

Mr. Ben Miller
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031

Dear Mr. Miller:

Thank you for allowing the National Association of REALTORS® (NAR) the opportunity to provide written comments on issues discussed at the recent EPA/HUD-sponsored Listening Session on the Disclosure Rule. As you are aware, any changes to the current lead-based paint regulations will have profound implications for its 930,000 Realtor members, who include residential brokers, sales agents, and multi-housing property owners and managers who are critical for the disclosure process to function effectively.

A number of issues were discussed at the July 29, 2003 Listening Session on Section 1018 of Title X - The Federal Lead Based Paint Disclosure Rule. NAR has chosen to comment on five of the issues that have the potential to impact REALTORS® and other real estate professionals directly:

- Data quality and availability concerns.
- Clarify and expand to what extent an owner/seller must disclose lead-based paint information of which he “should be” aware.
- How to insure meaningful transfer of information from the seller to the prospective purchaser regarding lead-based paint or lead-based paint hazards.
- Clarify the responsibilities of the property manager to notify an entire building when and if lead-based paint or lead-based paint hazards are discovered in one unit.
- Clarify the disclosure rules for zero bedroom housing units where young children are expected to reside.

Data quality and availability concerns

NAR believes this element underlies and should support any future discussion or rulemaking regarding lead-based paint. NAR would encourage EPA and HUD to proceed with any rulemaking only in areas that have sufficient quantifiable, scientific data that clearly demonstrate a problem in need of clarification or revision. Anecdotal information, while important, does not provide sufficient evidence of a problem that requires a rulemaking to fix. We would also encourage EPA and HUD to rigorously comply with the requirements of the Data Quality Act, to ensure that all stakeholders have the opportunity to review all the information and data on which a possible rulemaking will be based.

Clarify and expand to what extent an owner/seller must disclose lead-based paint information of which he “should be” aware.

The focus of the discussion at the Listening Session was to clarify and expand the term

“known” to “should have known” in the context of what knowledge an owner/seller, and owner/seller’s real estate agent, is required to disclose about lead-based paint or lead-based hazards of which he “should have known”. NAR is concerned that, because the term “known” is embedded in statute, revising or expanding that obligation goes beyond the purview of a rulemaking. In addition, the phrase “should have known” is too broad and vague of a standard. Real estate professionals can only disclose what is known, based on information provided to them by the owner/seller. It then becomes the choice of the consumer to determine whether the information provided, or the absence of any knowledge about lead-based paint or lead-based hazards, warrants their further attention.

How to insure meaningful transfer of information from the seller to the prospective purchaser regarding lead-based paint or lead-based paint hazards.

Some of the discussion at the Listening Session focused on the how the information was transferred from the seller to the buyer; i.e., did the seller or agent “adequately” disclose all the information known about lead-based paint hazards? Did the real estate professional review the EPA pamphlet, disclosure form and other materials with the prospective purchaser? Finally, did the purchaser, aside from signing the disclosure form, fully understand the degree to which lead-based paint may pose a hazard in the home?

NAR believes it would be difficult to quantitatively assess what is in essence a qualitative goal – the purchaser’s understanding and comprehension of information and material presented in the course of a real estate transaction. The signature on the form is one useful indication that the purchaser has received the material. It would be unreasonable, if not impossible, for the seller, landlord or agent to satisfy a further requirement to somehow insure that the purchaser or lessee has carefully reviewed and understood the material. Such a requirement may delay the completion of the transaction and result in the dissolution of the contract.

Clarify the responsibilities of the property manager to notify an entire building when and if lead-based paint or lead-based paint hazards are discovered in one unit.

According to EPA/HUD’s August 21, 1996 Interpretive Guidance, building managers are required to disclose unit-specific information only if the information was uncovered in the course of a building-wide evaluation of lead-based paint hazards. If there is unit-specific information that was not part of a building-wide evaluation, according to the Guidance, such information must be disclosed only during sales and rentals of the specific units that were evaluated.

NAR would encourage HUD and the EPA to remain within the disclosure parameters established by regulation and the Interpretive Guidance. NAR believes that Section 1018 is a transaction-based law, and as such should remain focused on the transaction. If a lead-based paint problem is discovered outside of the transaction, a comprehensive web of state and local laws will allow public health officials to take the necessary steps to

protect the health of the tenants.

NAR believes that any notice or disclosure requirement over and above what is described in the current Interpretive Guidance would have serious implications for a multi-family residential building, including:

- **Additional disclosure requirements would be logistically difficult for property managers** – Property managers would have to distribute more booklets, plus information on the lead-based paint hazard, each time one is discovered. This would be costly and burdensome for the property manager, for a minimal educational/awareness benefit.
- **Additional disclosure requirements would be confusing for residents** – Residents would invariably begin to pay less and less attention to the repeated distribution of lead-based paint hazards information. Repeated distribution would also create confusion among residents about lead-based paint hazards and the risks they face by living on the property.
- **Additional disclosure requirements may violate the rights of the tenants in whose unit the lead-base paint hazard was found** – Before this requirement is considered, additional legal research should be conducted focusing on the rights of the tenants in this situation. Tenants may not want information of this specificity released to their neighbors in the building, for fear of unfairly stigmatizing their property and family.
- **Transitory nature of the hazard** – Lead-based paint hazards are timely in nature. Peeling paint can be repaired, removing the hazard. Such information is therefore transitory, and may not be accurate at any given time. NAR believes disclosure should focus on the knowledge of lead-based paint and the nature of the abatement or removal activities, not the short-term hazard.

Clarify the disclosure rules for zero bedroom housing units where young children are expected to reside.

The focus of this discussion at the Listening Session was how to prevent children from being exposed to lead-based paint. NAR supports this goal. However, in the case where singles or childless couples purchase a 0-bedroom unit such as a loft, the real estate agent is simply not able to determine in any reliable way whether a child is expected to reside in the unit in the future. NAR supports the existing statutory language regarding 0-bedroom units, and believes it is unnecessary to propose any changes or clarifications for disclosure or inspection procedures.

NAR appreciates the opportunity to comment on issues raised at the recent EPA/HUD sponsored Listening Session. Please keep us informed as the scoping process moves forward. If you have any questions regarding these comments, please contact Russell Riggs at 202-383-1259, or Megan Booth at 202-383-1222.

Sincerely,

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