Act does not invalidate or nullify the contract or the lease, sellers and agents must comply with the requirement or subject themselves to harsh civil and criminal sanctions, penalties and fines.

Section 1018(a)(1)(B) of the Rules requires that "before the purchaser or lessee is obligated under any contract to purchase or lease the [target] housing, . . .the seller or lessor shall. . .disclose to the purchaser or lessee the presence of any known lead-based paint or any lead-based paint hazards, in such housing, and provide any lead hazard evaluation report available to the seller or lessor." A seller or lessor is deemed to have complied with the Act provided the following items are completed:

1. The seller or lessor must provide a prospective purchaser or tenant with the pamphlet entitled "Protect Your Family From Lead In Your Home". The pamphlet, which is published by the EPA, the United States Consumer Product Safety Commission and HUD, can be downloaded from the EPA's website. In addition to the standard English version, the pamphlet is also available in a variety of other languages, including Spanish, Arabic, Russian and Somali. The EPA recommends that the appropriate language version of the pamphlet should be utilized in each particular circumstance.
2. The sellers and lessors must disclose, based on "actual knowledge," not "constructive knowledge (constructive knowledge applies when the seller "knew or should have known...")," whether the "...target housing is known to contain lead-based paint and/or lead-based paint hazards." A seller or lessor must disclose to the purchaser or tenant information that is in his or her possession, or of which he or she actually has knowledge, relating to the existence of lead paint hazards.
3. Section 1018(a)(1)(B) further requires that sellers and lessors must "provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor." The commentary contained in the Regulations indicates that the "EPA and HUD have interpreted 'available evaluation reports' to mean records and reports that pertain to lead-based paint and/or lead-based paint hazards in the target housing and that are in the possession of the seller or lessor or that are reasonably obtainable by the seller or lessor at the time of the disclosure." Basically, sellers or lessors must, at the very least, make an attempt to locate a report that may have been conducted by them previously or, if no longer in their possession, try to obtain a copy of it from the company that the seller or lessor may have used to conduct such an inspection. The regulations explain that the

term “reasonably obtainable” is not intended to impose an obligation on the seller or lessor to conduct further evaluation or inspection of the target housing.

4. Sellers of target housing must provide a purchaser with a ten (10) day period within which to conduct an inspection or risk assessment for lead-based paint or lead-based paint hazards. While the parties can mutually agree to lengthen or shorten the time for inspection, the sample verbiage contained in the Rules, which is provided below, should be included in every real estate contract of sale (but not lease) relating to target housing:

This contract is contingent upon a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards at the Purchaser’s expense until 9 p.m. on the tenth (10th) calendar-day after ratification [Insert date 10 days after contract ratification or a date mutually agreed upon]. (Intact lead-based paint that is in good condition is not necessarily a hazard. See the EPA pamphlet Protect Your Family From Lead in Your Home for more information.) This contingency will terminate at the above predetermined deadline unless the Purchaser (or Purchaser’s agent) delivers to the Seller (or Seller’s agent) a written contract addendum listing the specific existing deficiencies and corrections needed, together with a copy of the inspection and/or risk assessment report. The Seller may, at the Seller’s option, within ____ days after Delivery of the addendum, elect in writing whether to correct the condition(s) prior to settlement. If the Seller will correct the condition, the Seller shall furnish the Purchaser with certification from a risk assessor or inspector demonstrating that the condition has been remedied before the date of the settlement. If the Seller does not elect to make the repairs, or if the Seller makes a counteroffer, the Purchaser shall have ____ days to respond to the counter-offer or remove this contingency and take the property in “as is” condition or this contract shall become void. The Purchaser may remove this contingency at any time without cause.

5. Sellers and lessors must include specific warning language, which can be found in the Act, in every contract of sale and lease and must also attach the executed disclosure form to the contract or lease as well. There are two separate and distinct disclosure forms, one for a sale and one for a lease. The warning language in the “lease” disclosure form was made less complex than the warning contained in the disclosure form used in connection with a sale of target housing. The forms are available for download at the EPA website (www.epa.gov). These forms are also available in Spanish and should be used when appropriate.

Agent’s Responsibility in Connection with the Sale or Lease of Target Housing

In September, 2003, the EPA issued a helpful instruction sheet (“Instructions”) which should be utilized and reviewed by all agents. Below is a summary of the requirements contained in these Instructions:

Step 1

At the time a Listing Agreement is signed and entered into, the Seller should complete the disclosure form by checking both statements under the Seller’s Disclosure section of the form. The seller should then sign and date at the bottom of the form under the Certification of

Accuracy section. The agent, if there is one, is required to inform the seller or lessor of his or her obligations under the Act and the Regulations as outlined above. At that point the seller or lessor is required to provide the agent with reports and information relating to the presence of lead paint or lead paint hazards present at or within the target housing.

Step 2

The seller's agent, once he or she has informed the seller (the seller can be a natural person, corporation, not-for-profit corporation or any other type of entity that owns or leases target housing) of the obligations under the Act, should initial the Agent's Acknowledgement section and sign and date the disclosure form. Again, this should be done at the time the Listing Agreement is provided to the seller or lessor and signed by him or her, and not at the time of the Closing, which frequently occurs.

Step 3

The Instructions further point out that "before a purchaser becomes obligated under any contract of sale or lease agreement, the seller, or the seller's agent, must provide the purchaser, or the purchaser's agent, with the disclosure form, the lead paint pamphlet and any record or reports." The agent for the buyer, if there is one, should then sign and date the form as Purchaser's Agent where indicated. Once that is done, the buyer should: (1) initial the three statements under the Purchaser's Acknowledgement; (2) check the appropriate box indicating whether the 10-day inspection opportunity was selected or waived; and (3) sign and date where indicated.

Step 4

Once all of the above requirements have been fulfilled and the agent ensures that the seller (or lessor) has complied with all the requirements of the Act and the Rules, the agent and seller (or lessor) must maintain copies of the completed and fully executed disclosure form and contract addendum or rider containing the required inspection contingency language and warning for a period of three (3) years after the completion of a sale (i.e. the Closing Date) or the commencement of the lease term under a lease.

Confusion in New York: Attorney or Agent?

While all of this is straightforward, many agents in New York fail to comply with the requirements of the Rules. Unlike other States and in northern New York State, attorneys prepare the contracts of sale in the New York City metropolitan area. Many agents believe that since the attorneys prepare the contracts, the attorneys must attach the disclosure form to the contract and include the required "warning" and contingency language in the contract. Many real estate licensees believe they are not required to do anything. This is not the case. Agents should be obtaining all of this information early on and then should be providing this information to the attorneys along with the memorandum of sale or lease memorandum, as the case may be.

Severe Penalties for Non-Compliance

Real estate licensees must follow all of the steps outlined above and must make certain that the sellers are informed of their duties and obligations and that they comply with them. If the seller's or lessor's agent fails to "ensure compliance" and fails to keep adequate records for at least three years, both HUD and the EPA can impose civil monetary fines and penalties of up to \$10,000 per violation. In addition, under Section 16(b) of the Toxic Substances Control Act ("TSCA"), which was amended by the Act, "any person who knowingly or willfully violates

Section 409 [of the TSCA] (and thus Section 1018) could, in addition to or instead of any civil penalty, be subject to a fine of not more than \$25,000 for each day of violation or to imprisonment for not more than 1 year or both." Thus, a "failure or refusal to comply under Section 409 of the TSCA" gives the government broad powers to assert penalties and criminal liability.

Section 1018(b)(3) of the Act further provides that "[a]ny person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual." This allows an aggrieved purchaser or lessee the opportunity to seek direct compensation from a seller, lessor or their agent. Section 1018(b)(4) also allows the court "to award court costs, reasonable attorneys fees, and expert witness fees to a prevailing plaintiff."

Agents must be aware of the requirements of the Act, and the Rules, and must be sure to follow the steps closely. Investigators will be knocking at your door.