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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Lead-Based Paint in Target Housing

Lead is highly toxic. Exposure to it can be dangerous, especially for children who are 6 years old or younger. Learning disabilities, hearing loss and violent behavior are some of the results of lead poisoning in children. Lead paint poisoning affects over one million children today.

The most common sources of lead poisoning are deteriorating lead-based paint (LBP), lead-contaminated dust and lead-contaminated soils. Lead paint found on walls, doors, windows and window sills in a home built before 1978 may be dangerous. LBP is a hazard if it is peeling, chipping, chalking, cracking or deteriorating. Even LBP that appears to be undisturbed can be a problem if it is on surfaces that children chew or that get a lot of wear and tear, such as windows and windowsills, doors and doorframes, stairs, railings, banisters, porches and fences. Even surfaces that have been covered with new paint or another covering can expose older LBP layers when they become cracked or chipped. The older a home is, the more likely it is to contain LBP.

Whenever the property is housing or a child care facility built before 1978, federal law requires that property owners disclose LBP and lead hazards to buyers and tenants and give buyers the opportunity to inspect for LBP, and requires new safety precautions when repairs and remodeling work are performed. Real estate agents are charged with the responsibility of making sure property owners abide by the federal LBP disclosure law developed and administered

by the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency.

This *Legal Update* overviews the various legal requirements impacting REALTORS® and real estate transactions. The *Update* begins with the latest data concerning the proportion of Wisconsin housing stock believed to contain LBP and a summary of the resulting risks to real estate professionals who do not strictly comply with applicable disclosure laws. After a review of the federal LBP disclosure law, the *Update* discusses pointers for REALTOR® implementation of that law in sales and rental transactions. The new law that is applicable when renovations, repairs and painting disturb paint is also highlighted, followed by a section of Legal Hotline questions and answers.

Harm, Danger and Risk

Childhood lead poisoning is a serious problem in Wisconsin that threatens the health, learning abilities and behavior of an individual during the crucially important younger years. These impairments can persist throughout a person's lifetime. As Karen E. Timberlake, Secretary of the Wisconsin Department of Health Services has observed, caring for these children exacts a cost on society in terms of medical costs, special education, juvenile and adult correctional programs, local government case management interventions, loss of individual income, higher health insurance premiums and increased Medicaid expenses.

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The Harm: Health Hazards for Children

There is no safe level of lead in the human body because even very low levels of exposure can cause permanent brain damage and adverse health effects that linger for many years. Lead interferes with the normal development of a child's brain. Lead exposure causes reduced IQ, learning disabilities, developmental delays, reduced height, poorer hearing and a host of other health problems in young children. According to the Centers for Disease Control and Prevention, about 310,000 of the nation's 20 million children under the age of 6 have blood lead levels high enough to impair their ability to think, concentrate and learn. Many of these effects are thought to be irreversible. In later years, lead-poisoned children have been shown to be much more likely to drop out of school, become juvenile delinquents and engage in crime and other anti-social behavior. At higher concentrations lead can irreversibly damage a child's kidneys and central nervous system and cause anemia and, in extreme cases, coma, convulsions and even death. Childhood lead exposure has also been linked to diabetes, memory loss and Alzheimer's disease.

Eliminating LBP hazards in pre-1978 housing is essential if childhood lead poisoning is to be eradicated. According to CDC estimates, the percentage of children with elevated blood lead levels has been cut in half since the early 1990s, although the prevalence of childhood lead poisoning in low-income, older housing remains high. HUD estimates that the number of houses with LBP has declined from 64 million in 1990 to 38 million in 2000. About 24 million homes contain significant LBP hazards with the potential to poison young children.

The Danger: Abundant Pre-1978 Housing Stock in Wisconsin

Approximately one-half of the entire U.S. housing stock and more than three-quarters of the housing units built before 1978 contain some LBP according to HUD. This paint, if properly managed and maintained, poses little risk. If allowed to deteriorate, lead from paint can threaten the health of occupants, especially children under 6 years old.

Children living in Wisconsin are at a higher risk than those living in most other states because Wisconsin has a high percentage of older homes. One-quarter of the homes in Wisconsin were constructed before 1950, when LBP was widely used. It is believed that these homes are responsible for two-thirds of the childhood lead poisonings in Wisconsin. Ninety percent of the lead-poisoned children in Wisconsin were first identified while living in a home constructed before 1950.

Lead poisoning is a statewide problem – there have been cases of children with lead poisoning in each of the 72 counties in Wisconsin. During 2006, more than 75 percent of the children with lead poisoning lived in 266 of the 1,330 census tracts in Wisconsin. These census tracts include communities of all sizes and include more than 200,000 housing units built before 1950, according to the DHS 2008 "Legacy of Lead" report.

The Risk: Major Liability for Property Owners and Licensees

To ensure compliance with the federal LBP disclosure law, an agent must inform sellers and landlords of their obligations under the federal LBP law and ensure that they have performed all required activities or personally ensure compliance with the applicable requirements. HUD and EPA commentary indicates that

this means agents must inform sellers and landlords of their obligations and make sure that the required activities are completed either by the seller or the landlord, or by the agent personally. Buyer's agents paid solely by the buyer are exempt.

If at any time the seller or landlord should balk at completing the required LBP disclosure process, the prudent listing broker should remind the owner of the penalties that may be imposed for non-compliance. The federal civil penalties for non-compliance can range up to \$11,000 for each violation. A seller or landlord may also be sued for three times the amount of damages incurred by a buyer or tenant who is injured as a result of the failure to disclose. These damages may include the costs of LBP abatement and the medical costs related to the treatment of lead poisoning.

Agent Responsibilities

Agents must ensure that:

- Sellers and landlords are made aware of their obligations under this rule.
- Sellers and landlords disclose the proper information and reports to buyers and tenants.
- Sellers give buyers the opportunity to conduct an inspection.
- Leases, rental agreements, offers to purchase and other sales contracts contain the appropriate warning statement, disclosure language, certifications and signatures.

REALTOR® Practice Tips:

An agent may be held responsible if the seller or landlord fails to comply with the federal LBP disclosure law and the agent does not personally ensure compliance. However, a real estate agent shall not be liable for the failure to disclose to a buyer or tenant the presence of LBP and/or LBP hazards known by a seller or landlord but not disclosed to the agent.

Penalties for Non-compliance

The civil penalty for each violation by an agent or owner shall be no more than \$11,000 for violations occurring on or after July 28, 1997. In addition to being subject to the various types of civil sanctions, any person who knowingly or willfully violates the federal LBP disclosure law is subject to misdemeanor criminal sanctions. These sanctions may include imprisonment for not more than one year, as well as a criminal fine of not more than \$100,000 for each day of violation. Disclosure law violations that are especially egregious in nature – in terms of the threat of harm, the level of culpability or both – can be brought to the attention of EPA's Criminal Investigation Division. Organizations may be fined up to \$200,000 per count.

The EPA also may obtain injunctive relief by requesting the legal support of the Department of Justice. The DOJ may make an application for injunctive relief in U.S. district court to direct a violator to comply with the federal LBP disclosure law. In addition to requesting such relief, the DOJ, on the EPA's behalf, also may request that the court use its general equity powers to compel a violator to abate the LBP and/or LBP hazards in the target housing.

Given the high stakes of non-compliance, both in terms of the health of Wisconsin children and the severe monetary penalties that may be imposed upon those who fail to comply with the federal LBP disclosure law, brokers must make sure that their companies have clear, mandatory office policies for federal LBP disclosure law compliance. This is essential for the protection of the broker, the broker's business and assets, and the broker's agents. The triple damages awarded in cases of permanent disabilities can be millions of dollars, and claims for bodily

injury and afflictions resulting from undisclosed environmental hazards are generally not going to be covered by a broker's errors and omissions or general liability insurance policies. Prevention and compliance are key.

REALTOR® Practice Tips:

The risk of great harm sustained by children from the dangers lurking in pre-1978 housing stock and the risk of staggering penalties and damage awards mean that every licensee should make sure that the federal LBP disclosure law is followed with precision in every target housing transaction.

Federal LBP Disclosure Law

To protect the public from exposure to lead from paint, dust, and soil, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X. Section 1018 of this law directed HUD and the EPA to jointly issue regulations to require disclosure of information on LBP and LBP hazards before the sale or lease of housing constructed before the phase-out of residential LBP use in 1978. The resulting federal LBP disclosure law establishes the following requirements:

1. Sellers and landlords of most residential housing built before 1978 must disclose the presence of known LBP and/or LBP hazards in the housing.
2. Sellers and landlords must provide buyers and tenants with any available records or reports pertaining to the presence of LBP and/or LBP hazards.
3. Sellers and landlords must provide buyers and tenants with a federally approved lead hazard information pamphlet.
4. Sellers must provide buyers with a 10-day opportunity to conduct a risk assessment or lead inspection for the presence of LBP and/or LBP hazards before buyers are obligated

under any purchase contract.

5. Sales and leasing contracts must include certain disclosure and acknowledgment language.
6. Agents must ensure compliance with these requirements.

These provisions ensure that families receive both specific information on the housing's lead history and general information on lead exposure prevention. With this information, consumers can make more informed decisions concerning home purchase, lease and maintenance to protect their families from lead hazard exposure.

This federal LBP disclosure law applies to all housing defined as target housing, which includes most private housing, public housing, housing receiving federal assistance and federally owned housing built before 1978.

Housing that is not affected by the LBP disclosure law includes:

- Zero-bedroom dwellings, such as lofts, efficiencies, dormitories, military barracks, studios and individual room rentals.
- Target housing sold at foreclosure.
- Dwelling units leased short term for 100 days or less where no renewal or extension is available, such as vacation homes or short-term rentals.
- Designated housing for the elderly and persons with disabilities unless children reside or are expected to reside there.
- Rental housing that has been inspected by a certified inspector and is found to be free of LBP.

LBP Disclosure Law

Definitions

- **Available:** in the possession of, or reasonably obtainable by, the seller or lessor at the time of the disclosure.
- **Abatement:** any measure or set of

measures designed to permanently eliminate LBP hazards by methods such as removing, replacing, encapsulating, containing, sealing or enclosing LBP with special materials in conformance with applicable legal requirements.

- **Buyer or Purchaser:** one or more individuals or entities who enter into a contract to purchase an interest in target housing including, but not limited to, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations.
- **Housing for the Elderly:** retirement communities or similar types of housing reserved for households containing one or more persons 62 years of age or more at the time of initial occupancy.
- **Inspection:** (1) an on-site, surface-by-surface investigation to determine the presence of LBP, and (2) the provision of a report explaining the results of the investigation.
- **Lead-based Paint:** 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. Note: the standards under Wisconsin law are much stricter: LBP means paint or any other surface coating material containing more than 0.06 percent lead by weight, calculated as lead metal, in the total nonvolatile content of liquid paint or in the dried film of applied paint, or more than 0.7 milligrams of lead per square centimeter in the dried film of applied paint (see Wis. Admin. Code § DHS 163.03(61)).
- **Lead-based Paint Hazard:** any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate federal agency.
- **Lessee or Tenant:** any entity entering into an agreement to lease, rent or sublease target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations.
- **Lessor or Landlord:** any entity offering target housing for lease, rent or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations.
- **Reduction:** measures designed to reduce or eliminate human exposure to LBP hazards through interim controls, abatement, etc.
- **Risk Assessment:** an on-site investigation to determine and report the presence of LBP, and to evaluate and report the extent, nature, severity and location of LBP hazards in residential dwellings, including: (1) information gathering regarding the age and history of the housing and occupancy by children under 6; (2) visual inspection; (3) limited wipe sampling or other environmental sampling techniques; (4) other activity as may be appropriate and (5) provision of a report explaining the results of the investigation.
- **Seller:** one or more individuals or entities who transfer, in return for consideration, (1) legal title to target housing, in whole or in part, (2) shares in a cooperatively owned project or (3) an interest in a leasehold. Seller includes, without limitation, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations.
- **Target housing:** any housing constructed prior to 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 zero-bedroom dwelling.

Sales of Target Housing

Target housing sellers must:

- 1. Disclose all known LBP and LBP hazards and any available reports regarding LBP.**

The law requires that sellers and lessors disclose available lead information about target housing and common areas so that families can be informed about preventive actions. Common areas (hallways, stairways, lobbies, recreation rooms, community centers, playgrounds, laundry rooms, garages, boundary fences, etc.) are those areas in multifamily housing structures such as condominiums, etc., and apartment buildings that are used by or accessible to all occupants.

- 2. Give buyers the EPA pamphlet *Protect Your Family from Lead in Your Home*.**

The EPA's pamphlet, *Protect Your Family From Lead in Your Home*, provides important information for families and homeowners to help them identify when LBP is likely to be a hazard and how to get their homes checked. If families and building owners are aware of the presence of LBP and the proper actions to take, most LBP hazards can be managed.

- 3. Include the required warning language and signed statements from all parties verifying compliance in the contract.**

The required Lead Warning Statement required by the federal LBP disclosure law states as follows:

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning

disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

This language is included in the WRA's Offer Addendum S – Lead Based Paint Disclosures and Acknowledgments. In Addendum S, the seller certifies that all information disclosed regarding the seller's knowledge of any LBP and the available records and reports concerning LBP at the property are true and accurate. The buyer acknowledges and certifies that the buyer has received the seller's LBP disclosures, reports and records, has received the mandatory EPA lead hazard information pamphlet and had the opportunity to conduct a LBP risk assessment or inspection. In addition, the agents in the transactions acknowledge that the seller was advised of his or her obligations under the federal LBP disclosure law and that he or she is aware of his or her duty to ensure compliance with the federal LBP disclosure law. Sellers, buyers and agents all certify that the information provided by them is true and accurate.

- 4. Retain signed acknowledgments for 3 years, as proof of compliance.**

This record retention aspect of the federal LBP disclosure law coincides with the record retention rules under Wis. Admin. Code § RL 15.04, which also requires a three-year retention of transaction records.

- 5. Give buyers a 10-day opportunity**

to test the housing for lead.

An owner selling his or her house need not check the house for LBP before the sale. The federal LBP disclosure law does not require that the seller or the buyer conduct or finance a lead inspection or risk assessment. The seller, however, is required to provide the buyer a 10-day period to test for LBP or LBP hazards. The key is that the buyer be given the opportunity to test for LBP before buying the property. The lead inspection or risk assessment period does not have to be 10 days and can be lengthened or shortened by the mutual written consent of the parties.

Nothing in the federal LBP disclosure law requires an owner to remove LBP or LBP hazards discovered during an inspection or risk assessment. The two parties to the offer to purchase or other sales contract, however, may negotiate hazard reduction activities as a contingency.

The professionals who perform LBP inspections and risk assessments must be certified. Agents should give the buyer the DHS list of credentialed LBP contractors (<http://dhs.wisconsin.gov/lead/CompanyList/index.htm>) if the buyer chooses to conduct an inspection.

 **REALTOR® Practice Tips:** REALTORS® should always strictly comply with the provisions of the federal LBP disclosure law. Potential environmental hazards should always be disclosed to the parties and REALTORS® should stand ready to provide a list of competent contractors should the parties need to investigate or eliminate any hazard on the property.

REALTORS® Completing Addendum S

The WRA's Addendum S has been developed for REALTORS® to use to ensure compliance with the federal LBP disclosure law. This addenda

serves as a self-contained summary of the federal LBP disclosure rules and as a checklist for compliance. If all of the steps stated in the addendum are completed – the addendum is filled in and signed by all parties and agents in the transaction, and the addendum is properly incorporated into the offer to purchase before acceptance, federal LBP disclosure compliance will be achieved. Although other LBP disclosure forms on the market may be shorter, Addendum S helps protect a licensee from liability. The summary of the LBP rules aids the licensee in explaining the law to the seller. Addendum S is available from the WRA or on Zipform.

Addendum S was intended for use in transactions involving target housing built before 1978. Some companies have office policies requiring the use

of LBP addenda in all residential transactions, but this is not required by federal law. Addendum S is also not required in commercial transactions.

Addendum S begins with the mandatory Lead Warning Statement and the property description. Next comes the Seller Disclosure and Certification section, which includes the seller's LBP disclosures, certification and signatures. These Addendum S disclosures are based on the seller's knowledge of LBP in and around the home. Therefore, if the seller does not know of the existence of LBP, he or she does not have an affirmative duty to test for LBP prior to signing the Addendum S.

The blanks in the Addendum S Seller Disclosure and Certification section are there to assist the seller to make the mandatory disclosures required by

the LBP disclosure law. If there is no disclosure to be made, (e.g. seller has no knowledge of LBP or LBP hazards) the appropriate practice would be to put a dash through the line or write "none." The federal LBP disclosure law merely requires that the seller "indicate" knowledge of LBP or availability of records. While Addendum S uses the words "none" and "none available" as a prompt to drafters of the form, any language that effectively indicates no knowledge or no available forms will satisfy the federal law.

 **REALTOR® Practice Tips:** REALTORS® should always look for painted surfaces in bad condition while inspecting a property when the property is listed. Peeling, chipping or cracking paint and lead dust from friction sources such as windows,



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doorframes and stairs is a hazard if the paint is LBP. These items should be noted during the property inspection and will be required to be disclosed as potential material adverse facts pursuant to Wis. Admin. Code § RL 24.07(3) if the seller does not disclose the same on Addendum S.

The balance of the first and second pages of this three-page form contains a summary of the federal LBP disclosure rules, including the disclosure requirements for sellers, the rules for certification and acknowledgment of the LBP disclosures, and a Definitions section.

The third page begins with the Agents Acknowledgment and Certification section, which contains the agents' acknowledgment, certification and signatures. Next the federal LBP provisions requiring that the buyer be provided with an opportunity to conduct a LBP evaluation are summarized, followed by the Buyer Inspection Contingency; Acknowledgment and Certification section, which includes the LBP inspection contingency; and the buyers' acknowledgment, certification and signatures.

LBP Inspection Contingency

The LBP contingency in Addendum S gives buyers the choice of:

1. Adopting the LBP contingency language on the addendum,
2. Drafting and attaching their own LBP contingency language or
3. Waiving the opportunity for a LBP inspection contingency.

If no choice is made, Addendum S indicates that the buyers will be deemed to have elected a 10-day inspection contingency per the LBP Inspection Contingency provision on the third page of Addendum S. The LBP inspection contingency requires the use of certified LBP inspectors, risk assessors and abatement contractors as is required under Wisconsin law.

A copy of the inspection report must be given to the seller and listing agent. Once the seller has any additional LBP

inspection reports, they will have to be added to the Seller's Disclosures on Addendum S for any subsequent buyers and copies of these reports will need to be given to these subsequent buyers.

A "risk assessment" means an on-site investigation of paint, dust, water or other environmental media to determine the existence, nature, severity and location of lead hazards. A risk assessment determines whether any lead hazards are present and if so, how they can be controlled. In a risk assessment, a certified risk assessor determines whether the home contains lead hazards such as deteriorated LBP, lead-contaminated dust and lead-contaminated soil. The risk assessor's report suggests ways to reduce or control the hazards, for example, more frequent cleaning and dusting, repairing deteriorated LBP surfaces or planting grass in areas with bare soil. The assessor may also suggest that old windows be replaced, old floors be covered or soil be removed.

"Lead inspection" means the on-site, surface-by-surface investigation of painted, varnished or other coated surfaces to determine the presence of lead. A lead inspection reveals the lead content of every painted surface in the house. The inspection, however, does not tell you whether the paint is a hazard or how you should deal with it. The presence of lead is not necessarily a hazard to occupants, depending upon whether the LBP is deteriorated and/or present on accessible surfaces, friction surfaces (such as windows and doors), or impact surfaces (such as the surface of a door) such that it may adversely impact human health.

Timing of Seller's LBP Disclosure

Addendum S is used most effectively and offers the most liability protection for real estate agents when the sellers complete the form when a residential listing for target housing is taken. The prudent listing broker will review Addendum S information and explanations with the client and have the seller complete and sign the seller section of the Addendum S at the same time the RECR is completed.

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The listing agent can sign Addendum S, and copies of the seller-completed RECR and Addendum S will be ready for distribution to buyers at a showing or open house, for instance, along with the EPA pamphlet *Protect Your Family From Lead in Your Home*.

Once the buyers have completed and signed the Buyer section (lines 123-156 of the Addendum S), and the cooperating agent has signed the form, then it is ready to attach to the offer. Sellers generally cannot accept any offer until all the steps referred to in Addendum S have been completed, and the form has been filled out, signed by the parties and agents, and attached to the offer.

Buyers may refuse to complete Addendum S before the Seller Disclosure and Certification section is completed. In the Buyer Acknowledgment, the buyers certify that they have received the seller's LBP disclosures. An agent who encourages or permits the buyers to sign this before the Seller Disclosure and Certification section has been completed may risk potential liability. So may an agent who signs the Agent(s) Acknowledgment and Certification section (lines 113-122 of the Addendum S) wherein the agents certify that the sellers have been informed of their obligations under the federal LBP disclosure law. This may not be true if the sellers have not yet completed the form. The best reassurance that a cooperating agent has that the sellers have been advised of the law is the signatures of the sellers and the listing agent on Addendum S. Addendum S has a summary of the federal LBP law on the back, so sellers who have signed the form and have been given a copy presumptively have notice of the law.

The required LBP disclosures may be given to the purchaser after a seller has accepted a buyer's offer, as long as

the buyer has the unconditional right to cancel the purchase contract after receipt of the LBP disclosures and is allowed 10 days to conduct an inspection for LBP hazards. Buyers must retain the right to unconditionally amend or terminate an offer based on the information contained in the lead disclosures. They must be able to unilaterally cancel the offer without losing their earnest money or suffering any other adverse effects. This will work only if there is a contingency or some other mechanism in the offer to purchase giving the buyer the absolute right to unilaterally cancel the contract after the buyer's receipt of the seller's LBP disclosures. Such a right does not appear in the standard language of the Department of Regulation and Licensing-approved offer to purchase forms, so such a provision would have to be drafted and inserted into the offer to purchase.

For further discussion of these timing guidelines, see Pages 6-9 of the *Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing (Part III)*, dated August 2, 2000, and prepared by the HUD Office of Lead Hazard Control and the EPA Office of Pollution Prevention and Toxics, online at: www.epa.gov/lead/ig3rjm.pdf.

Seller Counter-Offers and Rejections

An owner may not refuse to accept an offer solely because it contains an LBP inspection contingency, nor may an owner counter out an LBP inspection contingency. The federal LBP disclosure law provides that an owner generally may not accept an offer unless the buyer has been furnished with the opportunity to have an LBP inspection. The owner arguably cannot claim to have offered the buyer an opportunity to have an LBP inspection if he or she turns around

and rejects an offer just because the buyer chose to exercise his or her right to have an LBP inspection contingency. The same is true if the seller counters the LBP inspection contingency out of the offer. Obviously, it may be a bit difficult, in some circumstances to pinpoint the seller's motivations, but in other cases it may be clear that the seller is attempting to circumvent the requirements of the LBP law. REALTORS®, accordingly, should warn their clients against such illegal conduct because a seller could face stiff penalties for noncompliance.

A letter from EPA and HUD to NAR states that it is 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."

The HUD/EPA letter also, however, advises that the seller is not required to pay for LBP testing or risk assessment, and suggests that the seller may be able to counter back with a different LBP inspection contingency that does not require the seller to cure nor give the buyer the option of voiding the offer if LBP is found. The federal LBP disclosure law is flexible and permits the seller and the buyer the opportunity to negotiate the terms of an LBP inspection contingency. Such a contingency may simply provide for the buyer to conduct an LBP inspection or risk assessment, and not include any mechanism for the seller to cure or for the buyer to void the offer. This would mean that a buyer would know whether there is or is not any LBP in the home, but could not do anything about it other than make plans to abate the LBP once the transaction is closed.

Buyer-Initiated LBP Addenda

When the seller has not given the buyer any information about any LBP on the premises, the buyer could originate the LBP addendum, making the assumption that the seller has no notice or knowledge of LBP on the property. This means that the buyer or cooperating agent would fill in the seller's disclosure sections on Addendum S to indicate "none." The cooperating agent may wish to first try to call the listing office and ask whether the seller has any LBP disclosures to make.

The buyer would complete and sign the form and have it submitted to the listing office along with the offer. The cooperating agent, assuming he or she is not a buyer's agent paid exclusively by the buyer, may be reluctant to sign Addendum S at that time. The agent would be certifying that the seller has been advised of his or her obligations under the federal LBP disclosure law and the agent would likely have no basis for making that assertion. The cooperating agent's signature, however, would have to be picked up later in the offer negotiations.

Upon receipt of the offer and Addendum S, the seller and listing agent would sign it, assuming that the seller disclosure information inserted by the cooperating agent was correct. If this information was incorrect, the seller would need to counter the offer, make his or her LBP disclosures, and provide any and all documentation indicating the presence of any known LBP. Alternately, the seller could reject the buyer's offer, provide the completed Addendum S and have the buyer start over, or use some other mechanism that gives the buyer the opportunity to consider the seller's LBP disclosures and time to modify the offer, if desired.

LBP Disclosures Required in "As-Is" Sales

There is no exclusion in federal LBP disclosure law for "as-is" sales. The seller will be obligated to provide

the appropriate disclosure and allow the buyer the opportunity to inspect for LBP. In an "as-is" sale, the seller may decline to complete the Real Estate Condition Report (RECR), but the federal LBP disclosure law remains in force in transactions involving target housing, along with all of the penalties for non-compliance, regardless of whether other disclosures are being made by the seller.

RECR Exemptions Distinguished from LBP Exemptions

As of December 6, 1996, no offers on residential housing built prior to 1978 can be accepted without the LBP disclosure. This disclosure requirement is independent of the RECR law. Whereas a seller risks buyer rescission under Wisconsin law for failure to deliver the RECR, the penalties for non-compliance with the LBP law are federal (\$11,000 penalties, triple damages plus attorney fees) and apply not only to the seller, but also to the real estate agents involved in the transaction who must ensure compliance.

LBP Pamphlet in Various Languages

In cases where the buyer or tenant sign an offer or rental agreement in a language other than English, the law requires that the LBP disclosures be provided in the same language as the contract. The EPA pamphlet, *Protect Your Family From Lead in Your Home*, is printed in English and Spanish and is available in other languages as well. Visit www.epa.gov/lead/pubs/leadprot.htm.

- Spanish: "Proteja a Su Familia Contra el Plomo en el Hogar" (2003): www.epa.gov/lead/pubs/pyfcameraspan.pdf
- Vietnamese: "Hay Bao Ve Gia Dinh Cua Ban Khoi Bi Nhiem Chi O Trong Nha" (2001): www.epa.gov/lead/pubs/leadvn.pdf
- Russian (2003): www.epa.gov/lead/pubs/pyf_russian.pdf

- Arabic (2003): www.epa.gov/lead/pubs/pyf_arabic.pdf
- Somali: "Ka Badbaa di Qoyska Halista Leedhka" (2003): www.epa.gov/lead/pubs/pyf_somali.pdf

Foreclosures

When it comes to the provision of an Addendum S or another LBP disclosure form under the federal LBP disclosure law, foreclosures are exempted transactions because the EPA and HUD believe the circumstances typically surrounding foreclosure transactions make pre-sale disclosures and evaluation unworkable and impractical. Access to properties during foreclosure proceedings is often limited, making LBP evaluations impossible. Such properties typically are sold on an "as-is" basis with regard to all structural and environmental factors. Further, these transactions do not necessarily involve direct interaction between the property owner and the buyer, and the lender is unlikely to have information on the presence of LBP and/or LBP hazards. In light of these circumstances, EPA and HUD believed that it would be inappropriate to extend federal LBP disclosure and evaluation requirements to foreclosure transactions. This exemption refers specifically to the foreclosure process culminating with the sale of the property at the sheriff's sale.

REO Transactions

The circumstances typically surrounding foreclosures and sheriff's sales make pre-sale LBP disclosure and evaluation unworkable. This exclusion does not apply to the sale of housing originally acquired through a foreclosure sale and subsequently resold. In such cases, the EPA and HUD believe that the LBP disclosure provisions can be incorporated into the sales process since many of the extenuating circumstances of sheriff's sales no longer apply.

While the foreclosure sale (sheriff's

sale) itself is exempt from the federal LBP disclosure laws, the later sale of real estate-owned (REO) property that is target housing is not exempt. The lender or asset manager who does not make all required LBP disclosures risks the harsh penalties provided for noncompliance. REO listing agents should try to do everything possible to ensure that the bank or asset manager complies with its disclosure duties because they do not receive a free pass from the agent responsibilities under the LBP law. The listing agent must try to have the owner complete an Addendum S or other LBP disclosure form in compliance with the federal LBP law. This will include advising the owner of the law, the owner's obligations thereunder and the possible liability involved and asking about the owner's knowledge of LBP, any reports on the issue, etc. In such a case, it will be imperative that the listing agent pay attention to the painted and varnished surfaces at the property and disclose any peeling, cracking, or deteriorating paint as information suggesting the possibility of a material adverse fact to the parties in writing. The listing agent may also wish to provide the LBP pamphlet for the buyer.

If the owner does not provide LBP disclosures, the cooperating agent may wish to initiate an Addendum S as described on Page 9 of this *Update*.

Do It Yourselfers

Sellers and buyers may decide to scrape peeling, cracking or chipping paint and repaint the surface in order to prepare the house for sale or to decorate a new house that was just purchased. Unfortunately, dry scraping LBP can create serious health hazards, especially for young children. There have been cases where homeowners have unintentionally poisoned their own children because of the lead dust and paint chips generated during home remodeling projects. Landlords who try to remove LBP

hazards from their properties must use state-certified personnel for any lead abatement or lead investigation activity in target housing or a child-occupied facility.

Homeowners may work on their homes as long as they own the home, the home is occupied by the owners or their immediate family, and no child residing in the home has been identified as having an elevated blood lead level. They should be urged, in all instances, to first learn about LBP hazards and lead-safe work practices. Property owners doing work involving surfaces covered with LBP must be extremely careful to not inadvertently create lead hazards when doing maintenance or remodeling work.

REALTORS® can help homeowners find out how to safely work with LBP surfaces. Free copies of the following booklets may be obtained from the National Lead Information Center by calling (800) 424-LEAD or by going online to the listed sites:

- "Lead in Your Home: A Parent's Reference Guide": www.epa.gov/lead/pubs/leadrev.pdf
- "Lead Paint Safety, a Field Guide for Painting, Home Maintenance, and Renovation Work": www.epa.gov/lead/pubs/leadsafetybk.pdf

REALTORS® can make copies of these publications and the contact information for the lists of certified lead companies (see <http://dhs.wisconsin.gov/lead/CompanyList/index.htm>) and give it to buyers and sellers. It may prevent someone from unintentionally turning a remodeling project into a room full of lead dust, and thus avert a tragedy.

 **REALTOR® Practice Tips:** When helping parties find professional LBP inspectors and contractors, REALTORS® should avoid recommending or endorsing a particular expert because a "recommendation" may result in

liability. REALTORS® should not accompany the inspector through the house because this may imply that the REALTOR® is supervising the inspector. The party should personally pick and directly hire any LBP contractor.

 **REALTOR® Practice Tips:** If a REALTOR® is aware that an owner, contractor or other person has dry-scraped or removed LBP without observing lead-safe precautions, that information must be disclosed as a material adverse fact. The creation of lead chips and lead dust is a hazard, the extent of which can only be measured by testing. The parties must have the opportunity to test and protect themselves and their families from any LBP hazards.

Leases, Rentals and LBP

Antwaun A. v. Heritage Mutual Insurance Company, 228 Wis. 2d 44, 596 N.W.2d 456 (1999), mandates testing whenever the landlord of a residential property constructed before 1978 either knows or, in the use of ordinary care should know, that there is peeling or chipping paint on the rental property. If testing confirms the presence of LBP, the court gave no specific direction about what was next required. However, the footnotes of the opinion quote the Wisconsin Civil Jury Instructions regarding the duty of property owners and other materials indicating that, under general common negligence law, the owner has a duty to either warn other persons of a defect or harmful condition or correct the condition, as is reasonable under the circumstances.

As all REALTORS® know, the federal LBP law requires all landlords to disclose all known LBP, including all testing results, whenever a pre-1978 residential rental property is rented or leased. If the peeling paint is LBP, landlords arguably have common law and statutory duties to disclose and eliminate a LBP hazard

(does not necessarily mean removing all LBP) to protect their tenants. For further discussion of the *Antwaun* case see www.wra.org/legal/Court_cases/antwaun.asp and Pages 7-10 of *Legal Update 99.08*, "Addendum O, Addendum S & LBP Issues," online at www.wra.org/LU9908.

The federal LBP disclosure rule applies to leases of target housing. A lease, for the purposes of this law, is a transaction where the tenant or lessee enters into an agreement with the landlord or lessor to lease, rent or sublease target housing. Subleases are also included so that the subtenant or sublessee also receives the LBP disclosures and information. Verbal rental agreements and periodic tenancies such as a month-to-month tenancies are also included. Written LBP disclosures and the LBP pamphlet must still be provided. The rule does not apply to leases for 100 days or less, such as for vacation homes or short-term rentals, or rental housing that has been inspected by a state-certified inspector and found to be free of LBP.

LBP disclosures need not be repeated for the renewal or extension of existing leases where the landlord previously disclosed all information required by the rules and no new information concerning LBP on the premises has come to the attention of the landlord. In situations with no formal renewal process involved, such as a month-to-month holdover after the expiration of a one-year lease term, renewal shall be interpreted to occur at the point where the parties agree to a significant change in the terms of the lease, such as a rent rate adjustment.

Landlords and property managers should never lose sight of LBP responsibilities, including the duty to test for LBP and provide the federal LBP disclosures to tenants. Landlords and property managers who rent out target housing must:

1. Disclose all known LBP in the home

and provide any available reports on LBP in the housing to tenants.

2. Give tenants the EPA-approved LBP pamphlet, *Protect Your Family from Lead in Your Home*.
3. Include certain warning language in the lease as well as signed statements from all parties verifying that all requirements were completed, typically by attaching an LBP addendum such as the WRA's Addendum L to Lease – Lead Based Paint Disclosures and Acknowledgments.
4. Retain signed acknowledgments for three years, as proof of compliance.

Under the law, the 10-day inspection period is limited to sales transactions; a tenant is not given the same mandatory right to a LBP inspection. However, nothing prevents the tenant from negotiating with the landlord to allow time for a LBP inspection before renting if so desired by the tenant and agreed to by the owner.

Agents such as rental agents and property managers who are under contract with the property owner or landlord must ensure that:

- Landlords are made aware of their obligations under the federal LBP disclosure rule.
- Landlords disclose the proper information to tenants. The agent is responsible if the landlord fails to comply, however, an agent is not responsible for information withheld by the landlord.
- Leases and rental agreements contain the appropriate notification and disclosure language and proper signatures.

LBP Rental Checklist for Property Managers

1. Determine if the property is target housing.
2. Look for painted surfaces in bad condition while inspecting the property. Peeling, chipping or cracking paint and lead dust are hazards if the paint

is lead-based and must be disclosed as potential material adverse facts if the landlord does not disclose on Addendum L.

3. Advise the landlord of his or her obligations under the LBP rules.
4. Ask the landlord if he or she has any knowledge of LBP on the property. For owners of multi-unit buildings, this includes LBP in common areas like hallways and lobbies as well as the units being rented. If the rental agent has advised the landlord of his or her obligations under the federal LBP rules, the agent will not be held liable for any LBP information the landlord did not share with the rental agent.
5. Obtain copies of any available LBP records pertaining to the property
6. Have the landlord complete and sign Addendum L. A property manager can complete Addendum L for the owner, provided that the property manager is properly authorized such as in the property management agreement.
7. The rental agent signs Addendum L.
8. Give the tenant the EPA's pamphlet, *Protect Your Family From Lead in Your Home*, which may be ordered from the WRA at www.wra.org or obtained from the EPA at www.epa.gov/lead/pubs/leadprot.htm.
9. Give the tenant Addendum L and copies of the landlord's LBP reports and records. It is permissible to provide tenants with a photocopy of the original Addendum L executed by the landlord.
10. Landlords and agents are required to retain a copy of the completed lease or LBP lease addendum for three years after the commencement of the lease term.

Failure to disclose LBP can be very expensive, as demonstrated by a HUD/EPA settlement with two Michigan landlords worth over \$350,000 (see <http://portal.hud>.

[gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-242](http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-242)), a recent \$110,000 settlement between HUD and two Texas property owners (see http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-094) and a \$2.25 million HUD/EPA settlement with a Massachusetts real estate corporation that agreed to commit more than \$2 million for lead abatement work (see http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-030). In all cases, the landlords failed to inform tenants that their homes may contain potentially dangerous lead and have agreed to take steps to engage in lead hazard reduction work to make these homes safe.

Lead-Free/Lead-Safe Registry

The Lead-Free/Lead-Safe Registry is a listing of Wisconsin housing (single-family and apartments) and child-occupied facilities such as day cares, that meet lead-free or lead-safe property standards. The Lead-Free/Lead-Safe Registry is maintained by the Wisconsin Department of Health Services online at <http://dhs.wisconsin.gov/waldo/Registry/index.htm>.

The lead-free standard is met when no LBP is present anywhere on the interior of the building or unit, or the exterior of the property or in any common areas if a rental property. The lead-safe standard is met when no LBP hazards are present on the interior of the building or unit, or the exterior of the property or any common areas of a rental building. A lead hazard is present if LBP is deteriorated (chipping, flaking, peeling, chalking or cracked) or is present on friction or impact surfaces such as windows, doors, drawers and floors where it is subject to friction, abrasion or rubbing.

Painted surfaces such as windows, walls, stairs and floors must be in good condition and no paint chips or hazardous levels of lead dust may be present for a property to be considered lead-safe. In other words, lead-safe means that no hazard or danger from LBP was found at the property when it was inspected. LBP may still be present, but it was determined to not pose a danger to the health of the property's occupants as long as the paint remains in good condition.

Lead-safe certificates can be issued for a term ranging from nine months to 20 years, depending on the extent of the long-term LBP hazard reduction that has been achieved. A property owner can obtain short-term certificates by eliminating immediate LBP hazards and stabilizing painted surfaces. This may give the owner time to take more permanent hazard reduction measures in order to earn progressively longer certificate terms. All properties with certificates are posted by the DHS online at <http://dhs.wisconsin.gov/waldo/Registry/index.htm>.

DHS rules impose high maintenance standards on lead-safe property owners to ensure that tenants and other occupants are protected from LBP exposure. Registry properties must be regularly inspected for LBP hazards. If LBP problems are found, owners must promptly repair them using only certified persons when work may disturb LBP.

Renovations, Repairs and Painting Rules

To protect against the risk of LBP poisoning, the EPA issued a Lead-Based Paint Renovation, Repair and Painting Program (RRP) rule on March 31, 2008, requiring contractors, painters and other workers to use lead-safe practices, provide educational pamphlets to property owners and occupants, contain the work area, minimize lead dust and follow thorough clean-up protocol.

The RRP rule applies to residential houses, apartments and child-occupied facilities such as schools and day care centers built before 1978. The rule covers residential, public or commercial buildings where children under age 6 are regularly present as well as those buildings where an expectant mother resides. Renovation is broadly defined to include many activities not normally considered to be renovations. "Renovation" is defined as any activity that disturbs painted surfaces and includes most repair, remodeling and maintenance activities, including painting and window replacement.

Effective December 22, 2008, contractors, property managers and others who perform renovations for compensation in residential houses, apartments and child-occupied facilities built before 1978 are required to distribute the March 2008 *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools (Renovate Right)* pamphlet.

Beginning April 22, 2010, renovation firms are required to be certified, have at least one certified renovator on staff who can train their other employees in the use of lead-safe work practices and follow lead-safe work practices that minimize occupants' exposure to lead hazards.

In general, anyone who is paid to perform work that disturbs paint in target housing and child-occupied facilities built before 1978 is subject to the RRP rule if the work disturbs 6 square feet or more of paint per room, 20 square feet or more of exterior paint, or involves windows. This may include, but is not limited to, remodelers of single- and multi-family housing; landlords; property managers and maintenance workers for residential buildings and dwellings; general contractors, special trade contractors including painters, plumbers, carpenters and electricians; and window replacement workers. Homeowners can do the work themselves in

their own owner-occupied homes.

Contractors and other professionals who work on building renovations are worried that the RRP rule will add financial burdens to their already distressed sector of the economy. To comply with the RRP rule, those working on older sites will need to invest in lead-testing kits, plastic sheeting, respirators, protective clothing and other lead-safety materials. Regulated workers will have to wrap their work sites in plastic sheeting to contain any LBP dust and then carefully clean when they are done. Crews will need to post signs and document notification to owners and occupants and use a HEPA-filter vacuum to clean up. All of that can add up to extra costs for training, material and labor. The exact cost depends on how many surfaces have LBP and the size of the project. Some contractors estimate that a \$50,000 kitchen remodel could cost homeowners an extra \$500 to \$2,000, while others believe the cost increase might be much more. Contractors also worry that fly-by-night contractors will flout the rules, skip the training and undercut the bids of more responsible firms.

1. What activities are subject to the RRP rule?

In general, any activity that disturbs paint in pre-1978 housing and child-occupied facilities, including:

- Remodeling and repair/maintenance
- Electrical work
- Plumbing
- Painting
- Carpentry
- Window replacement

2. What housing or activities are excluded and not subject to the RRP rule?

- Housing built in 1978 or later
- Housing for elderly or disabled

persons, unless children under 6 years old reside there

- Zero-bedroom dwellings (studio apartments, dormitories, etc.)
- Housing or components declared lead-free by a certified inspector or risk assessor
- Minor repair and maintenance activities that disturb 6 square feet or less of paint per room inside, or 20 square feet or less on the exterior of a home or building

Note: minor repair and maintenance activities do not include window replacement and projects involving demolition or prohibited practices.

3. What does the RRP rule require contractors to do?

Effective after April 22, 2010, firms doing work subject to this rule must be certified by the Wisconsin DHS. Renovators must be trained to follow lead-safe work practices. Examples of these practices include:

- Work-area containment to prevent dust and debris from leaving the work area.
- Prohibition of certain work practices like open-flame burning and the use of power tools without HEPA exhaust control.
- Thorough clean-up followed by a verification procedure to minimize exposure to lead-based paint hazards.

4. What are the responsibilities of an RRP certified firm?

Firms performing renovations must ensure that:

- All individuals performing activities that disturb painted surfaces on behalf of the firm are either certified renovators or have been trained by a certified renovator.
- A certified renovator is assigned to each renovation and performs all of the certified renovator responsibilities.

- All renovations performed by the firm are performed in accordance with the work practice standards of the RRP rule.
- Pre-renovation education requirements of the RRP are fulfilled.
- The program's recordkeeping requirements are met.

5. How will a renovator become certified?

To become a certified renovator an individual must successfully complete an eight-hour initial renovator training course offered by an accredited training provider. The course completion certificate serves as proof of certification. Once the renovator is certified, he or she can train other workers in lead-safe work practices. These workers are not considered certified workers.

6. Does the certified renovator need to be on the job at all times?

The certified renovator must be available to oversee setting up containment, clean-up and cleaning verification. The certified renovator must also be available by telephone or stay on site if requested by the client.

7. Will subcontractors need to be certified?

Subcontractors working in target housing need to be certified or supervised by a certified renovator to follow RRP rule requirements. Subcontractors may be treated like non-certified workers and can be trained on site by a certified renovator and supervised accordingly.

8. If a property owner hires someone to repaint a hallway, does the RRP rule apply?

The rule does not apply as long as the contractor is just repainting over the old paint, is not removing any possible LBP, and does not scrape or patch or disturb more than 6 square feet. However if the contractor removes a window, window sash, door

– anything with more than 6 square feet of painted wood (throwing away a 1-foot by 3-foot painted shelf, for example), this activity falls under the RRP rule. Replacing kitchen cabinets would be another covered activity.

9. Is replacing a broken window a covered activity?

Maintaining vinyl windows or other replacement windows with manufacturer-applied coatings fabricated after 1978 would not require a lead-safe renovator to do the work. However, if the repair requires disturbance of paint, then the rule applies.

Future RRP Regulation

One of the most controversial parts of the new RRP rule is the post-renovation test. The rule requires that contractors perform a “white-glove test” to see whether dust is left behind. But there is no specific test that identifies whether lead – as opposed to other dust – is left. As a result, the EPA has proposed a new rule that would require clearance or dust sampling and lab testing after certain renovation projects. The EPA estimates \$160 per room in testing costs. In Wisconsin testing can only be done by state-certified risk assessors and the cost is about \$240 per room. So the cost to replace a damaged door could triple under this proposed rule.

Under the new rule dust wipe testing must be performed after all renovations involving:

1. Use of a heat gun at temperatures below 1,100 degrees Fahrenheit.
2. Removal or replacement of window or door frames.
3. Scraping 60 square feet or more of painted surfaces.
4. Removing more than 40 square feet of trim, molding, cabinets or other fixtures.

A link to the proposed rule in the Federal Register is found at: <http://edocket.access.gpo.gov/2010/pdf/2010-10102.pdf>.

<http://edocket.access.gpo.gov/2010/pdf/2010-10097.pdf>.

There also is an EPA proposal for regulating renovation of public and commercial buildings at <http://edocket.access.gpo.gov/2010/pdf/2010-10097.pdf>.

Legal Hotline Questions and Answers

An offer was written and did not have the Addendum S that was available from the seller. Neither agent noticed it at the time. Since then, the selling agent has chosen to add in the Addendum S on the offer after all parties have signed. The agent did this by whiting out the addendum language in the offer, inserting Addendum S and changing the dates. The broker knows the white out was improper and recognizes that federal law was not met regarding the disclosure. Should the incorporation of Addendum S have been done in an amendment?

If the Addendum S is not incorporated into the offer, it is possible that the disclosure might be given after acceptance. This would not comply with federal law. HUD officials have indicated that they have begun a program auditing real estate broker offices to ensure full compliance with the requirements of the LBP disclosure law. It is a violation of the LBP law to not have had the Addendum S completed and included in an offer before it is accepted, and then try to insert it after the fact by whiting out and modifying dates. This only compounds the problem. Due to these unique circumstances, the use of an amendment that states the proper current dates and incorporates the Addendum S may be the best course of action.

The use of white out on any form is not acceptable practice by real estate licensees. Furthermore, the modification of dates and addition of attached documents should always be done with a separate document signed by all of the parties. In addition to the

violation of federal law by the lack of the LBP disclosure, the licensee could also be subject to discipline by the DRL for lack of competency demonstrated by changing dates and using white out on the original offer to purchase.

Federal LBP law provides that no offers on residential housing built prior to 1978 can be accepted without the LBP disclosure. Addendum S must be used in sales transactions involving target housing. “Target housing” means any housing constructed prior to 1978, except for housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or expects to reside in such housing), and except for any zero-bedroom dwellings. “Housing for the elderly,” means retirement communities or similar types of housing designed specifically for households where at least one person is 62 years of age or older at the time of initial occupancy. With both housing for the elderly and housing for persons with disabilities, the exclusion from the LBP rules is lost if children under the age of 6 years reside there or are expected to reside there. “Zero-bedroom dwellings” are residential dwelling units where the living area is not separated from the sleeping area. This includes efficiencies, studio apartments, lofts, dormitory housing, military barracks and rentals of individual rooms in residential dwellings. Addendum S is not necessary for a purely commercial property unless residential units are included within the property.

The federal LBP rules provide that each agent shall ensure compliance with all the requirements of the rules. “Agent” is defined as any party who enters into a contract with a seller for the purpose of selling target housing. This includes persons who enter into a contract with a representative of the seller, and excludes buyers and buyer representatives who receive all compensation from the buyer. This

means all listing, selling, cooperative and buyer's agents (unless paid only by the buyer) must abide by the federal LBP rules. To ensure compliance with the rules, an agent shall inform the seller of his or her obligations under the federal LBP rules. HUD and the EPA's commentary on the final rules indicates that agents must make sure that the required activities are completed either by the seller or by the agent personally.

A buyer was purchasing target housing and applied for a Rural Development loan. The lender's appraiser said that in order to qualify the property needed to be painted. The buyer and his friends want to do the painting. Does this activity trigger the LBP renovation rules?

Beginning April 22, 2010, renovation work – including painting – is subject to the Lead-Safe Renovation Rule (RRP rule) when the work is performed for compensation in a dwelling or child-occupied facility built before 1978 and it disturbs 6 square feet or more of paint per room, 20 square feet or more of exterior paint, or involves windows. The RRP rule does not apply to homeowners conducting renovation activities in their own single-family residence if their home is occupied solely by the owner and the owner's immediate family. If an owner hires a contractor to conduct renovation work on a pre-1978 home, then training and certification is required.

Under the Wisconsin rules found in Wis. Admin. Code § DHS 163.10(1) (a)2, certified workers must be used to perform work on target housing when one of the following applies:

- a. The individual performing the work does not own the target housing or real property.
- b. An individual other than the property owner or the property owner's immediate family rents or occupies the target housing or real property.

- c. A child residing in the target housing has been identified as having an elevated blood lead level.

Under this definition, the buyer could not perform the painting work until after closing, when the buyer becomes the owner. One other possibility may be if this just involves repainting over the existing paint and not doing any scraping, etc. Otherwise it would appear that the RRP rule will require that certified painters be hired for the job.

A bank is selling a bank-owned property (REO) in "as-is" condition. Does the bank still have to fill out a condition report?

Wis. Admin. Code § RL 24.07(1) (b) requires listing brokers to inspect property prior to entering into a listing. The listing broker is required to ask the seller for a written statement regarding the property condition. If the seller elects not to provide this, the broker may ask the seller to document this by signing the Seller Refusal to Complete Real Estate Condition Report form.

There is no exemption from the Wis. Stat. Chapter 709 seller disclosure law based solely on the fact that the owner does not live in the property. Such owners might include the owner of a rental duplex or a bank that has acquired a home by foreclosure. A seller in this position can either (a) complete the Real Estate Condition Report (RECR) to the best of his or her knowledge, (b) retain a professional to provide an inspection report to be used as the basis for completing the RECR, (c) refuse to complete the RECR and sell "as is," risking buyer rescission, or (d) refuse to complete the RECR and sell "as is," refusing to accept any offers from buyers who do not waive their Chapter 709 rescission rights.

Note that the requirement to provide the LBP disclosure for target housing (WRA Addendum S, for example)

does not exempt REO property.

An agent is writing an offer on a home that is in an estate and the seller is the personal representative. An attorney is representing the personal representative. The agent asked for a copy of the RECR, even if it just states the seller never lived there. The seller is saying he does not need to provide an RECR. The agent also needs to send him a blank Addendum S because he does not have one. Does the seller need to complete an RECR and Addendum S?

All sellers subject to Wis. Stat. Chapter 709, whether broker-assisted or FSBO, must complete a Chapter 709 RECR or risk rescission of the offer to purchase. Chapter 709 generally applies to all persons who transfer real estate containing one to four dwelling units, including condominium units, time share property, living quarters in a commercial property, etc. Chapter 709 does not apply to (1) personal representatives, trustees, conservators and other fiduciaries appointed by or subject to supervision by the court, but only if those persons have never occupied the property (note: this does not include powers of attorneys); (2) real estate that has not been inhabited, e.g. new construction; and (3) transfers exempt from the real estate transfer fee, e.g., between spouses, foreclosures, probate transfers, etc. (note: this does not include sales of foreclosed properties).

With respect to the federal LBP disclosure rule and Addendum S, the definition of "seller" in the federal law includes estates. There is no exception for sales by estates. A seller who does not comply with the law is subject to triple damages plus attorney fees.

Does the LBP Disclosure need to accompany an offer to purchase for a home built after 1978?

The federal LBP disclosure rules provide, in 24 C.F.R. § 35.92, that each offer to purchase target

housing must include an attachment or addendum containing the LBP information, disclosures and signatures. In general, target housing includes housing built before 1978.

Some financing programs require the sellers or buyers to scrape and repaint. How should that be handled?

If scraping is going to be performed by someone other than the owner-occupant and it disturbs 6 square feet or more of paint per room, or 20 square feet or more of exterior paint, then it needs to be done by a certified painter or contractor pursuant to the RRP rule.

If an owner-occupant is going to do this painting, be sure that they are made aware of the safe way to work with LBP.

When helping parties find professional LBP inspectors and contractors, REALTORS® should avoid recommending or endorsing a particular expert because a recommendation may result in liability. Give the party the DHS list of credentialed LBP contractors (<http://dhs.wisconsin.gov/lead/CompanyList/index.htm>). Let the party deal directly with and do the hiring and the supervision of the contractor to avoid unintended liability. Real estate agents must recognize that it is not a part of their duties to hire contractors for the parties.

An agent is listing a property that is held in a trust. The woman who owns the property is 96 years old and in a nursing home. Is a LBP addendum required?

With respect to the federal LBP disclosure rule and Addendum S, in cases where a trustee has been given authority to sell target housing by the beneficiaries of the trust, the trustee would have the responsibility to comply with the requirements of this rule. Otherwise, the responsibility would rest with the beneficiaries of the trust.

What should a real estate agent do if the seller will not comply with the federal LBP rules?

If at any time the seller should balk at completing the required LBP disclosure process, the agent may wish to remind the seller of the penalties that may be imposed for non-compliance. The federal civil penalties for non-compliance can range up to \$11,000 for each violation. The penalty for those who knowingly and willfully violate the federal LBP disclosure rules can be up to \$11,000 for each violation or imprisonment for up to one year, or both.

The seller may also be sued for three times the amount of damages incurred by a buyer who is injured as a result of the seller's failure to disclose. These damages may include the costs of LBP abatement and the medical costs related to the treatment of LBP poisoning. Any agents involved, however, cannot be held liable for the seller's failure to disclose LBP if the agent has advised the seller of his or her LBP disclosure obligations, and the seller did not reveal his or her LBP information, reports and records to the agent.

If an agent is going to try to complete Addendum S on behalf of an uncooperative seller, the agent may wish to specify that any information filled in is based on information provided by the client, and should avoid saying there is no LBP without attributing that information to the client. The other alternative available to an agent who is working with an uncooperative seller may be to terminate the listing rather than take the chance of potential federal LBP disclosure law liability. Accordingly, it may be beneficial to have a seller complete the Addendum S and RECR at the time of the listing, maybe even before the actual listing contract is executed.

LBP Resources

NAR

- Lead-Based Paint Video – NAR's Risk Management Committee has produced three videos covering risk management planning, identity theft, and lead-based paint: www.realtor.org/law_and_policy/risk_management_videos
- NAR's *Lead-Based Paint: A Guide to Complying with the Federal EPA/ HUD Disclosure Regulations*: www.realtor.org/prodser.nsf/products/E141-558?OpenDocument (free member download)
- *Field Guide to Lead-Based Paint*: www.realtor.org/library/library/fg712

EPA

- *EPA's Lead in Your Home: A Parent's Reference Guide*: www.epa.gov/lead/pubs/leadrev.pdf
- *Protect Your Family From Lead in Your Home* (the mandatory LBP pamphlet given to buyers and tenants): www.epa.gov/lead/pubs/leadpdf.pdf or order from the WRA (in English or Spanish) at www.wra.org
- *Lead Paint Safety, a Field Guide for Painting, Home Maintenance, and Renovation Work*: www.epa.gov/lead/pubs/leadsafetybk.pdf
- *The Lead-Safe Certified Guide to Renovate Right* (the mandatory LBP renovations pamphlet given to homeowners, child care facilities and the families attending the facilities): www.epa.gov/lead/pubs/renovaterightbrochure.pdf
- *Small Entity Compliance Guide to Renovate Right; EPA's Lead-Based Paint Renovation, Repair and Painting Program* (a handbook for contractors, property managers and maintenance personnel working in homes, child care facilities and schools built before 1978): www.epa.gov/lead/pubs/sbcompliance-guide.pdf

DHS

- DHS Lead-Safe Homepage: <http://dhs.wisconsin.gov/lead/>
- DHS list of credentialed LBP contractors: <http://dhs.wisconsin.gov/lead/CompanyList/index.htm>
- Wisconsin Department of Health and Family Services: "The Legacy of Lead: Report on Childhood Lead Poisoning in Wisconsin 2008": <http://dhs.wisconsin.gov/lead/LegacyofLead/LegacyofLead45109.pdf>
- Lead Poisoning in Wisconsin Mapping Feature (see the association of lead poisoning and lead-based paint in older housing): <http://dhs.wisconsin.gov/lead/Maps/index.HTM>

WRA

- REALTOR® Resource Page – Lead-Based Paint: This resource page emphasizes the importance of REALTOR® members recognizing the complexity of this issue and how it impacts them in their business. This resource page includes *Legal Updates* relating to this topic, Wisconsin LBP litigation, Wisconsin LBP legislation, Wisconsin LBP statutes and rules, the federal disclosure and renovation rules, and information about the training and certification of LBP personnel. You can also find the lead certification requirements and the DHS lead section contact person, links to a national list of certified LBP contractors and information from the EPA site that explains some of the procedures certified persons follow. For all of these resources, visit www.wra.org/LBP.
- October 2008 *Legal Update*, “Lead-Based Paint Renovations, Repairs and Painting”: www.wra.org/LU0810
- *Legal Update 99.08*, “Addendum O, Addendum S, & LBP Issues”: www.wra.org/LU9908
- *Legal Update 96.07*, “Lead-Based Paint Disclosure Implementation”: www.wra.org/LU9607

- *Legal Update 96.04*, “Lead-Based Paint Disclosures”: www.wra.org/LU9604

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