

Lead-Based Paint Requirements

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Subject: Lead-Based Paint Requirements

November 18, 1992

MEMORANDUM FOR: Frank M. Malone, Director, Office of
Preservation and Property Disposition
Division, HMP

/s/ David R. Cooper for

THROUGH: John J. Daly, Associate General Counsel, Insured
Housing and Finance, GH

FROM: David R. Cooper, Assistant General Counsel, Multifamily
Mortgage Division, GHM

SUBJECT: Lead-Based Paint Rider on the Model Contracts of Sale
(GHM: L-1262)

The purpose of this memorandum is to notify your office that we are changing the instructions to Regional Counsel regarding the use of the Rider to the Model Contracts of Sale entitled "Lead-Based Paint Hazards."

Currently, the Rider contains two paragraphs: one which requires the purchaser to inspect, test and abate any lead-based paint hazards; and another which requires the purchaser to abate any hazards found by HUD when it tested. The instructions to Regional Counsel in the September 21, 1992 memorandum delegating authority to Regional Counsel to prepare Contracts of Sale for the disposition of HUD-owned multifamily projects provided:

"In order to assure compliance with the Lead-Based Paint Poisoning Prevention Act (42 USC 4821-4886) and the regulations thereunder (24 CFR Part 35, Subpart E and 200.825), the Rider entitled "Lead-Based Paint Hazards" should be included when the Disposition Authorization so requires. The Rider contains two paragraphs labeled '(1)'. The first paragraph should be used when HUD requires the purchaser to inspect, test and abate any hazards. The second paragraph should be used when HUD has inspected and tested but requires the purchaser to abate any hazards."

We included the first paragraph to conform to Housing's practice with regard to sales involving structures that must be tested for lead-based paint hazards. The practice allows HUD to require a purchaser to inspect and test for lead-based paint hazards if HUD does not have time to inspect and test prior to the sale. It is our understanding that Housing believes that

this practice is consistent with the policies in Chapter 11, Section 11-2 of the Handbook 4315.1 REV-1, Multifamily Property Disposition - Management. It is also our understanding that Housing believes the words "HUD shall cause" in Sections 200.825(b) and (c) permit Housing to pass on to purchasers the requirement to inspect and test, respectively. A pending property disposition has caused us to reconsider the validity of this practice. The purchaser of Buckingham/Yorkleigh, St. Louis, Missouri, challenged HUD's authority to require the purchaser to inspect and test for lead-based paint hazards. It is our opinion that under the applicable lead-based paint regulations and the above handbook provisions that HUD must inspect, test and abate any hazards, but can require the purchaser to complete abatement of any hazards if HUD does not have time to complete the abatement.

The regulations make clear that HUD must inspect and test before offering the property for sale in the case of defective paint surfaces, or as part of the sale process in the case of chewable surfaces. Section 200.825(b) provides:

"HUD shall cause the property to be inspected for defective paint surfaces before offering the property for sale. . . . If defective paint surfaces are found, treatment as required by 24 CFR 35.24(b)(2)(ii) shall be completed before delivery of the property to the purchaser or, if the disposition program under 24 CFR Part 290 provides for repairs to be completed by the purchaser, such treatment may be included in the required reports." (Emphasis added.)

Section 200.825(c) provides:

"HUD shall cause a random sampling of dwelling units to be tested for lead-based paint on chewable surfaces as part of the sales contracting procedure. . . . Treatment shall be completed before delivery of the property to the purchaser, or, if the disposition program under 24 CFR Part 290 provides for repairs to be performed by the purchaser, such treatment may be included in the required repairs." (Emphasis added.)

The language in Section 200.825(b) "HUD shall cause the property to be inspected . . . before offering the property for sale. . ." (emphasis added) puts the burden on HUD, either directly or through hiring an inspector, to inspect the units. HUD cannot pass the burden to a purchaser to inspect. Section 200.825(c) provides that "HUD shall cause a random sampling of dwelling units to be tested . . . as part of the sales contracting procedure" If lead-based paint chewable surfaces are found, the regulations provide that "Treatment shall be completed before delivery of the property to the

purchaser" (Emphasis added.) Notwithstanding that both cited regulations state, "if the disposition program under 24 CFR Part 290 provides for repairs to be performed by the purchaser, such treatment may be included in the repairs," when one reads Section 200.825(b) coupled with the first part of the second sentence of Section 200.825(c), both of which contain the word "before", it leads one to the conclusion that HUD must, either directly or through an inspector, test the dwelling units prior to transfer to the purchaser. HUD cannot pass the testing requirement on to a purchaser. However under both quoted sections, HUD may require the purchaser to abate any found hazards if the disposition program under 24 CFR Part 290 provides for repairs to be performed by the purchaser. This is the only responsibility HUD may pass on to a purchaser.

We consulted Grant E. Mitchell, Administrative Law Division, the Division responsible for drafting the lead-based paint regulations, and he confirmed that it was their position that HUD is required to inspect and test for any lead-based paint hazards and can only require a purchaser to abate any found hazards. Mr. Mitchell commented that it was the intent of the drafters of the regulations that HUD, either directly or by hiring an inspector, was ultimately responsible for the inspection and testing. Mr. Mitchell stated that it was unlikely that there would be support for amending the regulations to allow HUD to require purchasers to inspect and test.

The explanation of HUD's responsibility in the handbook regarding lead-based paint is confusing. The instructions in chapter 11, section 11-2, paragraph E, discussing inspection, testing and abatement of lead-based paint hazards, require HUD to inspect, test and abate, but if HUD does not have time prior to sale, the purchaser can be required to inspect, test and abate. However, in subparagraph E.2. the instructions make clear that HUD, as MIP or owner, has the responsibility to inspect, test and abate any found hazards, but if HUD is unable to complete the abatement, HUD may require the purchaser to abate the lead-based paint hazards. The instructions in subparagraph E.2. are consistent with the regulations.

Therefore, it is our opinion that HUD may not pass on the responsibility to inspect and test for lead-based paint hazards to the purchaser. However, HUD, under the regulations and as further clarified by the handbook instructions, may require a purchaser to abate, if HUD does not have time to do it, any lead-based paint hazards found by HUD during an inspection or test. Consequently, our office will be sending a supplemental memorandum to Regional Counsel instructing them to delete the first paragraph of the "Lead-Based Paint Hazards" Rider to the Model Contracts of Sale, and to use only the second paragraph when the purchaser will be required to abate any lead-based paint hazards. Your office will need to instruct the Regions that HUD

is responsible for inspecting and testing for lead-based paint hazards and that the inspections and tests must be completed

prior to the sale. Additionally, your office will need to amend the handbook to make clear that HUD has the responsibility to inspect and test for lead-based paint hazards, and that HUD may only require a purchaser to abate lead-based paint hazards that HUD has not had time to abate.

If you have any questions, please contact Gayle E. Bohling at 708-4107.