Title X: Residential Lead-Based Paint Hazard Reduction Act of 1992

Interim Enforcement Response Policy

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THE DISCLOSURE RULE
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THE POLICIES AND PROCEDURES SET FORTH HEREIN ARE INTENDED SOLELY FOR THE GUIDANCE OF EMPLOYEES OF THE EPA. THEY ARE NOT INTENDED TO, NOR DO THEY CONSTITUTE A RULEMAKING BY THE EPA. THEY MAY NOT BE RELIED UPON TO CREATE A RIGHT OR A BENEFIT, SUBSTANTIVE OR PROCEDURAL, ENFORCEABLE AT LAW OR IN EQUITY, BY ANY PERSON.

INTERIM ENFORCEMENT RESPONSE POLICY
The Disclosure Rule

I. Introduction to the Statutory and Regulatory Authority

The U.S. Congress found that low-level lead poisoning is widespread among American children, affecting as many as three million children under the age of six. In addition, minority and low income children are disproportionately affected. Lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems. The health of American children living in as many as 4 million American homes is endangered by lead-based paint and/or lead-based paint hazards. In response to this national crisis, Congress has enacted Title X - Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4851 ("Title X").

Section 1018, of Title X, requires the Environmental Protection Agency ("EPA") and the Department of Housing and Urban Development ("HUD") to promulgate joint regulations for the disclosure of lead-based paint in pre-1978 housing (target housing) which is offered for sale or lease. EPA and HUD jointly promulgated regulations. EPA's regulations were published on March 6, 1996, at 61 Fed. Reg. 9064, and are codified at 40 C.F.R. Part 745, Subpart F ("Disclosure Rule"). HUD's regulations are codified at 24 C.F.R. Part 35.

This Enforcement Response Policy addresses violations of the Disclosure Rule and provides procedures to determine the appropriate enforcement response to such violations.

EPA's intent is to issue a Notice of Noncompliance ("NON") to first time violators unless a child or a pregnant woman is put at risk of lead poisoning. The NON will put violators on notice of their obligations and include a compliance assistance package which will provide the information necessary to obtain compliance. An individual who disregards the NON and continues to violate the law may be subject to a penalty.

Violations of the Disclosure Rule are subject to civil penalties under Section 16 of the Toxic Substances Control Act ("TSCA"). Section 1018(b)(5) specifically states:

> *" It shall be a prohibited act under Section 409 of the Toxic Substances Control Act for any person to fail or refuse to comply with a provision of this section or with any rule or order issued under this section. For purposes of enforcing this section under the Toxic Substances Control Act, the penalty for each violation applicable under Section 16 of that Act shall not be more than $10,000. "* [1]

[1] The Civil Monetary Penalty Inflation Adjustment Rule has adjusted all of EPA's civil monetary penalties by a ten-percent increase, thus increasing the maximum penalty for violations of the Disclosure Rule to $11,000 per violation 61 Fed. Reg. 69361 (1996).

Therefore, violations of the Disclosure Rule are prohibited acts under Section 409 of TSCA. Section 16 of TSCA, 15 U.S.C. § 2615(a), states that any person who violates a provision of Section 409 shall be liable to the United States for a civil penalty.

II. Summary of Rule and Requirements

The Disclosure Rule requires that Sellers, Lessors and any Agent must comply with certain requirements when selling or leasing target housing. For purposes of the Disclosure Rule, "Seller" is defined as an entity that transfers legal title to target housing, in whole or in part, for consideration. The Disclosure Rule defines a "Lessor" as any entity that has legal title to target housing. "Purchaser" is defined as an entity that enters into an agreement to purchase an interest in target housing under the Disclosure Rule. Finally, the Disclosure Rule defines "Agent" as any party who enters into a contract with a Seller or Lessor, including any person who enters into a contract with a representative of the Lessor or Seller, to purchase or lease target housing.

The Disclosure Rule requires that before a Purchaser or Lessee is obligated under any contract to purchase or lease target housing, the following are some of the general requirements which must be met:

- Sellers or Lessors must disclose the presence of any known lead-based paint and/or lead-based paint hazards to the Purchasers or Lessees and to any Agent.
- Sellers or Lessors must provide Purchasers or Lessees with any available records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards in the target housing;
- Sellers or Lessors must provide Purchasers or Lessees with an EPA-approved lead hazard information pamphlet;
- Sellers must grant Purchasers a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards;
- Sellers or Lessors must complete a Disclosure Form certifying compliance with the Disclosure requirements;
- Sellers and Lessors must retain a copy of the Disclosure Form for at least three years from completion of the transaction; and
- Each Agent involved in any transaction to lease or sell target housing must ensure compliance with all requirements of the Disclosure Rule.

The Disclosure Rule contains exclusions for the following transactions:

- Sales of target housing at foreclosure;
- Leases of target housing that have been found to be lead-based paint free by the appropriate inspector;
- Short term leases of 100 days or less;
- Lease renewals where previous disclosure has occurred;
- The purchase, sale or servicing of mortgages;
- The sale or lease of 0-bedroom dwellings; and
- Housing for the elderly or persons with disabilities (unless any child who is less than six years of age resides or is expected to reside in such target housing)

Consultation With EPA Headquarters

In the implementation of this new enforcement program, EPA Headquarters is requiring that EPA Regional Lead Coordinators ("Regions") consult with Headquarters on a specified number of enforcement actions to ensure consistency and to address any unique issues. Therefore, until Headquarters has concurred on the initial six Notices of Noncompliance and six Civil Administrative Complaints by each Region, all enforcement documents issued must receive prior concurrence from Headquarters. The Regions must also contact and consult with EPA Headquarters on the use of TSCA subpoenas to enforce the Disclosure Rule, and in cases involving egregious violations.

Enforcement Response Policy Applicability

This Disclosure Rule Enforcement Response Policy is immediately applicable and will be used to determine the enforcement response and to calculate penalties in administrative enforcement actions concerning violations of the Disclosure Rule.

Applicability to Federal Facilities

As discussed in Section III below, the Disclosure Rule defines "Seller" and "Lessor" to include government agencies. Thus, when a Federal facility or government agency is the Seller or Lessor of target housing as defined in the statute and the rule, the requirements of Section 1018 and the Disclosure Rule apply to such facility or agency.

Section 1018(b)(5) makes a violation of the Disclosure Rule a prohibited act under Section 409 of TSCA and then subject to EPA enforcement authority under Section 16 of TSCA. Section 408 of TSCA subjects each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government to all Federal, State, interstate, and local requirements, both substantive and procedural, respecting lead-based paint, lead-based paint activities, and lead-based paint hazards. The Federal, State, interstate, and local substantive and

procedural requirements referred to in Section 408 of TSCA include, but are not limited to, all administrative orders and all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature. The Disclosure Rule contains Federal requirements respecting lead-based paint, lead-based paint activities, and lead-based paint hazards. Therefore, Federal facilities are subject to the Disclosure Rule requirements.

EPA thus has express penalty authority over Federal facilities. In assessing penalties against Federal agencies, EPA will apply the Disclosure Rule Enforcement Response Policy. Before a penalty order becomes final, Section 16(a)(2) of TSCA requires the Administrator to provide the Federal agency with notice and an opportunity for a formal hearing on the record in accordance with the Administrative Procedures Act. 40 Code of Federal Regulations, Part 22, sets forth EPA's general rules of administrative practice governing the assessment of administrative penalties. The proposed Part 22 Consolidated Rules of Practice also require that before a final order of the Environmental Appeals Board issued to a Federal agency becomes effective, the head of the department, agency or instrumentality of the United States to which the order was issued can request a conference with the Administrator (40 C.F.R § 22.31(f)).

III. Responsible Party/Appropriate Respondent

The individuals who must comply with the Disclosure Rule are Sellers, Lessors and Agents who are involved in the selling or leasing of target housing. The Disclosure Rule specifically addresses the responsibilities of Agents by requiring them to ensure compliance with the provisions of the law. Agents fulfill this requirement by informing Sellers and Lessors of their obligations and by making sure that these activities are completed by either the Seller or Lessor or by the Agent personally. Accordingly, the Disclosure Rule also identifies the affirmative duty of the Sellers and Lessors to disclose to their Agents any known lead-based paint or lead-based paint hazards in target housing.

EPA reserves the right to exercise its enforcement discretion when issuing enforcement responses against the potentially responsible party or parties. In determining the appropriate respondent for the enforcement response, consideration must be given to the person who has direct control over the practices for disclosure and who should be aware of the requirement of the Disclosure Rule.

For violations under the Disclosure Rule, any nonpenalty enforcement response should be issued directly to the Agent of the property management firm that is responsible for the violation. For any penalty responses, the property management firm that employs the Agent generally would be named as the sole respondent in a Complaint. Notwithstanding the foregoing, EPA reserves the right to issue a NON to a property management firm, and to name an Agent as the sole respondent in a Complaint.

For purposes of this Enforcement Response Policy, the term "property management firm" shall mean any entity who enters into a contract with a Seller or Lessor to act as their representative for the purpose of selling or leasing target housing. Further discussions of the most common scenarios for both purchase and lease transactions are provided in *Appendix A* of this Enforcement Response Policy.

IV. Determining the Level of Action

Once a violation has been established with credible evidence, a determination must be made concerning which of the following enforcement actions should be taken: Notice of Noncompliance, Civil Penalty, Criminal Action, or some combination of these actions.

A. Notice of Noncompliance

In lieu of a civil penalty, EPA may issue a Notice of Noncompliance (NON) when, on a case-by-case basis, EPA believes justice would be served. A NON is the recommended response for a first- time violator of the Disclosure Rule. A compliance assistance package should be included as an enclosure with the NON to ensure future compliance with the Disclosure Rule.

The intent of the Disclosure Rule is to help to prevent exposure to lead-based paint and/or lead-based paint hazards by requiring disclosure and notification. There may be situations when **egregious** violations of the Disclosure Rule may warrant a penalty for first-time violators. In general, egregious violations should meet one of the following criteria:

1) the responsible party was aware of the Disclosure Rule requirements, but did not disclose or notify the Purchaser or Lessee that the target housing contains lead-based paint and/or lead-based hazards, and the target housing is to be occupied by a child less than six (6) years old or a pregnant woman;

2) the responsible party was not aware of the Disclosure Rule requirements, but knew that the target housing contains lead-based paint and/or lead-based paint hazards, and did not disclose or notify the Purchaser or Lessee, and the target housing is to be occupied by a child less than six (6) years old or a pregnant woman; or

3) the responsible party failed to comply with the Disclosure Rule requirements and a person less than 18 years old or a pregnant woman who resides in the target housing has elevated blood lead levels, and the target housing contains lead-based paint and/or lead-based paint hazards.

The examples below do not cover all situations that may be considered egregious violations, but provide some guidance.

Example of an Egregious Violation for Criterion 1

- A local health department became concerned about the blood lead levels of children living in target housing after receiving tips/complaints from residents. The local health department informed EPA that the Lessor of the target housing was aware of disclosure requirements because the health department conducted extensive outreach to the Lessor, but the Lessor did not comply with the Disclosure Rule when leasing the apartments. The apartments contained lead-based paint. Several children under the age of six (6) reside in the target housing.

Example of an Egregious Violation for Criterion 2

- A pregnant woman purchased target housing from a real estate agency. The real estate agency knew that the target housing contained lead-based paint, but did not inform the pregnant woman.

Example of an Egregious Violation for Criterion 3

- A 12-year old boy lives in target housing that was rented by his parents. The Lessor did not comply with the requirements of the Disclosure Rule when he rented the apartment to the boy's parents. The target housing contains lead-based paint and the boy is poisoned by lead-based paint.

The NON will require the violator to take corrective action in order to comply with the Disclosure Rule. Such corrective action will depend upon the specific violations. For example, the NON may require that action should be taken by a certain date and that proof of such action should be submitted to EPA. A property management firm that is a violator may be required to provide a copy of firm's policy requiring Agents to ensure compliance with the Disclosure Rule. Mitigating factors in cases where a NON has been issued shall be documented in the case file.

In the context of a property management firm, which may have employees such as Agents, the NON generally shall be issued directly to the employee(s) responsible for the violation with a copy of the NON should be sent to the Agent's employer. For example:

During an inspection at XYZ property management firm, six (6) real estate transactions were reviewed and violations of the Disclosure Rule were found in each of these six transactions. Agent A was the responsible party for two of those transactions; Agent B was the responsible party for one transaction, and Agent C was the responsible party for three. Each of the Agents would receive a separate NON detailing only those violations found in their specific transaction(s). For instance, all of Agent A's violations in the two transactions will be placed in one NON. A copy of the three NONs would be sent to the employer of the Agents.

B. Civil Administrative Actions

For those situations when a NON is not appropriate as an enforcement action (e.g., where the violator has already received a NON or a violation has been determined to be egregious), a civil penalty action is the suitable response. Violators may be subject to civil sanctions pursuant to TSCA Section 16. On September 10, 1980, EPA published the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy. 45 Fed. Reg. 59771 (1980). This penalty system provides the general framework for civil penalty assessments under TSCA. It establishes standardized definitions and applications of factors that TSCA requires the Administrator to consider in proposing to assess a civil penalty. The TSCA penalty system also states that as regulations are developed, specific penalty guidelines will be developed adopting in detail the application of the general penalty system to the new regulation. This Enforcement Response Policy has been developed to satisfy the TSCA penalty policy requirements for specific penalty guidelines for the Disclosure Rule.

A Civil Administrative Penalty must be stated in a Complaint. It is recommended that only the property management firm should be named as a Respondent and not the employee when a Complaint is issued that involves an employee of such firm. In the case of a history of violation where a NON has been issued previously to an Agent of a property management firm for violating the Disclosure Rule, and the Agent leaves the firm for another firm and violates the Disclosure Rule again, then that Agent will be named in a civil administrative complaint as the Respondent.

Before a penalty order becomes final, Section 16(a)(2) of TSCA requires the Administrator to provide the Respondent with notice and an opportunity for a formal hearing, on the record, in accordance with the Administrative Procedures Act. 40 Code of Federal Regulations, Part 22, sets forth EPA's general rules of administrative practice governing the assessment of administrative penalties.

C. Criminal Sanctions

A criminal violation of the Disclosure Rule under TSCA Section 16(b), 15 U.S.C. Section 2615(b) occurs for violations which are committed "knowingly or willfully." The penalty for criminal violations of the Disclosure Rule is up to $11,000 for each violation and/or imprisonment for up to one year. All criminal prosecutions are brought by the Department of Justice.

D. Injunctive Relief

The EPA may obtain injunctive relief by enlisting the legal support of the U.S. Department of Justice ("DOJ"). DOJ may make an application for injunctive relief in U.S. federal district court under TSCA Section 17(a), to direct a violator to comply with the

Disclosure Rule. In addition to requesting such relief, DOJ may also request on EPA's behalf that the court use its general equity powers to compel a violator of the Disclosure Rule to abate the lead-based paint and/or lead based-paint hazard in the target housing. A Region may take this course of action only after consultation with EPA Headquarters.

E. Multiple Remedies

There may be unusual instances when a particular situation will present facts which require that more than one final action should be taken. The use of multiple remedies should be done in accordance with the procedures outlined below and only after consultation with Headquarters:

Criminal Sanctions: The law is well settled that simultaneous civil and criminal enforcement proceedings are legally permissible. Regions may conduct parallel proceedings. However, if it is necessary to conduct simultaneous criminal and civil enforcement actions, such proceedings should not unfairly prejudice the defendant.

Notice of Noncompliance: In general, a NON should not be used in conjunction with any other final remedy. Whenever a particular situation presents several violations, some of which would merit a NON, while others would merit civil penalties, a NON may be issued for the nonegregious violations, and an administrative penalty action should be issued for the egregious violations.

Civil Administrative Penalty and Injunctive Relief: There may be instances in which the concurrent use of filing a civil administrative complaint and requesting injunctive relief is appropriate. This course of action is acceptable, provided that the facts of the case warrant such action.

To conclude, the use of multiple remedies depends on the facts and circumstances of each case. To preserve uniformity and fairness, the Regions are required to consult with EPA Headquarters before using any combination of multiple remedies for a particular case.

V. Assessing the Gravity-Based Penalty

~~The Gravity-Based Penalty for violations of the Disclosure Rule are assessed pursuant to~~ the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy. 45 Fed. Reg. 59771 (1980), ("TSCA Civil Penalty Guidelines"). Regions are advised to consult the TSCA Penalty Guidelines because only a summary is presented below. Under the TSCA Civil Penalty Guidelines, penalties are determined in two stages:

1) The first stage is the determination of a "Gravity-Based Penalty" ("GBP"). Gravity refers to the overall seriousness of the violation. To determine the gravity-based penalty, the following factors are considered:

- the "nature" of the violation;
- the "circumstances of the violation"; and
- the "extent" of harm that may result from a given violation.

These factors are incorporated into a penalty matrix that specifies the appropriate gravity-based penalty. Once the gravity-based penalty has been determined, upward or downward adjustments may be made to that penalty amount.

2) The second stage involves upward or downward "adjustments" to the gravity-based penalty. Adjustments to the penalty amount are made by considering the following factors:

- the violator's ability to pay/ability to continue in business;
- history of prior violations;
- degree of culpability;
- such other factors as justice may require; and
- voluntary disclosure.

A. Nature

The TSCA Civil Penalty Guidelines discusses the "nature" of the violation as the essential character of the violation, and incorporates the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature. The requirements of 40 C.F.R. Part 745, Subpart F, are most appropriately characterized as "hazard assessment" in nature. The Disclosure Rule requirements are designed to provide potential Purchasers or Lessees of target housing with information that will permit them to weigh and assess the risks presented by the actual or possible presence of lead-based paint or lead-based hazards in the target housing they might purchase or lease. The "nature" of the violation will have a direct effect on the measure used to determine which "circumstances" and "extent" categories are selected on the GBP matrix *Appendix B.*

B. Circumstances

The "circumstances" reflect the probability of harm resulting from a particular type of violation. For a Disclosure Rule violation, the harm is associated with the failure to disclose information on lead-based paint or lead-based paint hazards. Therefore, the primary circumstance to be considered is the Purchaser's or Lessee's ability to properly assess and weigh the factors associated with human health risk when purchasing or leasing target housing. The greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the Purchaser or Lessee will be uninformed about the hazards associated with lead-based paint.

The following system ranks potential violations using six levels which factor in compliance with the disclosure requirements and the level of potential harm associated with the buyer's or lessee's lack of knowledge of lead-based paint and lead-based paint hazards. The specific violations of the Disclosure Rule have been characterized with levels ranging from:

Level 1 and 2	violations having a high probability of impairing the ability to assess the information required to be disclosed. Level 1 involves egregious violations. Level 2 involves nonegregious violations.
Level 3 and 4	violations having a medium impact of impairing the ability to assess the information. These levels involve situations where opportunities for evaluations or assessments were not presented.
Level 5 and 6	violations having only a low impact on the ability to assess the information required to be disclosed. These violations result from a paperwork failure to include certification signatures or dates in the contract.

C. Extent

"Extent" is used to consider the degree, range, or scope of the violation. In the context of the Disclosure Rule, the measure of the "extent" of harm will focus on the overall intent of the rule, which is to prevent childhood lead poisoning. For example, the potential for harm from the failure to disclose known lead-based paint and lead-based paint hazard information to the Purchaser or Lessee of target housing would be considered "major" if risk factors are high for exposure. TSCA Civil Penalty Guidelines provides the following definitions for the three extent categories:

Major:	Potential for "serious" damage to human health or for major damage to the environment.
Significant:	Potential for "significant" amount of damage to human health or the environment.

Minor: Potential for a "lesser" amount of damage to human health or the environment.

Therefore, specific violations of the Disclosure Rule requirements have been characterized as "major," "significant," or "minor" in extent. Under the Disclosure Rule, the extent factor is based upon three measurable facts --

1) the age of any children who live in target housing;
2) a pregnant woman who lives in the target housing; and
3) the age of the target housing.

1. Age of the children: Children under the age of six (6) are more likely to be affected by the presence of lead-based paint and lead-based paint hazards. As children mature into adults, they are less affected by the presence of lead. The age factor will be determined by the age of the youngest child at the time the violation occurred. The extreme effects that lead can have on children under the age of six mandates a major extent factor, regardless of the age of the property. Children above the age of six (6), can also be adversely affected by lead-based paint and lead-based paint hazards; therefore, the extent factor takes this fact into consideration.

2. Pregnant women living in target housing: Pregnant women represent a special class of individuals who are also very susceptible to the dangers of lead-based paint and lead-based paint hazards. When a pregnant woman is poisoned by lead-based paint or lead-based paint hazards, her unborn child may also be adversely affected.

3. Age of the target housing: The age of the target housing is important in that older properties tend to contain paint with higher concentrations of lead (up to 50 percent by dry weight which was used to stabilize the paint), as well as more coats of paint. In 1955 the paint industry adopted a voluntary standard, limiting the use of lead in interior paints to no more than 1 percent lead by weight of nonvolatile solids. Data from the Bureau of Mines indicate that approximately 97 percent of the total tonnage of lead carbonates used in paint was used prior to 1960. Therefore, the extent factor for target housing built before 1960 is "major."

   In 1971, lead-based paint was defined as paint containing no more than 1 percent lead by weight, which was in keeping with the voluntary reduction by the paint industry. In 1973 the Lead-Based Paint Poisoning Prevention Act was amended to lower the lead level to .5 percent by weight. Therefore, the extent factor for target housing built between 1960 and 1973 is "significant."

   In 1977, lead-based paint was defined as a paint containing no more than .06 percent lead by weight, which is the current standard. (The current rule uses .5 percent lead by weight). In 1978, the Consumer Product Safety Act banned the sale of lead-based paint to consumers and the use of lead-based paint in residences and other areas where consumers have direct access to painted surfaces. Therefore, the extent factor is "minor" if the target housing was built between 1974 and 1978.

Violations

One Transaction

Each requirement of the Disclosure Rule is a separate and distinct requirement from the other requirements. Therefore, the penalty for each violation of the Disclosure Rule requirement will be assessed separately in one transaction. In addition, violations of the Disclosure Rule will be assessed on a per transaction (individual lease or contract) basis.

Multiple Transactions

A violator may be involved in numerous transactions in which violations of the Disclosure Rule occurred in each transaction. For instance, a Lessor of an eight (8) unit apartment building, which is target housing, who failed to comply with the Disclosure Rule when he rented each of the eight apartments, will be held liable for violating the Disclosure Rule requirements in eight (8) separate transactions. Each transaction "stands alone" and thus the penalty will be assessed as individual counts in the Complaint. When the civil administrative Complaint is filed against the Lessor, all eight (8) transactions will be included in the same Complaint. The total gravity-based penalty will be the sum of the penalties for violations of all eight (8) transactions. See *Appendix C* for examples of multiple transaction penalty calculations.

Per Day Penalties

TSCA allows penalties to accrue daily. However, EPA is using its discretion to reserve per day violations for those instances when egregious violations have occurred or there is a continuing failure to comply. Regions should consult with EPA Headquarters for those situations when they are considering per day penalties.

VI. Adjustment Factors

Section 16(a)(2)(B) of TSCA describes the factors that EPA must also consider in determining the amount of the civil penalty amount. With respect to the violator, these factors include: the ability to pay/ability to continue in business, history of prior such violations, degree of culpability, and other factors as justice may require. Other factors as justice may require include: (1) the size of business; (2) attitude; (3) supplemental environmental projects (SEPs); (4) voluntary disclosure; (5) adjustment for small independent owners/lessors; and (5) economic benefit derived from noncompliance.

A. Ability to Pay/Continue in Business

Section 16 of TSCA requires that the violator's ability to pay the proposed civil penalty be considered as a statutory factor in determining the appropriateness of the penalty. Absent of proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and sales. The TSCA Penalty Policy states that the EPA generally will not request penalties that are clearly beyond the financial means of the violator.

To determine the appropriateness of the proposed penalty in relation to a person's ability to pay, the case team should review Dun and Bradstreet reports, a company's filings with the Securities and Exchange Commission (when appropriate) or other available financial reports before issuing the complaint. In determining appropriate penalties for violators not found in the above reports, relevant facts obtained from the sales contract or lease (such as the sale or lease amount of the dwelling) or the number of dwellings owned or leased by the violator, may demonstrate the violator's ability to pay the penalty.

If a violator raises the ability to pay argument as a defense in its answer, or in the course of settlement negotiations, EPA should request the following types of information:

- The last three years of tax returns
- Balance sheets
- Income statements
- Statements of changes in financial position
- The Statement of operations
- Retained earnings statements
- Loan applications, financing agreements, security agreements
- Annual and quarterly reports to shareholders and the SEC, including 10K reports
- Statements on assets and liabilities.

EPA reserves the option, in appropriate circumstances, to seek a penalty that might prevent a company from continuing in business. For example, even when there is an inability to pay, it is unlikely that EPA would reduce a penalty when a Seller, Lessor or Agent has refused to correct a serious violation or when a Seller, Lessor or Agent has a long history of violations. This long history would demonstrate that a less severe measure (i.e., a penalty reduction) is ineffective.

B. History of Prior Violations

When a violator has a history of prior such violations of the Disclosure Rule, the penalty should be adjusted upward in accordance with the TSCA penalty policy by a maximum of 25%. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation(s).

For the purpose of this policy, EPA interprets "prior such violations" to mean prior violations of the Disclosure Rule. The following rules apply in evaluating the history of such violations:

(1) To constitute a prior violation, the prior violation: (1) must have resulted in a consent agreement and final order or consent order (CAFO/CACO), consent decree, default judgment, non-consensual civil judgment or criminal conviction; and (2) must have been entered by or executed within five (5) calendar years prior to the issuance of the subsequent complaint. Receipt of payment made to the U.S. Treasury can be used as evidence constituting a prior violation, regardless of whether a respondent admits to the violation or enters into a CAFO/CACO. Issuance of a Notice of Noncompliance does not constitute a prior violation for purposes of this policy. A prior violation refers collectively to all the violations which may have been described in one prior CAFO/CACO.

(2) A corporation owned by or affiliated with the same parent corporation may not necessarily effect each other's history (such as with independently-owned franchises), if they are substantially independent of one another in their management, and in the functioning of their Boards of Directors. The EPA reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the violator fails to provide the necessary information, and the information is not readily available through other sources, then EPA is entitled to rely on the information it does have in its control or possession.

(3) In the case of wholly-owned subsidiaries, the parent corporation's history of violation shall apply to all of its subsidiaries. The history of violation for a wholly-owned subsidiary will apply to the parent corporation.

C. Degree of Culpability

The two principal criteria for assessing culpability are: (a) the violator's knowledge of the Disclosure Rule, and (b) the degree of the violator's control over the violative condition. For penalty purposes, when the violator intentionally commits an act which he knew would be a violation of the Disclosure Rule or would be hazardous to health, or has been issued a prior NON, the penalty may be increased by up to 25%.

D. Other Factors as Justice May Require

This Enforcement Response Policy acknowledges that no two cases are exactly alike. Unique circumstances above and beyond those taken into account by the factors discussed in the previous sections may be significant in determining the appropriateness of a penalty.

(1) Attitude

EPA may **reduce** the proposed civil penalty by a maximum amount of 30% for attitude, if the circumstances warrant. The Attitude adjustment has three components: (1) cooperation; (2) immediate steps taken to comply with the Disclosure Rule; and (3) early settlement.

(a) The EPA may reduce the base penalty **up to 10%** based on a respondent's cooperation throughout the entire compliance, case development, and settlement process.

(b) The EPA may also reduce the base penalty **up to 10%** for a respondent's immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which it comes into compliance.

(c) The EPA may reduce the base penalty **up to 10%** if the case is settled before the filing of pre-hearing exchange documents.

(2) Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally-beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the defendant is not otherwise legally required to perform. See, Interim Revised Supplemental Environmental Projects Policy ("SEP Policy") (May 3, 1995). In return, the cost of the SEP reduces the amount of the final penalty paid by the respondent.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. EPA must ensure that the inclusion of a SEP in settlement of an enforcement action is consistent with the SEP Policy in effect at the time of the settlement.

(3) Voluntary Disclosure

A Seller, Lessor, or Agent who conducts an audit and voluntarily self- discloses any violations of the Disclosure Rule under the "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706, December 22, 1995 ("Audit Policy") may be eligible for a 100% reduction in the gravity-based penalty, if they meet the nine criteria established in the Audit Policy.

If a violator self-discloses a violation of the Disclosure Rule, but not under the Audit Policy, the proposed civil penalty amount may still be reduced for such a voluntary disclosure. The EPA wants to encourage voluntary disclosure for Disclosure Rule violations. In order to do this, an automatic penalty reduction may be made. To be eligible, the violator must make the disclosure before EPA notifies him of a pending inspection, or before EPA receives information relating to the alleged violation. Voluntary disclosure of a violation will result in a 25% reduction of the penalty. An additional 25% penalty reduction may be given to those violators who report the potential violation to EPA within 30 days. Under these circumstances the penalty reductions are as follows:

Voluntary disclosure	25%
Immediate disclosure within 30 days of discovery	25%
Total	up to 50%

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the Civil Complaint. The Civil Complaint should state the original penalty, the reduced penalty and the reason for the reduction pursuant to this Enforcement Response Policy.

(4) Size of Business

Given the universe of parties covered by the Disclosure Rule, a violator may request assistance under the EPA's Policy on Compliance Incentives for Small Business ("Small Business Policy") (June 10, 1996). The Small Business Policy states that a business, with fewer than 100 employees, is eligible for elimination of the entire civil penalty if the violator participates in the compliance assistance program or conducts a voluntary self-audit and meets all four criteria listed in the Small Business Policy. The four criteria are: 1) the violator has made a good faith effort to comply with the applicable environmental requirements; 2) the violator has violated the applicable environmental requirement for the first time; 3) the violator has remedied the violation within a specified time; and (4) the violation does not present a significant health or environmental threat and does not involve criminal conduct. Regions are advised to consult the Small Business Policy to determine whether a respondent's eligibility.

(5) Adjustment for Small Independent Owners and Lessors

Civil penalties should be adjusted downward by 50% for individuals who own one rental property or target housing which is "for sale by owner." However, such reduction should only apply if no Agent was involved in the transaction. This reduction is to reflect the reality that these Sellers and Lessors are generally not engaged in the selling or leasing of property as a business.

(6) Economic Benefit of Noncompliance

A Seller, Lessor or Agent who has violated the Disclosure Rule may not profit from his violative acts. Congress has stated that a violator should not be allowed to profit from delays in compliance. Assessing a penalty amount that reflects a violator's economic benefit of noncompliance serves two purposes which are vital to an effective enforcement program. First, the penalty deters violators by taking away the economic incentive to violate the law; thus, ensuring that violators do not reap economic benefit by failing to comply. Second, for a penalty to be effective the fines must be as great as the economic gain in not complying or the penalty will not give deterrent value. Consideration of economic benefit as part of the penalty maintains a "level playing field" by ensuring that violators do not obtain an economic advantage over competitors who made the necessary investments in environmental compliance.

The Disclosure Rule's ability to prevent harm to public health and the environment is severely weakened whenever an economic incentive exists to violate the law. The penalty system attempts to eliminate, or at least reduce, economic incentives by adding an estimate of economic gains from noncompliance to the base penalty.

If the EPA determines that the gravity-based penalty has not adequately captured the economic benefit, the EPA reserves the right to seek the economic benefit from the violator and will make that determination on a case by case basis. [2]

[2] The Disclosure Rule also allows the Purchaser or Lessee to bring a civil action for damages, and the court may award treble damages, court costs, reasonable attorneys fees, and expert witness fees if that party prevails.

APPENDIX A

Responsible Party Definitions
and
A Table of Scenarios

Responsible Agent parties in sales transactions:

In sales situations, the Listing Agents, Selling Agents, and Buyer Agents (if paid by the Seller or through a cooperative agreement with the listing agent) are "Agents" and are responsible for ensuring compliance under this rule. For the purposes of this Enforcement Response Policy, Real Estate Agencies, Contract Service Providers and Property Management Firms are "Agents."

Listing Real Estate Agency (Listing Agent): Traditionally, the real estate agency enters into a direct contract with the Seller or Lessor for the right (exclusive or otherwise) to represent the Seller. The contract states the terms of compensation in the amount of a set percentage of the sales price in consideration of the time and effort expended by the Broker (real estate agency) on behalf of the Seller, and in further consideration of the advice and counsel provided to the Seller. Thus, Real Estate Agencies are Agents under the Disclosure Rule, and are responsible for ensuring compliance with the Disclosure Rule.

Since the Sales Associate and the Real Estate Agency and/or Broker are in a contractual relationship for the purpose of selling or leasing target housing, a signature from either party is sufficient to satisfy the Disclosure Rule.

Selling Real Estate Agency (Selling Agent): The residential real estate sales contract traditionally is *brokered* between a Listing Real Estate Agency that represents the Seller, and a Selling Real Estate Agency that represents the Purchaser. Both agencies are generally paid its commission by the Seller. The Listing and Selling Real Estate Agencies generally have sales associates who share their sales commission with the real estate agency. The following chart describes the typical "splitting of fees" between the Sales Associate and the Brokers, but the actual percentage figures may vary from situation to situation.

Commission 6% of sales price - paid 100% by Seller

Listing Sales Associate	1.5%
Listing Real Estate Agency	1.5%
Subtotal	3.0%
Selling Sales Associate	1.5%
Selling Real Estate Agency	1.5%
Subtotal	3.0%
Total	6.0%

Buyer's Agent: If the Selling Real Estate Agency is compensated totally by the Purchaser, the Selling Real Estate Agency is not an Agent for the purposes of the Disclosure Rule, and therefore, is not liable for violations of the Disclosure Rule.

Contract Service Provider: Another situation which may arise is when a Seller does not use the services of a Real Estate Agency, but instead handles the transaction personally with the help of a Contract Service Provider. The Contract Service Provider ensures that all the proper documents are used, completed and signed.

Property Management Firm: The Property Management Firm acts as an Agent for a Lessor by entering into a contract with a Seller or Lessor for the purpose of leasing or selling target housing. These duties generally entail showing the target housing to prospective Purchasers or Lessees and ensuring that all sales and leases are properly executed by the parties. Thus, Property Management Firms are Agents for the purposes of the Disclosure Rule.

Resident manager: In a situation when a Resident Manager performs the same duties as described above for Property Management Firms, but the Resident Manager is an Independent Contractor, the Resident Manager is still an Agent for the purposes of the Disclosure Rule.

Responsible Party Table:

The Responsible Party Table attempts to chart the most common scenarios for both purchase and lease transactions. A leasing situation may involve a variety of relationships. This Table may be revised as more examples are discovered during the course of an investigation. EPA reserves the right to exercise its enforcement discretion when issuing enforcement responses against any Potentially Responsible Party or Parties.

Note: Within the table, the symbol " -> " denotes "contracts with" -- Scenario C: Owner of Property "contracts with" Contract Service Provider who "contracts with" Employees of a Contract Service Provider who "contracts with" Purchaser.

RESPONSIBLE PARTY TABLE: Part I - SELLING SITUATIONS	
Parties involved in the selling situations:	**Potential Responsible Parties:**
Scenario A: Owner of Property -> Purchaser	(1) SELLER- Owner of the property
Scenario B: Owner of Property -> Contract Service Provider -> Purchaser	(1) SELLER- Owner of the property (2) AGENT- Contract Service Provider
Scenario C: Owner of Property-> Contract Service Provider -> Employee of Contract Service Provider -> Purchaser	(1) SELLER- Owner of the property (2) AGENT- Contract Service Provider
Scenario D: Owner of Property-> Contract Services Provider -> Selling Real Estate Agency -> Agent -> Purchaser	(1) SELLER- Owner of the Property (2) AGENT - Contract Service Provider (3) AGENT- Selling Real Estate Agency* *Selling Real Estate Agency compensated by the Seller
Scenario E: Owner of Property-> Listing and Selling Real Estate Agencies ->Listing and Selling Sales Associates -> Purchaser	(1) SELLER- Owner of Property (2) AGENT- Listing Real Estate Agency* * Listing Real Estate Agency compensated by the Seller; Selling Real Estate Agency compensated by the Purchaser
Scenario F: Owner of Property-> Listing and Selling Real Estate Agencies - Listing and Selling Sales Associates -> Purchaser	(1) SELLER- Owner of Property (2) AGENT- Listing and Selling Real Estate Agencies* * Listing and Selling Real Estate Agency both compensated by the Seller

RESPONSIBLE PARTY TABLE: Part II - LEASING SITUATIONS	
Parties who are involved in the leasing action:	**Potential Responsible Parties:**
Scenario A: Owner of Property -> Lessee	(1) LESSOR- Owner of Property
Scenario B: Owner of Property -> Property Management Firm-> Employee of Property Management Firm-> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Property Management Firm
Scenario C: Owner of Property-> Real Estate Agency (who handles leasing transaction) -> Sales Associate -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Real Estate Agency
Scenario D: Owner of Property Management Firm-> Property Management Firm as Owner of property-> Employee of Property Management Firm-> Lessee	(1) LESSOR- Owner of Property Management Firm
Scenario E: Property Management Firm as Owner of Property-> Employee of Property Management Firm-> Lessee	(1) LESSOR- Property Management Firm as Owner of Property
Scenario F: Owner of Property -> Resident Apartment Manager -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Resident Apartment Manager
Scenario G: Owner of Property -> Contract Service Provider -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Contract Service Provider
Scenario H: Owner of Property -> Contract Service Provider -> Employee of Contract Service Provider -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Contract Service Provider

RESPONSIBLE PARTY TABLE: Part II - LEASING SITUATIONS	
Parties who are involved in the leasing action:	**Potential Responsible Parties:**
Scenario I: Real Estate Agency as Owner of Property -> Sales Associate -> Lessee	(1) LESSOR- Real Estate Agency as Owner of Property
Scenario J: Owner of Property -> Locator Service -> Lessee	(1) LESSOR- Owner of Property
Scenario K: Owner of Property -> Locator Service -> Employee of Locator Service -> Lessee	(1) LESSOR- Owner of Property
Scenario L: Owner of Property-> Locator Service-> Property Management Firm-> Employee of Property Management Firm -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Property Management Firm
Scenario M: Owner of Property -> Locator Service -> Employees of Locator Service -> Property Management Firm -> Employee of Property Management Firm -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Property Management Firm
Scenario N: Owner of Property-> Locator Service->Real Estate Agency-> Sales Associate -> Lessee	(1) LESSOR- Owner of Property (2) AGENT- Real Estate Agency
Scenario O: Owner of Property -> Locator Service -> Employee of Locator Service -> Real Estate Agency -> Agent	(1) LESSOR- Owner of Property (2) AGENT- Real Estate Agency

APPENDIX B

Penalty Matrices:

- Circumstances Level Matrix
- Extent Category Matrix
- Gravity-Based Penalty Matrix

CIRCUMSTANCE LEVEL MATRIX

Circumstance Level	Disclosure Rule Violation	FTTS Code
Disclosure and Notification: Level 1 applies only to "Egregious" violations*		
Level 1*	Seller, Lessor and Agent Requirement: Failure to provide Purchaser or Lessee EPA-approved lead hazard information/pamphlet as pursuant to 40 C.F.R. § 745.107(a)(1)	L8D
Level 1*	Seller, Lessor and Agent Requirement: Failure to disclose to Purchaser or Lessee presence of any known lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 C.F.R. § 745.107(a)(2)	L8D
Level 1*	Seller, Lessor and Agent Requirement: Failure to disclose to each Agent presence of any known lead-based paint and/or lead-based paint hazards in the target housing and the existence of any available records or reports pertaining to lead-based paint pursuant to 40 C.F.R. § 745.107(a)(3)	L8D
Level 1*	Seller, Lessor and Agent Requirement: Failure to provide to Purchaser or Lessee any records or reports available to the Seller or Lessor pertaining to lead based-paint and/or lead-based paint hazards in the target housing as cited 40 C.F.R. § 745.107(a)(4)	L8P
Disclosure and Notification: Level 2 applies only to "Non-Egregious" violations		
Level 2	Seller, Lessor and Agent Requirement: Failure to provide Purchaser or Lessee EPA-approved lead hazard information/pamphlet as pursuant to 40 C.F.R. § 745.107(a)(1)	L8D
Level 2	Seller, Lessor and Agent Requirement: Failure to disclose to Purchaser or Lessee presence of any known lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 C.F.R. § 745.107(a)(2)	L8D
Level 2	Seller, Lessor and Agent Requirement: Failure to disclose to each Agent presence of any known lead-based paint and/or lead-based paint hazards in the target housing and the existence of any available records or reports pertaining to lead-based paint pursuant to 40 C.F.R. § 745.107(a)(3)	L8D
Level 2	Seller, Lessor and Agent Requirement: Failure to provide to Purchaser or Lessee any records or reports available to the Seller or Lessor pertaining to lead based-paint and/or lead-based paint hazards in the target housing as cited 40 C.F.R. § 745.107(a)(4)	L8P

The following Levels below will be applied in egregious and nonegregious situations, using the Extent Matrix to determine Major, Significant or Minor Category:		
Warning Statements		
Level 3	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, the Lead Warning Statement as pursuant to 40 C.F.R. §745.113(a)(1)	L8I
Level 3	Seller and Agent Requirement: Failure to include, as an attachment in the contract, a statement by the Seller disclosing the presence of known lead-based paint and/or lead-based paint hazards as pursuant to 40 C.F.R. § 745.113 (a)(2)	L8I
Level 3	Lessor and Agent Requirement: Failure to include as an attachment or within the contract, a statement by the Lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards as pursuant to 40 C.F.R. § 745.113 (b)(2)	L8I
Level 3	Lessor and Agent Requirement: Failure to include as an attachment, or within the contract to lease target housing, the Lead Warning Statement as pursuant to 40 C.F.R. §745.113(b)(1)	L8I
Opportunity to Conduct Inspection		
Level 4	Seller and Agent Requirement: Failure to permit the Purchaser a 10-day period to conduct a reassessment or inspection for the presence of lead-based paint and/or lead-based paint hazards pursuant to 40 C.F.R. § 745.110(a)	L8T
Certification and Acknowledgment		
Level 5	Seller and Agent Requirement: Failure to include in the contract as an attachment a statement by the Purchaser of an opportunity to conduct risk assessment or inspection or to waive an opportunity to do so as pursuant to 40 C.F.R. § 745.113(a)(5)	L8I
Level 5	Seller and Agent Requirement: Failure to include in the contract a list of any records or reports available to the Seller that pertain to lead hazard information or the failure to indicate that no such list exists as pursuant to 40 C.F.R. § 745.113(a)(3)	L8I
Level 5	Seller and Agent Requirement: Failure to include in the contract a statement by the Purchaser affirming receipt of the information required by 40 C.F.R. § 745.113(a)(2) and (a)(3) and the lead hazard pamphlet required under 15 U.S.C. Section 2696 as specified in 40 C.F.R. § 745.113(a)(4)	L8I

Level 5	Seller and Agent Requirement: Failure to include in the contract as an attachment, a statement by the one or more Agents involved in the transaction to sell target housing that the Agent(s) has informed the Seller of the Seller's obligations and that the Agent(s) is aware of his duty to ensure compliance, as pursuant to 40 C.F.R. § 745.113(a)(6)(i) and (ii)	L8I
Level 5	Lessor and Agent Requirement: Failure to include as an attachment or within the contract, a list of any records or reports available to the Lessor that pertain to lead hazard information or the failure to indicate that no such list exists as pursuant to 40 C.F.R. § 745.113(b)(3)	L8I
Level 5	Lessor and Agent Requirement: Failure to include in the contract for lease a statement by the Lessee affirming receipt of the information required by 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard pamphlet required under 15 U.S.C. Section 2696 as specified in 40 C.F.R. § 745.113(b)(4)	L8I
Level 5	Lessor and Agent Requirement: Failure to include in the contract as an attachment, a statement by the one or more Agents involved in the transaction to lease target housing that the Agent(s) has informed the Lessor of the Lessor's obligations and that the Agent(s) is aware of his duty to ensure compliance, as pursuant to 40 C.F.R. § 745.113(b)(5)	L8I
Failure to Retain Records/Signatures and Dates		
Level 6	Seller and Agent Requirement: Failure to include in the contract signatures of the Sellers, Agents and Purchasers certifying to the accuracy of their statements, as well dates, pursuant to 40 C.F.R. § 745.113(a)(7)	L8I
Level 6	Lessor and Agent Requirement: Failure to include in the contract for lease signatures of the Lessor, Agent and Lessee certifying to the accuracy of their statements, as well dates, pursuant to 40 C.F.R. § 745.113(b)(6)	L8I
Level 6	Failure to retain a copy of the completed disclosure records for no less than three years from the completion date of the lease or sale pursuant to 40 C.F.R. § 745.113(6)(c)(l).	L8R

*** Level 1 applies only to "Egregious" violations**

Extent Category Matrix

	Target housing built before 1960	Target housing built between 1960 and 1973	Target housing built between 1973 and 1978
Pregnant woman and/or children under 6 years of age	**Major**	**Major**	**Major**
Pregnant woman and/or children 6 years but under 18 years	**Significant**	**Significant**	**Significant**
Individuals 18 years and older	**Minor**	**Minor**	**Minor**

Gravity-Based Penalty Matrix[3]

The GBP, a function of the nature, circumstances and extent of each violation, is determined by using the following matrix.

CIRCUMSTANCE	MAJOR	SIGNIFICANT	MINOR
	EXTENT	EXTENT	EXTENT
HIGH			
Level 1	$11,000	$6,600	$2,200
Level 2	$8,800	$5,500	$1,320
MEDIUM			
Level 3	$6,600	$4,400	$660
Level 4	$4,400	$2,750	$440
LOW			
Level 5	$2,200	$1,430	$220
Level 6	$1,100	$550	$110

[3] Matrix takes into consideration the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69361 (1996).

APPENDIX C

Civil Penalty Worksheet Examples

Case Scenario: Several Violations in "One" Transaction (Contract/Lease)

A Lessor owns an apartment which was built before 1960 and is occupied by a child under six (6) years of age or a pregnant woman. The Lessor failed to comply with any of the Disclosure Rule requirements, lead-based paint was lead present, and the Lessor was aware of the requirements (Egregious violation).

- The first Step: determine the "Circumstance" Level by referring to the Circumstance Matrix. List each applicable violation:

Violation 1:	Lessor failed to provide Purchaser or Lessee EPA-approved lead hazard information/pamphlet	Level 1
Violation 2:	Lessor failed to disclose to Purchaser or Lessee presence of any known lead-based paint and/or lead-based paint hazards	Level 1
Violation 3:	Lessor failed to disclose to each agent, presence of any known lead-based paint and/or lead-based paint hazards, and the existence of any available records or reports pertaining to lead-based paint	Level 1
Violation 4:	Lessor failed to provide to Lessee any records or reports available pertaining to lead based-paint and/or lead-based paint hazards in the target housing	Level 1
Violation 5:	Lessor failed to include as an attachment, or within the contract to lease target housing, the Lead Warning Statement	Level 3
Violation 6:	Lessor failed to include as an attachment or within the contract, a statement by the Lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards	Level 3
Violation 7:	Lessor failed to include as an attachment or within the contract a list of any records or reports available to the Lessor that pertain to lead hazard information and failed to indicate that no such list exists	Level 5
Violation 8:	Lessor failed to include in the contract for lease a statement by the Lessee affirming receipt of the information	Level 5
Violation 9:	Lessor failed to include in the contract as an attachment, a statement by the one or more agents involved in the transaction to lease target housing that the agent(s) has informed the Lessor of the Lessor's obligations and that the agent(s) is aware of his duty to ensure compliance	Level 5
Violation 10:	Lessor failed to include in the contract for lease signatures and dates of the Lessors, agents and Lessee certifying to the accuracy of their statements	Level 6
Violation 11:	Lessee failed to retain a copy of the completed disclosure records for no less than three years from the completion date of the lease	Level 6

- The second Step: determine the "extent" of the violation under the Extent Matrix:

  Pre-1960 target housing occupied by a child under 6 years of age is considered Major

- The third step: determine the Gravity-Based Penalty ("GBP") under the Penalty matrix for each violation:

Violation 1:	Level 1, Major = $11,000
Violation 2:	Level 1, Major = $11,000
Violation 3:	Level 1, Major = $11,000
Violation 4:	Level 1, Major = $11,000
Violation 5:	Level 3, Major = $ 6,600
Violation 6:	Level 3, Major = $ 6,600
Violation 7:	Level 5, Major = $ 2,200
Violation 8:	Level 5 Major = $ 2,200
Violation 9:	Level 5, Major = $ 2,200
Violation 10:	Level 6, Major = $ 1,100
Violation 11:	Level 6, Major = $ 1,100

Gravity-Based Penalty: $63,800

(**NOTE**: These same 11 violations at the **"significant"** extent category (resident child 8 years old) would have a GBP of $36,190. At the **"minor"** extent category (no children) for these 11 violations, the GBP would be $7,480.)

Final Step: Once the GBP has been determined, the appropriate adjustment factors need to be applied. The **following page** applies the $63,800 GPB to the Adjustment Factor Worksheet which will compute the final proposed penalty, specifically,

History of violation:	0 %
Degree of Culpability:	Level II (no adjustment)
Attitude:	30% (cooperation/steps taken to comply)
Voluntary Disclosure:	0% (not voluntary)
Size of Business:	0
Small Independent owners/lessor:	0%

The Total Proposed Penalty is $63,800
(for the 11 violations in this one transaction at the major category -- egregious violation)

CIVIL PENALTY ASSESSMENT WORKSHEET

Date of entry: 12/1/97
Complaint ID Number: Case Officer
Name of Respondent: XYZ Company
Date Complaint Issued:
Date Answer Received:
Date Final Order Signed:
Date Remittance Received:

↓Entry Column

(1) Gravity-Based Penalty (GBP) from matrix			$	63800
(2) Adjustment factors				
	Ability to pay/Ability to continue in business		%	0
	History of prior violations		%	0
	Degree of culpability		%	0
(3) Sum of items in line 2			%	0
(4) Other factors as justice may require				
	Attitude:		%	30
	SEPs:		%	0
	Voluntary Disclosure:		%	0
	Size of business:		%	0
	Adjustment for small independent owner/lessor:		%	0
(5) Sum of items in line 4			%	30
(6) Sum of lines 3 and 5 (percentage converted to decimal)				0.3
(7) Multiplication of the GBP in line 1 by total in line 6			$	19140
(8) Subtraction of line 7 from line1=adjusted penalty			$	44660
(9) Enter the dollar amount in line 8			$	44660
(10) Enter the amount of economic benefit from noncompliance			$	0
(11) Sum of lines 9 and 10			$	44660
(12) Enter 0			$	0
(13) Sum of line 12 and line 11 equals the **PROPOSED PENALTY** $				44660

CIVIL PENALTY WORKSHEET EXAMPLES

Case Scenario 2: Several transactions with violations within each transaction:

A Lessor owns an apartment which was built in 1969. No lead-base paint hazard was present: Several transactions for apartments in that building were inspected.

Transaction 1: **Lessor failed to comply with three (3) requirements under the Disclosure Rule. All occupants of the apartment were more than 18 years of age.**

Violation 1:	Lessor failed to include as an attachment, or within the contract to lease target housing, the Lead Warning Statement	Level 3
Violation 2:	Lessor failed to include in the contract for lease a statement by the Lessee affirming receipt of the information	Level 5
Violation 3:	Lessor failed to include in the contract for lease signatures and dates of the Lessors, agents and Lessee certifying to the accuracy of their statements	Level 6

Transaction 2: **Lessor failed to comply with one (1) requirement under the Disclosure Rule. One of the occupants of the apartment was 4 years of age.**

Violation 1:	Lessor failed to include as an attachment, or within the contract to lease target housing, the Lead Warning Statement	Level 3

Transaction 3: **Lessor failed to comply with five (5) requirement under the Disclosure Rule. One of the occupants of the apartment was 7 years of age.**

Violation 1:	Lessor failed to provide Purchaser or Lessee EPA-approved lead hazard information/pamphlet	Level 2
Violation 2:	Lessor failed to include as an attachment or within the contract a list of any records or reports available to the Lessor that pertain to lead hazard information and failed to indicate that no such list exists	Level 5
Violation 3:	Lessor failed to include in the contract for lease a statement by the Lessee affirming receipt of the information	Level 5
Violation 4:	Lessor failed to include in the contract as an attachment, a statement by the one or more agents involved in the transaction to lease target housing that the agent(s) has informed the Lessor of the Lessor's obligations and that the agent(s) is aware of his duty to ensure compliance	Level 5
Violation 5:	Lessor failed to include in the contract for lease signatures and dates of the Lessors, agents and Lessee certifying to the accuracy of their statements	Level 6

Determining the extent of the violations is the next step . . .

- The second Step: determine the "extent" of the violation under the Extent Matrix:

  1969 target housing occupied by a child of varying ages depending on the apartment unit. Therefore, the extent levels are different:

- The third step: determine the GBP under the Penalty matrix for each violation:

1969 Apartment Building: No known lead-based paint or lead-based paint hazard:

TRANSACTION 1: (Minor extent -- occupants more than 18 years of age)

Violation 1:	Level 3, Minor =	$ 660
Violation 2:	Level 5, Minor =	$ 220
Violation 3:	Level 6, Minor =	$ 110
Count 1	Total Penalty	= $ 990

TRANSACTION 2: (Major Extent -- occupant under 6 years of age)

Violation 1:	Level 3, Major =	$ 6,600
Count 2	Total Penalty	= $ 6,600

TRANSACTION 3: (Significant Extent -- occupant 6 years or under 18 years of age)

Violation 1:	Level 2, Significant =	$5,500
Violation 2:	Level 5, Significant =	$1,430
Violation 3	Level 5, Significant =	$1,430
Violation 4:	Level 5, Significant =	$1,430
Violation 5	Level 6, Significant =	$ 550
Count 3	Total Penalty	= $10,340

Gravity-Based Penalty: **$17,930** (Total penalty of the 3 transactions)

(NOTE: In a sales situation, the transactions would represent the 3 files reviewed at a Real Estate Agency.)

Final steps, apply adjustment factors . . .

APPENDIX D

Civil Penalty Assessment Worksheet

CIVIL PENALTY ASSESSMENT WORKSHEET
EXPLANATION OF FACTORS

Line (1) Gravity-Based Penalty (GBP) from the Matrix
Enter a whole number in the appropriate field indicating the gravity-based penalty in a dollar amount from the Enforcement Response Policy. The appropriate fields are marked with asterisks. Do not push enter following the entry of a number into a field; scroll down to complete the entry.

Line (2) Adjustment Factors
Enter a whole number in the appropriate field for each item. This number indicates a percentage, but do not enter a percentage sign (%), and do not put this entry in decimal form. The computer will convert the whole number into a decimal. If the adjustment is a negative number then enter a minus sign directly proceeding the number. A positive sign is not necessary, but if added directly proceeding a number will not harm the final calculation. This number will indicate if the penalty should be adjusted upward or downward. Example: -25 (this indicates a 25% reduction in the penalty).

Ability to pay/Ability to continue in business: This percentage adjustment will be determined by using information regarding the dollar amount of the sale/lease and the number of dwellings sold or leased.

History of prior violations: This entry should be limited to an upward adjustment of 25%. The adjustment is based on the violator's previous violations. Prior violations include:

- CAFO/CACO (a prior violation consists of all violations described in one prior CAFO/CACO), default judgment, consent decree
- A NON is not a prior violation
- A violation by the same property management firm will be considered as a prior history.

Degree of culpability: Based on the violator's knowledge of the particular requirement and the degree of control over the violative condition.

The two principal criteria for assessing culpability are: (a) the violator's knowledge of the Disclosure Rule, and (b) the degree of the violator's control over the violative condition. For penalty purposes, when the violator intentionally commits an act which he knew would be a violation of the Disclosure Rule or would be hazardous to health, or has been issued a prior NON, the penalty may be increased by up to 25%.

Line (3) Sum of items in line 2
Do not enter a number into the appropriate field for each item. The computer will calculate the total of the adjustments entered for the items in line 2.

Line (4) Other factors as justice may require
Enter a whole number into the appropriate field for each item. This number will indicate a percentage adjustment in the penalty that will be allowed for these factors.

- **Attitude**-Regions may give a percentage reduction for attitude, if circumstances warrant. The attitude adjustment has two components: cooperation and steps taken to comply. The EPA may reduce the based penalty up to 15% for each of these factors for a total of 30%

- **Supplemental Environmental Projects (SEPs)**-Regions may give a percentage reduction for the violator's involvement in environmentally beneficial projects for settlement of an environmental enforcement action.

- **Voluntary Disclosure**-Voluntary disclosure of a violation may result in a 25% reduction of the gravity-based penalty. Sellers/Lessors/Agents cannot quality for reductions in both attitude and voluntary disclosure.

- **Size of Business**-Regions should follow the EPA's Small Business Policy and reduce penalties accordingly, when confronted with violations that may warrant a civil penalty.

- **Adjustment for small independent Sellers/Lessors**-Fines should be adjusted downward by 50% for individuals who own four or fewer rental properties and in "for sale by owner" transactions.

Line (5) Sum of items in line 4
Do not enter a number into this field. The computer will calculate the total of the adjustments enter for the items in line 4.

Line (6) Sum of lines 3 and 5 (percentage converted to decimal)
Do not enter a number into this field. The computer will calculate the total adjustments given for factors included in lines 2 and 4, and convert these to decimal form to be used in calculating the dollar amount of the adjustment to the penalty.

Line (7) Multiplication of the GBP in line 1 by line 6
Do not enter a number into this field. The computer will multiply the GBP in line 1 by the amount in line 6 which is the total percentage adjustment, and this will result in the dollar adjustment for the penalty resulting from the factors in lines 2 and 4.

Line (8) Subtraction of line 7 from line 1
Do not enter a number into this field. The dollar adjustment of the penalty will be subtracted from the GBP in line 1 to give an adjusted, but not a final penalty.

Line (9) Enter the dollar amount that is shown in Line 8

Line (10) Enter the dollar amount of economic benefit from noncompliance
Enter a whole number in this field. This number will represent a dollar amount that the violator has gained by avoiding compliance. This is explained in the Enforcement Response Policy.

Line (11) Sum of lines 9 and 10
Do not enter a number into this field. This will increase the penalty by adding the adjusted penalty with the amount that the violator has gained by not complying.

Line (12) For the Disclosure Rule Violations enter 0 dollar amount --

Line (13) Sum of line 12 and line 11 equals the PROPOSED PENALTY:
Do not enter a number into this field. This will give you the proposed penalty for the violation.

This form can be used to recalculate the penalty as additional adjustments, such as economic benefit or SEPs are determined. It will be important to include the date for any changes made due to adjustments.

CIVIL PENALTY ASSESSMENT WORKSHEET

Date of entry:
Complaint ID Number:
Date Complaint Issued:
Date Answer Received:
Date Final Order Signed:
Date Remittance Received:

↓Entry Column

(1) Gravity-based Penalty (GBP) from matrix			$	*****
(2) Adjustment factors				
	Ability to pay/Ability to continue in business		%	*****
	History of Prior Violations		%	*****
	Degree of Culpability		%	*****
(3) Sum of items in line 2			%	0
(4) Other factors as justice may require				
	Attitude:		%	*****
	SEPs:		%	*****
	Voluntary Disclosure:		%	*****
	Size of business:		%	*****
	Adjustment for small independent owner/lessor:		%	*****
(5) Sum of items in line 4			%	0
(6) Sum of lines 3 and 5 (percentage converted to decimal)				0
(7) Multiplication of the GBP in line 1 by total in line 6			$	0
(8) Subtraction of line 7 from line1=adjusted penalty			$	0
(9) Enter the dollar amount in line 8			$	*****
(10) Enter the amount of Economic Benefit from non-compliance			$	*****
(11) Sum of lines 9 and 10			$	0
(12) Enter 0			$	*****
(13) Sum of line 12 and line 11 equals the **PROPOSED PENALTY** $				0